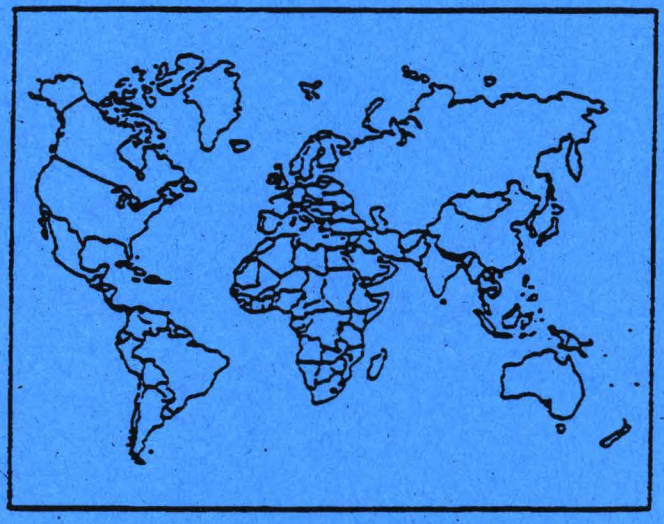
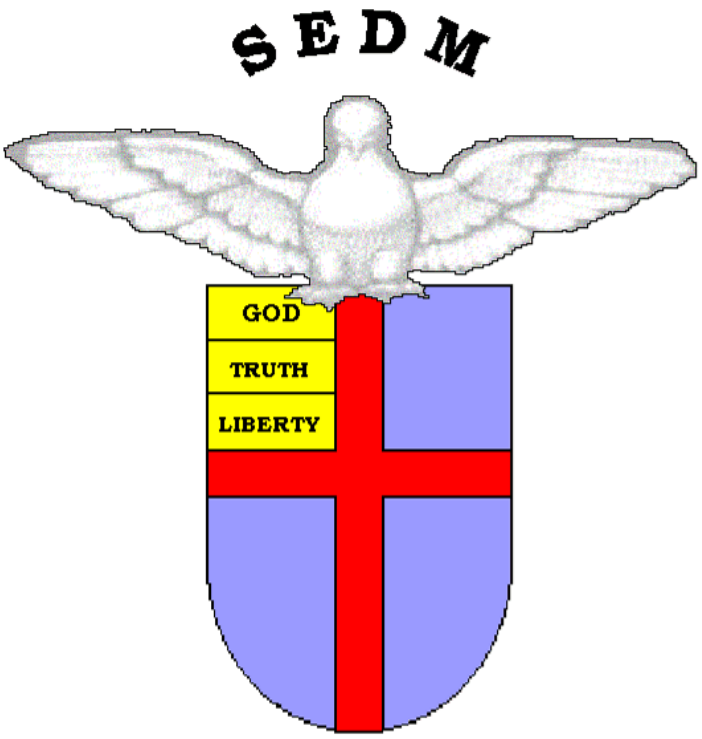
INTERNATIONAL LAW

ADMIRALTY / MARITIME PROCESS

ARE YOU LOST AT "C"



AUTHORS UNNAMED TO PROTECT THEIR LIVES!



Admiralty Questionnaire

1. Have you requested and acquired certified copies of the NOTICE[S] OF TAX LIEN[S] UNDER INTERNAL REVENUE LAW[S] from the County Recorder? (front and back of form)
2. Do you have copies of any Notices of Levy?
3. What is the total amount (DOLLARS) of the property taken (levied) to date?
4. How long has the IRS been making demands? (From ----to date)
5. Do you have or have you acquired a Certificate of Search from the United States District Court? (IN the District where you live)
6. Has the IRS conducted a tax sale of your property?
7. Has a Quiet Title Action been filed against your property?

INTERNATIONAL MONETARY FUND
WASHINGTON D C 20431

CABLE AD
INTERF

April 12, 1995

Dear Mr. Zimmer:

Re: Case No.

We have received a Summons in the above-mentioned civil action, signed by your deputy and dated April 3, 1995, requiring the International Monetary Fund to answer the complaint filed by Mr. D. Vern Chadwick in this action.

Article IX, Section 3 of the Articles of Agreement of the International Monetary Fund, which has been given full force and effect in the United States by the Bretton Woods Agreements Act, 22 U.S.C. Section 286h et seq., provides as follows:

> "Section 3. Immunity from judicial process
>
> The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract."

Furthermore, Executive Order 9751 of July 11, 1946 designated the International Monetary Fund as a public international organization entitled to enjoy certain privileges, exemptions, and immunities under the International Organizations Immunities Act (Public Law 291 - 79th Congress, 59 Statutes at Large, page 669 et seq., approved December 29, 1945; 22 U.S.C. Sections 288 to 288f). Section 2 of the Act provides in part as follows:

> "Sec. 2. International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:
>
> (a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity --

(i) to contract;

(ii) to acquire and dispose of real and personal property;

(iii) to institute legal proceedings.

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."

As you can see from the above, the Summons cannot legally be issued against the Fund and is being returned herewith.

Very truly yours,

Joan S. Powers

Joan S. Powers
Senior Counsel

Attachment

Mr. Markus B. Zimmer, Clerk
United States District Court
for the District of Utah
(10th Circuit)
235 U.S. Courthouse
350 South Main St.
Salt Lake City, UT 84101-2180

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. WIEKING
CLERK

January 30, 1995
(Date)

280 SOUTH FIRST
SAN JOSE, CA 9
408-291-77
FTS 466-77

RE:

Dear

A search of our files shows that:

(X) We have no record of the referenced case(s) in this office.

( ) Please submit a $15.00 search fee. (If forwarding a check, make it payable to: Clerk, U.S. District Court.)

( ) Your case(s) has/have been identified. Please refer to the following number(s), name(s) and judge's initials when making further inquiries regarding this case:_____.

(X) We have no record of the referenced person(s) in this office.

Very truly yours,

Richard W. Wieking, Clerk

By: Laura Sanchez de Jayle
Case Systems Administrator

NDC Intake - 1 (Rev. 8/90)

INTRODUCTION

Over the last six years the authors and researchers on this project have reviewed hundreds of pounds of material, traveled to other countries and interviewed persons within and without government about the current apparent disregard for our constitution and God-given rights. Because of innumerable man hours, this research team has uncovered a different or covert "Modus Operandi" and this mode of operation or MO has been to conduct a type of quiet war against the People of America.

The authors present the information as educational material only and we do not hold out the material in this book to be the basis of a legal opinion, nor should the reader. It is hoped that the information presented will spark many conversations around the kitchen table, with the Constitution in one hand and the BIBLE (the basis of our law) in the other. (see Public Law 96-1211).

It is recommended, before undertaking any legal action, you consult a QUALIFIED person to review and advise you (and your attorney) in **International Law/Admiralty-Maritime** Process.

This book has NO COPYRIGHT! You may copy and share the information with all who may be in need. The authors operate under two commandments: 1. Love God. 2. Love His kids.

Blue skies, no sea gulls (or wear a hat), clear sailing!

PS. Watch for Sharks (IRS)

CHAPTER ONE

THE LAMB TO THE SLAUGHTER

Ask yourself how many people each year loose their property, or how often a family is broken up. Sometimes, there is even loss of life as a direct result of the actions of the Agency known as the Internal Revenue Service (IRS). No matter what the answer is, just one such loss is one too many. It seems that there is no way to stop this damage to our country, our families and our lives.

Now, put yourself into this equation. The IRS has begun to send you letters, and it demands money that is beyond your means. Then, while you are in the middle of distress, Al Smith tells you how to stop the IRS. In order to have this information it will cost you a few thousand dollars. (Al Smith is not a real person but a composite of several so called Patriots for profit).

This whole process is new to you. At this point you still trust the folks at IRS, and you try to work out your problems. So, like thousands before you, you make a trip to the local IRS office and explain that someone has made a

mistake. Although you do not know the tax laws, there is something very wrong. The IRS agent, smiling from ear to ear, tells you that you can handle the tax easily, pay the tax! You again explain, to deaf ears, that you do not have the money which they claim, nor did you ever make enough money to have been charged with such a tax. So, your friend, the IRS agent, tells you that you can pay the tax and then sue the IRS, or that you can petition the Tax Court. In Tax Court you will meet a new friend, the judge, another IRS AGENT. Of course, you can file bankruptcy.

After this experience, you remember Al Smith, and you call him up. Al gives you more information than you can handle at first, but you rely upon him. Al will lead you out of all these tax problems. All you have to do is send a few letters out, pay Al for all his secret knowledge and claim the 5th Amendment.

At this point Al is a hero. Then the IRS seems to go into overdrive and events happen which overcome your senses. The boss at work receives a letter from the government. The boss does not understand why he must send all, or the biggest part of your pay check, to the IRS. All he knows is that, if he does not, he will lose his business. This same action takes place at the bank, credit union, etc. Al has an answer, send another letter and all will be well. Nothing

happens.

A few weeks later, a letter arrives from the government. After opening the brown envelop you discover a **"NOTICE OF TAX LIEN UNDER REVENUE LAWS".** Quickly you rush to the phone to call Al. Al sends you another letter to stop the problem. Secure in your belief that Al knows what he is doing, you follow his instructions. You go on about your business, except that now, no pay is coming from work. Your family and friends are beginning to look at you as if you are crazy. By this time you have read all of the information that Al has sent you. You find that there are hundreds if not thousands of people out there, just like you, that know the truth. But the Courts, the local Sheriffs, members of Congress, and even Church leaders, refuse to hear the truth.

Several months pass. You change jobs, and a few dollars are beginning to come in again. Al has suggested that you do away with your drivers license, social security number, birth certificate and marriage license. You have learned that all of these documents, numbers etc. are meant to make you a slave. The more you study the more you are convinced that you know the truth and despite the outcome, you can never go back to believing in the government or any institution that supports this type of outlaw activity. You

have become a Patriot! You have become a "Tax Protestor."

You do the best that you can to share this information with anyone that will listen. It causes you grief but you know that your cause is just. While you were sitting at your computer writing a letter to your Congressman telling him of your belief and frustration, there is a knock on the door. An IRS agent hands you a notice of seizure. They intend to sell your home at an auction in about four months. Quickly you call Al. A recorded message comes on the phone – "the number you have dialed is no longer in service and there is no new number." A thousand thoughts go through your mind. What has happened to Al? None of your friends that you have met at Al's meetings know where he is or what is going on. It seems that their major concern at this time is the number of black helicopters in the sky or army vehicles seen on the freeway. What about food storage and do you have guns and ammo?

The sale takes place but nothing changes. You remain in your home. Several months pass. The sheriff shows up at your door with some IRS agents and another person, someone you have never met. This is the person who purchased your home at the tax sale. You are then forced off your property at gun point and told that if you try to come back into the home you will be

arrested or shot. Everything in the home now belongs to the person who purchased your home. No one knows the where abouts of Al.

You are broke. You are sick emotionally and physically. Your spouse and children have left you. Your neighbors think that you are a criminal. What do you do? For $49.95 plus tax you can get a book that explains how to get everything back. So, after collecting aluminum cans to gather the money, you open a post office box and send off a postal money order for the book. It is a happy day when the book arrives. You open the book to the forward. To your shock, it is signed by Al.

By this time you are hurting so badly that you do not know to whom you should turn, or who to believe. You talk with your church leader. He explains that the government does not take anyone's property without a good reason. After all, are you not to render unto Caesar! **Remember, most churches are corporations (501C3).**

You file a law suit in the Federal District Court against the IRS agents and the United States Government. You have acquired material from friends and the money to file the suit. Documents are exchanged back and forth between

you and the court. You have put all of your emotions and beliefs on paper. Every fiber of your being knows that you are right. Yet, before your case ever goes to trial, you have been declared a "frivolous tax protestor" and your case is dismissed without a hearing. The court threatens you with fines etc. if you ever file another suit in the Federal Courts.

This foregoing nightmare has been repeated hundreds of times across our country. Of course, there are some things that are in common and some things that do not match everyone's particular situation. For example, in our little story we did not petition the tax court, nor was a ninety day letter (Notice of Deficiency) discussed. We did not talk about the bankruptcy issue although many people flee to the Bankruptcy Court to escape the disaster.

What we intend to introduce for your consideration is a newer view of the activities of the IRS and a possible remedy to this seemingly impossible situation, which is destroying our country. It is hoped that our courts and responsible people in government may still have the moral courage to stand for what is right in these dark days.

Since the chances of winning in the courts are limited, we must look at

different areas of the law to see if any possibility has been over looked. Also we must not rely on AI any longer. We must check every document and every position presented to us in order to understand the process. How is it that the IRS can take away our property and the U.S. Constitution is powerless to protect us. The answer may be found in the study of International Law — Admiralty/Maritime Law.

Most people have some understanding of the different types of law such as Criminal or Civil. For example, as this is being written, the O.J. trial is on the TV. Talk radio seems like nothing more than the O.J. soap opera. This circus deals with Criminal Law. Civil Law has been used when dealing with Tort claims, such as a fender bender or your property rights. Very few people (including attorneys and even the courts) have an understanding of Admiralty/Maritime Law. The Supreme Court of the United States has declared:

> "To the extent that admiralty procedure differs from civil procedure, it is a mystery to most trial and appellate judges, and to the non-specialist lawyer who finds himself-sometimes to his surprise-involved in a case cognizable only on the admiralty "side" of the court. Admiralty practice, said Mr. Justice Jackson, is a unique system of substantive laws and procedures with which members of the Court are singularly deficient in experience." Black Diamond S.S. Corp. v. Stewart & Sons, 336 U.S. 386, 403, 69 S. Ct. 622, 93L Ed. 754 (1949) (dissenting opinion).

Is it any wonder that the State Courts do not have any concept of Admiralty process, when they rule against you in favor of the purchaser of the IRS tax lien, in a Quiet Title action? Note, more on this later.

> "The Federal District courts are the accustomed forum in which actions in admiralty are tried and in the absence of some special reason therefor, no effort should be made to divert this type of litigation to judges less experienced in the field" Calmar S.S. Corp. v United States, 345 US 446, 97 L ed 1140, 73 S Ct 733.

Now, before we start looking at every action as an Admiralty action, we need to consider the following:

> 2 Am Jur, Vol 2, ADMIRALTY section 15 – Limited
>
> Admiralty is a limited jurisdiction, depending for its existence on whether or not the cause involved is an admiralty or maritime matter. There is no statutory definition of admiralty jurisdiction, and difficulties attend every attempt to define its exact limits. The extent of the admiralty jurisdiction, as conferred by the Constitution, is not limited by the scope of admiralty jurisdiction as it existed under English law, nor was it extended as far as the admiralty jurisdiction then reached in the civil law countries. The scope of admiralty jurisdiction in this country is to be determined in the light of the Constitution, the laws of Congress, and the decisions of the Supreme Court.....

At this point, you may be asking yourself, what does this have to do with the IRS and tax laws? Keep in mind that, when an action has been filed in the

courts, it is necessary to file in the proper jurisdiction, venue.

> **The Huntress**, 12 Fed. Case 984 @ 992 & 989, (Case No. 6,914) (D.Me. 1840): "In this country revenue causes had so long been the subject of Admiralty cognizance, that congress considered them as CIVIL CAUSES OF ADMIRALTY AND MARITIME JURISDICTION, and to preclude any doubt that might arise, carefully added the clause, 'including,'etc. This is clear proof that congress considered these words to be used in the sense they bore in this country and not in that which they had in England. **The Act gives exclusive admiralty maritime jurisdiction to the district court.** As a court of the law of nations,...But in cases where the courts of common law have always exercised concurrent jurisdiction, the jurisdiction is not, and was never intended by the constitution to be, exclusive, though the subject matter be maritime....The common law, and of course the sense in which the technical words of that law are used, WAS NEVER IN FORCE IN THIS COUNTRY, any further than as it was adopted by common consent, or the legislature. BEYOND THIS, IT WAS AS MUCH A FOREIGN LAW AS THAT OF FRANCE OR HOLLAND."

Although this case is from 1840, it is still in operation today. Reread that opening line again — revenue causes....the subject of Admiralty....

Let us move ahead to this century, for those readers who are concerned about "old law," and take note of a case from the recent past, United States of America v. $3,976.62 in Currency, One 1960 Ford Station Wagon Serial No. 0C66W145329 :

> "Although, presumably for purposes of obtaining jurisdiction, action for forfeiture under Internal Revenue Laws is commenced

> as **PROCEEDING IN ADMIRALTY**, after jurisdiction is obtained proceeding takes on character of civil action at law, and at least at such stage of proceedings, Rules of Civil Procedures control."

Has the light started to come on, or are we still in the dark? The point being made is that all revenue activity is controlled by Admiralty process. The Supreme Court often quotes **Benedict on Admiralty**, and it seems that if the highest court in the land quotes from it, then we should take a look.

> 1 Benedict (6th Edition) section 17, p. 28: " As no court **other than a court of admiralty** can enforce maritime liens, no other court can displace, discharge or subordinate them. Neither the State courts nor the United States courts on their common law, equity and bankruptcy sides can divest, transfer to proceeds or adjudicate the maritime liens unless the maritime lienors voluntarily submit themselves to the jurisdiction.

Let us now examine the **NOTICE OF FEDERAL TAX LIEN UNDER INTERNAL REVENUE LAWS**. Turn the document over and what do you see. **"United States v. _____"**. If you do not find this on the notice which you have, keep in mind that, in some counties, the recorders do not record the back side of the document. The IRS usually will not send the complete document to you. It is very important that you find such a document because on the back side we find that the lien has been filed pursuant to 26 USC 6321. What does this mean?

> ".....[I]t is now generally held that government tax claims under 26 USC § 6321 'upon all property and rights of property whether real

or personal' **rank below all other maritime liens....**" **Benedicts's "admiralty,"** 7th ed., Vol 2 Chapter IV § 51 footnote 7.

Open a copy of Black's Law Dictionary to **IN REM** and we see something that may shed some light on the above quotation from Benedicts's Admiralty:

> **In rem** – A technical term used to designate proceedings or actions instituted **against a thing**,.....It is true that, in a strict sense, a proceeding **in rem** is one taken directly against property, and has for its object the disposition of property, without reference to the title of individual claimants; .....(See: Quasi in rem)

Is it possible that the **NOTICE OF TAX LIEN**[s] is an in rem action? Unless someone can come up with a better idea or another reading of the Notice, it clearly states "rights to property".

Now it is time to turn on the computer because in order to do a word search it would take days, weeks, or even months to find **in rem** in the Internal Revenue Code. I will only help you one time. Open a copy of Title 26 and turn to § 7323 which reads:

> (a) Nature and Venue.- The proceedings to enforce such forfeitures shall be in the nature of proceeding in rem in the United States District Court for the district where such seizure is made.

Stop for a moment and lets recap what we have learned so far:

1. The District Court for the United States is the court of nations having exclusive and limited Admiralty jurisdiction/ venue.

2. Revenue actions are Admiralty as pointed out in "The Huntress" and other cases listed above. See Benedicts on Admiralty.

3. **NOTICE OF TAX LIEN UNDER REVENUE LAWS** are Admiralty actions pursuant to 26 USC § 6321 against property and the rights to property **in rem** (see 26 USC § 7323 also § 7401 to be discussed later).

4. In rem deals with rights to property not with the "person". Because so many people have problems with the word person, the one we are talking about has blood in his veins.

We have a few other areas to cover and then we will get into the "how to" section. Since you are going to make a trip to the Law Library, look at Title 28 §§ 2461-2465. In § 2463 we read:

> " **All property** taken or detained **UNDER ANY REVENUE LAW** of the United States ... shall be deemed in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

How many people have asked the IRS agent or Sheriff for a court order while they drive away with the persons car or they sell the home at a tax sale. The Sheriff, when questioned, has replied "the IRS does not need a court order". Now folks, is it possible that our Sheriff cannot read, or does he fear the IRS. Again we ask that you look at the basis of our law the Bible KJV. In Hosea 4:6 "My people are destroyed for lack of knowledge..."

Back in 1861 there was a civil war in this country. The President had a problem. The Southern States were in rebellion and the Federal Government could not declare war against the Southern States for the Federal Government would have recognized the sovereignty of the South. If it had recognized the sovereignty of the South, it would have no claim to any of the property of the States or the People. (see Black's Law for Prize and Booty) Therefore, the President was granted power under 12 stat 319 over the property of person's in rebellion against the United States.

Today we have people in rebellion against the United States, as defined by 12 stat 319 and the Trading with the Enemy Act of October 6th, 1917. This is also an undeclared/silent war against the People of this Country, being waged by the IRS agents, not only for the United States, but for "the Bank and the Fund" see 22 USCA § 286 et. seq.

In a letter to members of Congress dated January 13,1995, Congressman James A. Traficant Jr pointed out:

> **"The IRS is an agency out of control."**....."Last year, I described at length on the House floor the cases of everyday American families whose lives were ruined without cause by the IRS. I received thousands of letters from all over the country from people who told me their IRS horror stories."

How many people have been declared "tax protestors"? Once the title "tax protestor" is used, 12 stat 319 can be used to take your property. Please take the time to look this up and share it with your friends. In the State of Utah it is common, in dealing with the State Tax Commission, for the Commission to place the letters **TP** after any case number involving tax issues. The Judges in the state courts hearing these actions, when questioned "what does the TP stand for," simply say they do not know.

The Clerks of the court responsible for issuing the number for the tax cases claim they do not know what the two letters TP mean. Do you think Forrest Gump could figure this out? Life is like a box of Chocolates...

In the 5th Amendment to the Constitution, it says:

> " no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger"

Back in 1933 the President declared a "state of emergency," and we are still under this declared state of emergency today. Since a state of emergency is existing, and only the President can end such, we must be in "public danger" . So much for the 5th Amendment.

" I believe there are more instances of abridgement of freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations..."

James Madison

In Congressman Traficant's letter quoted above, he is attempting to introduce a bill into Congress to shift the **burden of proof** from the taxpayer to the Internal Revenue Service. The burden of proof is always on the plaintiff. So when you petition the tax court, bankruptcy court, or district court, you are in fact the plaintiff and the burden of proof falls on you. However, in the Admiralty process the burden of proof falls to the one filing a **libel** (Notice of Tax Lien in the county record), and, in this instance, you are not the Plaintiff, but a Petitioner filing an **Answer (Libel of Review).**

Could this, then, be the key?

****

Please take the time to go to the local law library and check out each quotation for yourself, do not ask AI. Many people make a mistake when they find a case or part of a statute and use this as a basis for an action. Laws change and rules change from state to state and from court to court. Remember that just because a case is quoted it may

not apply to you or your case.

****

CHAPTER TWO

THIS IS THE KEY?

For the moment lets say that you are the owner of a ship and you have taken on a cargo in France. You sail to the port of New York USA to unload your cargo but when you arrive in the port your vessel is seized by the government for violation of some revenue statute. The US Marshall serves an arrest warrant at the direction of the Federal District Court, signed by a magistrate/judge for the district where the "res" (ship) is located. The Marshall posts a notice on the res of the seizure.

You have been served a copy of a complaint made upon "an oath of solemn affirmation". Upon review of the complaint it is clear that the circumstances from which the claim arises states with such particularity that the defendant

(you) will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading. See Supplemental Rules for Certain Admiralty And Maritime Claims (SR Fed Civ P) E2a.

Lets review the elements of what just took place. But, before we do so, take out a pencil and a clean sheet of paper. At the top of the paper write THINGS NECESSARY TO PERFECT A LIEN.

In our example, was the Captain, Agent for the owner, or the owner served a copy of a complaint made upon an oath of solemn affirmation?

Point #1 on your paper. Of course the answer to our question is YES.

Point #2 How was the complaint and/or arrest warrant served? "Study aid" see Federal Rules of Civil Procedure (FRCP) Rule 4. In our example the process was served by the US Marshall. You should have point two on your paper by this time.

Point #3 Is the information clear on the complaint so that it will not be necessary to move for a more definite statement ... so that you may frame a responsive pleading.

Point #4. Has the Court for the District where the res is located been served?

Point #5. Was the notice properly posted?

As you can see there is a definite process that must be followed in order to perfect a lien under Admiralty process. However what do you do if there is a defect in the service of process. So much so that you or the court have been improperly served or no service of any kind has been performed.

One answer is. When a person finds to his surprise, that he has not been served, or improperly served he may petition the District Court **for** the United States for the District where the res is located (in rem) for a Libel of Review to determine the basis, (foundation) if any, for the libel. [Notice of Tax Lien Under Revenue Laws, filed in the county record absent a court order

or oath of solemn affirmation]

> See 2 Benedict [6th Edition] section 275, pg. 119,120: "But where a party discovers that... he has had no proper notice... and has thereby been deprived of property; or where there has been fraud of any kind... so that no regular remedy is left him, he may obtain redress by filing a **libel of review**. The subsequent proceedings will be the same as in any suit and the decree of the court will be such as equity demands, There is no corresponding provision in the Civil Rules." Emphasis mine.

Stop, pencil down. Before we go into more detail on our two examples so far, we must take a look at the District Court that signed the Warrant for the arrest of the property. Also, it is important to understand who the parties of real interest are.

The District Court is divided in three separate sections. The first section is devoted to criminal law. The second section is devoted to civil law. The third section and the one, least understood by the judges and attorneys, as noted in Chapter One, is the Admiralty division.

The Admiralty section of the court has its own distinct set of court rules. It would be wise to check with the District Court in your area or local law library to acquire the rules that govern the actions of the court. It is a must to have a copy of the supplemental rules of admiralty. These rules are numbered A -

F, instead of the numeric system familiar to most people. We will discuss some of these supplemental rules later on.

One of the researchers on this project had an interesting conversation a couple of years ago with a nationally known attorney. This attorney had been a government employee for nearly thirty years. The attorney made this observation about the rules of court. It was his opinion that the rules of court were designed to quickly dispense with the novice, "pro se attorney", thereby cutting down on the work load that the courts were under. As the attorney explained; Whenever a complaint/answer was presented to his department and had been placed on his desk, the first things that he would check were the Rules of Court. As he explained, the work load is so great that we look for any way to disqualify a Plaintiff—Defendant.

It is extremely important that you read and understand the rules of court. Unfortunately, many people are never heard in our court system because they do not know or understand the rules. It is quite possible to win your case based solely on rules and never have the merits of the case heard. It is because of these rules that the admiralty process becomes viable.

In order to understand the admiralty court we need to look at some of the other courts and the position the taxpayer is placed in when he enters their jurisdiction.

The first court is an Administrative Court. It is known as the United States Tax Court. This court operates under the authority of the Executive Branch of the United States Government (the President). The Secretary of Treasury (the Governor of the International Monetary Fund) provides the regulations that govern the operation of the tax court and this court does not operate under the same set of rules as the District, Circuit or Supreme Court.

The IRS uses a type of trickery (Modus Operandi) in order to move their victim into the tax court. This is done by sending the victim a Notice of Deficiency also known as a ninety day letter. In this Notice of Deficiency letter the target is informed that he has 90 days to petition the tax court if he disagrees with the amount that they have decided the target is going to pay. Note: the term "target" is a term used in the United States Attorney's Manual in referring to the taxpayer.

By the way, in the Notice of Deficiency, it is common to see penalties and

interest attached to the taxpayer for the manufacture, sale or distribution of machine gun parts pursuant to 26 USC § 6651(a) and of course one of their favorites, civil fraud 26 USC § 6662. In Cramer v The Commissioner of Internal Revenue, case# 11718-94, the petitioner, Mr Cramer, pointed out to the court that the claim of civil fraud by the IRS reversed the burden of proof. The Court agreed. The Attorney for the government (currently under investigation by the Inspector General's Office for criminal misconduct in this case and the court was notified of this on the record before the hearing began) said, that upon review of the record, no fraud was present. However, the government did not remove the fine imposed under 26 USC § 6662. This is a fun case and one that Congress decided to review, not by choice, but just because Mr Cramer pushed his way in through letter writing, thereby placing it on the record. Judge Powell was so unprepared for Mr. Cramer that several times the Judge claimed that the Internal Revenue Code is found in Title 28. Please find this case and study it. Review Mr. Cramer's opening statement.

If we look at 26 USC § 7401, we will find that before any penalty, civil or criminal can be applied it requires the sanction (O-Kay) of the Attorney General or his/her delegate and the Secretary of the Treasury. Many a patriot has wasted their time going into tax court and arguing that 6651(a) and 6662

could not and did not apply to them because they were a non taxpayer, non resident alien, did not deal in alcohol tobacco or firearms, etc. Remember, this is an Administrative Court and the judge will remind you that this is a court of limited jurisdiction. The court will not allow the taxpayer to go behind the Notice of Deficiency to determine if there is any basis in fact for the deficiency.

What is meant by – go behind the deficiency? When you petitioned the Tax Court to hear your complaint, you took on the position of the Plaintiff. The burden of proof became your responsibility. The government on the other hand, was the innocent Defendant. Yes, I said innocent. Under our form of (In)justice, the Defendant is innocent until proven guilty. The Defendant is not required to testify against himself. Also, the court is eager to grant a protective order denying the Petitioner any access to any records that would support his position and be embarrassing to the government. If you find yourself as the Plaintiff (Petitioner) the burden of proof always falls on your shoulders. It is impossible to prove a negative. For those of you who have had the sad experience of going to Tax Court you realize what a mistake it was to take the bait and petition the Tax Court. By doing so, you merely rubber stamped the IRS lie.

Some of you may have appealed the Tax Court decision to the Federal District Court. You also could have gone to this court in the first place by paying the tax first and then suing for a recovery. Fat chance. Just like our illustration in the Tax Court you are the Plaintiff. The burden of proof is on you. Again they played their trick and you took the bait. The government trots out the Anti-Injunction Act 26 USC § 7421 and you are barred from stopping the collection process while you attempt to have your day in court. Again court rules play an important part. Pursuant to Rule 64 of the Civil Rules they may continue their collection process and you can do noting more than watch you car, bank account, job, home and family go away. The American that brings a suit against the government in the Federal District Court only stands about a 12% chance of winning.

Well, you see everything leaving and you are trying to hold on to what little you have left, so you file bankruptcy. Congratulations, you just took the bait and are in their trap again. When you filed bankruptcy, you were able to by-pass the Anti-Injunction Act for a short time. However, depending upon how aggressive the U. S. Attorney is, the automatic stay can be lifted in a matter of a few weeks. Again, the property can be seized and sold off. If the judge has a small understanding of the law he will require the IRS to supply the

court with an inventory list of the property taken and any monies to be deposited with the registrar of the court.

Remember 28 USC § 2463? Along with doing battle with the U. S. Attorney, you will also find his helper, the Trustee for the Bankruptcy Court. By the way, the Trustee is the defacto owner of all your property. Again, because you petitioned the Bankruptcy Court, the burden of proof falls on your shoulders and the government can play hide and seek while they destroy you.

NOT SIGNED

In Chapter one, our little lamb received a Notice of Lien. If he had taken the time to look at the signature line, it is quite likely that he would have found that it was never signed. In most cases the IRS uses a stamp **for** another party. For example: rubber stamp Jim Jones **for** James Doe. Question: Is it possible for another person to testify **for** you as to your personal first hand knowledge? See FRCP Rule 56(e)(g).

In Admiralty, there is no court which has jurisdiction unless there is a valid international contract in dispute. If you know it is Admiralty Jurisdiction, [see the HUNTRESS, Benedict on Admiralty, and 26 USC § 6321 as noted above.]

and they have admitted on the record that you are in an Admiralty Court, you can demand that the international maritime contract to which you are supposedly a party and which you supposedly have breached, be placed into evidence. However it is the practice (Modus Operandi) of the IRS to by pass the court altogether and trick you into becoming the moving party. The IRS never ever admits on the record that they are moving in Admiralty.

No court has Admiralty/Maritime Jurisdiction unless there is a valid International maritime contract that has been breached. And generally speaking only the parties of **REAL INTEREST** may bring an action.

> "A cardinal principle, in which the practice of admiralty courts differs from that of courts of common law, permits the parties to a suit to prosecute and defend upon their rights as such rights exist at the institution of the action; the assignment of a right of action being deemed to vest in the assignee all the privileges and remedies possessed by the assignor. According to the rule of common law, the injured party alone is permitted to sue for a trespass, the damages being deemed not legally assignable; and if there be an equitable claimant, he may sue only in the name of the injured party. **In admiralty, however, the common practice is to have the suit conducted in the names of the real parties IN INTEREST.**" 1 R.C.L. § 33, pg. 424 (1914); "....and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States." F.R.Civ.P. 17. The district courts are prohibited from granting venue where the United States has less than "one-half of its capital stock....." of the respondents/Libelants Principal, the Fund and Bank. 28 USC § 1349; The government by becoming a corporator, (See: 28 USC § 3002(15)(A)(B)(C), 22 USCA 286(e)) lays down its sovereignty and takes on that of a private citizen. It can exercise no power which is not derived from the corporate charter. (See: The

Bank of the United States vs. Planters Bank of Georgia, 6 L.Ed.(Wheat) 244; U.S. vs. Burr, 309 U.S. 242). The **REAL PARTY IN INTEREST** is not the de jure "United States of America" or "State", but "The Bank" and "The Fund". (22 USCA 286, et seq.). The acts committed under fraud, force and seizure are many times done under "Letters of Marque and Reprisal" i.e., "recapture." (See: 31 USCA 5323). Such principles as "Fraud and Justice never dwell together", Wingate's Maxims 680, and "A right of action cannot arise out of fraud." Broom's Maxims 297, 729.

Sometimes it is helpful if we take the time to draw a diagram of the steps taken in the process. (See Diagram I)

At the left hand top of the page you will note that a box containing the USA appears. Then, across from that box to the right a box containing The Governor of The International Monetary Fund AKA Secretary of the Treasury. These two boxes are not linked at this point inasmuch as the Governor is not an agent for the USA and is therefore intra government as opposed to inter government.

The United States is a part owner of the International Monetary Fund (IMF) and holds about 19 to 20% of the stock in this private corporation. (See: 22 USCA 286 et seq.) The Governor of the Fund can not be paid by the United States. Question: Where does the pay for the Judges of the Federal District Court come? BATF?

Below the box containing the Governor of the IMF we find the IRS. The Secretary makes the rules that the IRS must follow and Delegates authority to the Commissioner on down the line to the agents in the field. The Secretary as the Governor of the IMF is then in charge of the IRS. It follows that the agents in the field must be under his direct command if we have read the statues correctly.

Under his direction, some of the functions of the IRS are to send letters, make demands, visit and victimize their victims. This is done under the color of law. The phrase "color of law", means something that appears to be genuine, but is not. These IRS agents are in fact, agents for the Governor of the IMF not the USA. Question: Why are there two separate sections in the Internal Revenue Code dealing with misconduct? (See: 26 USC §§ 7214 & 7433). Why are the Notices of Lien "Under Revenue Laws" not signed, but stamped **for** a third party? **MODUS OPERANDI!**

Just to the left of the box containing the IRS we see a box around (DOJ) Department of Justice and arrows connecting these two entities. In the United States Attorney's Manual (USAM), we find that the IRS and DOJ must work in harmony .

USAM 6-4.010 reads in pertinent part: The Federal Tax Enforcement Program is designed to protect the public interest in preserving the integrity of this nation's self-assessment tax system....the Federal Tax Enforcement Program is designed to have the broadest possible impact on compliance attitudes by emphasizing balanced enforcement, not only with respect to the types of violations prosecuted but also the **geographic location** and **economic** and **vocational status**.....However, the tax enforcement program can only work effectively if **the IRS, Department of Justice, and U. S. Attorneys work in harmony.** Emphasis mine.

Below the IRS, is the beginning of the pattern or MO that the service follows, i.e. the Notice of Deficiency or 90 day letter. From this point, the arrows show the path between the various courts. If we follow this pattern the United States becomes a party to the Action[s] and this allows the DOJ/U.S. Attorneys to come to the aid of their buddies. At this time, the government will spend any amount of money it needs, or if need be, threaten harm to you or someone or something close to you, outside of the hearing of the court . Yes, just like the NAZI party in Germany, these agents, misguided as they are, believe they are protecting our country. It was reported that an 84 year old woman was forced out of a rest home for a tax due from 1975 in 1994. (See: 26 USC § 6501(a)). It makes me feel sick every time this happens. One person can change this and it may be you! Remember commandments: 1 & 2.

There is another set of boxes connected to the IRS on our diagram. One box shows the Notice of Lien filed with the county recorder.

Then follows the Notice of Seizure, Tax Sale and finally the Quiet Title Action in the State Court. This is the path that we want to follow.

First of all, the Notice of Lien was a Libel on the public record. This Libel was not filed with the District Court for the United States were the "res" is located. (You should go to the Court and request a Certificate of Search to use as proof of no claim filed.)

Next to follow in the Modus Operandi is the Seizure. (See: 28 USC §§ 2463-2465). If the Court has not been notified of the seizure, how can it have control over any property taken under **any revenue law**, unless it was not for the benefit of the United States of America. It must have been for the **use and benefit of another.**

What happens at the tax sale? (sale of home). The Special Procedures Function Officer is the agent that represents the governor of the Internal Monetary Fund, AKA Secretary of the Treasury. He is the grantor on a deed to the United States Internal Revenue Service. Question; why was it necessary for

the IMF to transfer the lien to the United States Revenue Service? Answer; until this transaction took place the United States was not a party to the action. Finally, a Quit Claim Deed is given to the purchaser of the lien (private party).

Just a note on Quit Claim Deeds. A Quit Claim Deed does not transfer any property rights. In point of fact, a Quit Claim Deed declares that the grantor of the deed holds no interest or equity in the property. For example, the reader of this book could issue a Quit Claim Deed for the State Capitol and this deed would be just as valid as the deed issued by the IRS for the home sold at the tax sale.

Finally, we arrive at the last segment of our diagram, Quiet Title action in the State Court. The next thing that happens after the tax sale is that the purchaser of the lien realizes he does not have title to the property he supposedly purchased. Therefore, in order for him to perfect his title, it requires a Court Order. Now, from our studies, does the State Court have jurisdiction to hear this Quiet Title Action? Can the purchaser of the lien produce the Court Order that authorized the sale? Is the purchaser the real party in interest? Can the real party in interest transfer said interest? If you

have followed the information so far you can easily answer each one of these questions.

SAMPLE PLEADINGS

FEDERAL

Name
Name
Address
City, State & Zip

Pro se

DISTRICT COURT FOR THE UNITED STATES
DISTRICT OF _____

---

and	
	Admiralty Case #
Petitioner/Claimant,	
	IN ADMIRALTY
v.	
	IN RE
	LIBEL OF REVIEW, ANSWER OF ————,AND———— COMPLAINT OF INVOLUNTARY SERVITUDE AND PEONAGE.
AGENTS FOR INTERNATIONAL MONETARY FUND INTERNAL REVENUE SERVICE, DISTRICT DIRECTOR, SPECIAL PROCEDURES FUNCTION OFFICER and THEIR PRINCIPAL, GOVERNOR OF INTERNATIONAL MONETARY FUND AKA SECRETARY OF THE TREASURY	IN RE ALL PROPERTY AND RIGHTS TO PROPERTY OF THE (LAST NAME'S OF PETITIONERS) THEIR ESTATE AND TRUST.
	Judge:
Respondents/Libelants.	

ANSWER AND VERIFIED COMPLIANT OF LIBEL

COMES NOW ———— and ————, Pro se appearing specially, supplemental rule Federal Rules of Civil Procedure (SFRCP) Rule (E)8 "Restricted Appearance," in the original in the alternative, as a matter of right and privilege and enter their answer SFRCP (B)3(b), to alleged rights under maritime liens and notice of intent to levy by Respondents/Libelants as Libelant in the first instance absent their verified oath or solemn affirmation of complaint pursuant to Supplemental Rules (B)(1), (C)(2) & (E)(4)(f) or in the alternative F.R.Civ.P.4(e), thereby denying Claimants procedural due process.

1. In the interest of law an justice mandates a hearing of Libel of Review pursuant to the Law of Nations and that said Petitioners/Claimants as Petitioner's and for the protection of their person, property, estate, and trust hereby enters their Complaint of Involuntary Servitude and Peonage due to wanton and malicious acts and threats, duress, coercion, fraud by Respondents/Libelants as Respondents in violation of the Laws of the forum United States of America and the Law of Nations pursuant to 18 USC §§ 2,3,4 113(b) 219, 241, 242, 371, 654, 661, 709, 951, 1001, 1028, 1341, 1346, 1581, 1621, 1622, 1961, 2111, 2382, 2384, 42 USC § 1983, 4th, 5th, 7th, 9th, 10th, 13th & 16th Amendments to the Constitution for the United States of America.

JURISDICTION

2. This is an admiralty/maritime cause of action within the meaning of Federal Rules of Civil Procedure 9(h). Pursuant to 28 USC §§ 2461 and 2463 "all property taken or detained under **any revenue law** of the United States .... shall be deemed in the custody of the law and subject only to the orders and decrees of the **courts of the United States having jurisdiction thereof."** Emphasis added.

3. The United States District Court is the mandated district court of the United States having de jure venue to hear a cause of action etc., pursuant to 5 Stat. 516, Chapter 188, § 5 enacted August 23, 1842 pursuant to the Act of September 24, 1789, Chapter 20: and The Constitution for the United States of America, Article III § 2; and, in that the Respondents/Libelants et al., are directed by the Governor of the Fund (I.M.F.) AKA Secretary of the Treasury Robert Rubin, alien custodian for Prize and Booty, and are foreign agents of their principal The Fund and Bank et. al., a fortiori mandates pursuant to the law of the United States of America Title 22 USC Foreign Relations and Intercourse - International Organizations Chapter 7 § 286g. Jurisdiction and venue of actions - "...any such action at law .... to which either the Fund or Bank shall be a party shall be deemed to arise under the laws of the United States, and the District Courts of the United States shall have original jurisdiction of any such action." Emphasis added.

4. The United States is not a proper party to this action even though the Principal's agents come in its (UNITED STATES) name on the " Notice of Federal Tax Lien[s] Under Revenue Laws" and the like, therefore, the Petitioners/Claimants do not make the United States pursuant to F.R.Civ.P 17, or in the alternative the United States attempts to make an appearance, the Petitioners/Claimants reserves their rights for disclosure of whose"...use or benefit of another [the action or levy in the original] shall be brought [for] in the name of the United States..."

NOTICE OF FOREIGN LAW

5. Petitioners/Claimants give NOTICE OF FOREIGN LAW pursuant to Federal Rules of Civil Procedure 44.1 and Federal Rules Criminal Procedure 26.1 and that this district court is under legal duty and obligation to take cognizance of the same, and in the matters concerning conflicts of law, the law of the forum United States of America and the Law of Nations are to govern.

NOTICE OF CLASSIFIED INFORMATION

6. Petitioners/Claimants give NOTICE that they will demand disclosure and

subpoena classified information and will question witnesses about same, pursuant to the "classified information Procedures Act." Public Law 96-456, 94 Stat. 2025; will address interrogatories to respondents,, and "[b]y the law of nations, the courts of justice of different countries are bound mutually to aid and assist each other for the furtherance of justice...", therefore, Petitioners reserves their right to petition this court to issue Letters Rogatory to foreign and domestic courts for oral examination of parties concerning treaties, compacts, agreements, contracts and the like involving the Respondents/Libelants et al., as it applies to any alleged claims as against Petitioner's/Claimant's property, estate trust and personally, concerning revenue under the forum United States of America and Law of Nations.

CAUSE OF ACTION

7. The respondents/Libelants and their agents et al., have filed maritime "Notice of Federal Tax Lien[s] [serial number _____] Under Internal Revenue Laws" in the County Record, _____ County, —city and state — for the year(s) _____ for the total amount of $_____ on the ____ day of _____, by foreign agent Revenue Officer No. _____ for _____ written _____, title Chief _____ absent a signature, oath of solemn affirmation validating lien, see Exhibit A; and have

served alleged notices of intent to levy, and have levied [sic] from fiduciaries of _____'s i.e. .....BANK NAME...$$ AMOUNT, ...etc, copies attached Exhibits B and C Notice[s] of Levy.

8. The Respondents/ Libelants's et al., Notices of Lien have damaged Petitioners/Claimants, –names husband & wife— their property and rights to property, estate, trust, their good name, and their ability to transfer, sale and freely use same, therefore, this has caused Petitioner/Claimant et al., to be put into a position of involuntary servitude and peonage against their will and the laws of the United States of America, the state of —— and the Law of Nations by Respondents/libelants et al.

9. The Petitioners/Claimants, upon receiving threatening notices and the like, have returned said Notices to the Department of the Treasury et al., thereby, attests and affirms that upon investigation and research, the facts stated herein are true and correct to the best of their knowledge and belief.

10. The Respondents/Libelants, in the original, and in the alternative filings of the Notices and the like, have never met the requirements of the de jure laws of the forum United States of America or the Law of Nations, the Admiralty, in any of their correspondence.

11. The Petitioners/Claimants, —names of husband and wife —, are without remedy to vacate, remove or replevin liens, levies and property respectively;

In that, due to lack of procedural due process i.e., a filing of libel before mesne process, as mandated in the district courts of the U.S. " In Admiralty", by the Respondents/Libelants et al., (see Exhibit D copy attached, Certificate of Search dated _____ _____, Clerk of the Court) therefore, Petitioner's only redress in the premises is for the court to review this Petition and make further inquiry into the acts of omission or commission by Respondents/Libelants et. al. by the Judges of this Court pursuant to Title 18 USC §§ 4, 3, and 2.

12. The Petitioners/Claimants affirm and declare based upon information, knowledge and belief that the above is true and correct. All and singular the premises are true and within the admiralty and maritime venue and jurisdiction of this Honorable Court.

CONCLUSION PRAYER FOR RELIEF

Wherefore Petitioners pray that this district court is mandated pursuant to the Supplemental Rules of Admiralty and the Law of Nations, Law and Justice supra., for an inquire into all the matters herein sworn to by the Petitioners/Claimants, ——names of husband and wife —, with a report of its findings pursuant to Libel of Review. If upon its findings and conclusions, pursuant to Law, Justice and Fact, it is found that Petitioner's/Claimant's

claims are well founded, then in the interest of Law and Justice: that, (1) The court Notify Respondents/Libelant et al., to return all properties (monies) taken from Petitioner's/Claimant's fiduciaries and the like; (2) Remove all Notices of Liens on record; or (3) The Respondents'/Libelant et al., refuse such notice by the court, that Petitioner's/Claimant's, Libel of Review, Complaint et al., be filed, Admiralty process issue, and that Respondents/Libelant, et al., be cited to appear and answer the allegations of this libel; that said suit shall be reviewed, in the original, in the alternative, that said alleged liens be removed and levies dismissed along with the return of all property of Petitioners/Claimants; and that Petitioners/Claimants,— names of husband and wife ——— may have such other and further relief as they may be entitled to receive.

Respectfully,

_____
Name Pro se

_____
Name Pro se

On ____ day of _____ 1995 in the State of _____

In the County of _____;

_____and _____ did appear before me with sufficient identification and signed in my presence the above document.

_____
Notary

seal

_____
My commission expires

Name
Name
Address
City state & Zip

Pro se

DISTRICT COURT FOR THE UNITED STATES
DISTRICT OF _____

NAME IN CAPS and NAME Petitioner/Claimant, V. AGENTS FOR INTERNATIONAL MONETARY FUND INTERNAL REVENUE SERVICE, DISTRICT DIRECTOR, SPECIAL PROCEDURES FUNCTION OFFICER and THEIR PRINCIPAL, GOVERNOR OF INTERNATIONAL MONETARY FUND AKA SECRETARY OF THE TREASURY Respondents/Libelants.	Admiralty Case # **IN ADMIRALTY** **IN RE** MEMORANDUM IN SUPPORT OF LIBEL OF REVIEW, ANSWER OF ————AND————, COMPLAINT INVOLUTARY SERVITUDE AND PEONAGE IN RE., ALL PROPERTY AND RIGHTS TO PROPERTY OF THE Jones', THEIR ESTATE AND TRUST Judge:

MEMORANDUM

1. The District Court of the United States is the proper venue and has jurisdiction to hear this libel of review. This is a proceeding in **ADMIRALTY**.

> "In this country, revenue causes had so long been the subject of admiralty cognizance, that congress considered them as **CIVIL CAUSES OF ADMIRALTY AND MARITIME JURISDICTION**, and to preclude any doubt that might arise, carefully added the clause, 'including,' etc. This is clear proof that congress considered these words to be used in the sense they bore in this country and not in that which they had in England. The Act gives exclusive admiralty and maritime jurisdiction to the **district court.** As a court of the law of nations, ...
>
> **THE HUNTRESS,** 12 Fed.Case 984 @ 992 & 989, (Case No. 6,914) (D.Me. 1840):

2. As further evidence that the action before the court is in fact an Admiralty action we find in **UNITED STATES of America v. $3,976.62 in currency, One 1960 Ford Station Wagon Serial No. 0C66W145329**,

> "Although, presumably for purposes of obtaining jurisdiction, action for forfeiture under Internal Revenue Laws is commenced as **Proceeding in admiralty,** after jurisdiction is obtained proceeding takes on character of civil action at law, and at least at such stage of proceedings, Rules of Civil Procedures control.

3. The Petitioners refer the court to 1 Benedict [6th Edition] § 17, p. 28: which reads in pertinent part: "As no court **other than a court of admiralty** can enforce maritime liens, no other court can displace, discharge or

subordinate them. Neither the State courts nor the United States courts on their common law, equity and bankruptcy sides can divest, transfer to proceeds or adjudicate the maritime liens unless the maritime lienor voluntarily submit themselves to the jurisdiction. Emphasis added.

4. Pursuant to 28 USC § 2463 "All property taken or detained **under any revenue law** of the United States..... shall be deemed in the custody of the law and subject only to the orders and decrees of the **courts of the United States having jurisdiction thereof."**

Emphasis added.

5. As a further indication that the issue before the court is a matter of admiralty, Petitioners refer the court again to **"Benedict's Admiralty, " 7th ed., Vol. 2 Chapter IV § 51 footnote 7.** "....[I]t is now generally held that government tax claims under 26 U.S.C. § 6321 'upon all property and rights of property whether real or personal' **rank below all other maritime liens..."**

6. "A cardinal principle, in which the practice of admiralty courts differs from that of courts of common law, permits the parties to a suit to prosecute and defend upon their rights as such rights exist at the institution

of the action; the assignment of a right of action being deemed to vest in the assignee all the privileges and remedies possessed by the assignor. According to the rule of the common law, **the injured party alone is permitted to sue for a trespass, the damages being deemed not legally assignable;** and if there be an equitable claimant, he may sue only in the name of the injured party. **In admiralty, however, the common practice is to have the suit conducted in the names of the real parties IN INTEREST."** 1 R.C.L. § 33, pg. 424 (1914); "...and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States." F.R.Civ.P. 17 The district courts are prohibited from granting venue where the United States has less than "one-half of its capital stock...." of the Respondents/Libelants Principal, the Fund and Bank. 28 U.S.C. § 1349; The government by becoming a corporator, (See: 22 U.S.C.A, 286e) lays down its sovereignty and takes on that of a private citizen 28 USC § 3002(15)(A)-(C). It can exercise no power which is not derived from the corporate charter. (See: **The Bank of the United States vs. Planters Bank of Georgia,** 6 L.Ed. (9 Wheat) 244; **U.S. vs BURR,** 309 U.S. 242). The **REAL PARTY IN INTEREST** is not the de jure "United States of America" or "State," but "The Bank" and "The Fund." (**22 U.S.C.A. 286,** et seq.). The acts committed under fraud, force and seizures are many times done

under "Letters of Marque and Reprisal" i.e., "recapture." (See **31 U.S.C.A. 5323).** such principles as "Fraud and Justice never dwell together", **Wingate's Maxims 680,** and "A right of action cannot arise out of fraud." **Broom's Maxims** 297, 729.

7. "According to international law it has long been established that, although a person who claims to be the owner of a ship is bound by the character fastened upon her by the flag, under which he has chosen to let her pass, captors are not affected by the flag, but are entitled to go behind it, and to show the true character of the ship by reference to the substantial interest in it, the effective control over it, and the real proprietorship of it." **Prize Law During the World War,** James Wilford Garner, MacMillian Co., (1927) § 284 pgs. 378, 379, quote of Sir Samuel in the "Kankakee, Hoching and Genesee," British Prize Court 1918.
See 2 Benedict [6th Edition] § 400, pgs. 92 & 93. 254 U.S. 671 @ P. 689 Admiralty Rules of Practice - Claim-How Verified-Rule 25.

8. This court lacks jurisdiction over the Petitioners who are appearing specially and not generally. Although in most courts special appearance has been abolished and in this instant case since the issue before the court is

admiralty the Petitioners point out: "While the modern version of Federal Rule of Civil Procedure 12 (h) (1) has abolished the distinction between general and special appearances for virtually all suits brought under those rules, the **Supplemental Rules for Certain Admiralty and Maritime Claims has preserved two forms of restricted appearance**..... Rule E(5)(a)...and Rule E(8)...The rule was fashioned in order to avoid subjecting an in rem party [—husband and wife names ———] to the jurisdiction of the court with reference to other claims for which 'such process is not available or **has not been served....**' ....."**U.S. v. Republic Marine, Inc.,** 829 F.2d. 1399 @ p. 1402.

9. Petitioner draws attention to 2 Benedict [6th Edition] § 275, pg. 119, 120: "But where a party discovers that ...he has had no proper notice... and has thereby been deprived of property; or where there has been fraud of any kind...so that no regular remedy is left him, he may obtain redress by filing a **libel of review.** The subsequent proceedings will be the same as in any suit and the decree of the court will be such as equity demands. There is no corresponding provision in the Civil Rules." Emphasis added.

10. The Petitioners/Claimants pray the indulgence of the court in reviewing 26 USC § 7323 JUDICIAL ACTION TO ENFORCE FORFEITURE. § 7323(a) reads:

Nature and Venue. - The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the United States District court for the district where such seizure is made. See Petitioners Exhibit D. No action was brought against names of husband and wife—— in the District Court of the United States.

11. The Petitioners/Claimants again direct the attention of the court to 26 USC § 7401 - AUTHORIZATION –No civil action for the collection or recovery of taxes, or of any fine, penalty, or **forfeiture,** shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced. A review of the record maintained by the Attorney General failed to show any authorization.

12. As a matter of public record contained in the GAO audit of 1992/3 the Internal Revenue Service falsifies documents routinely in order to meet its goals. See pg. 5 of audit results.

13. Since the statutes themselves declare that seizures and forfeitures are admiralty operations, **the property is held by the law** and cannot be conveyed unless by court order. A question arises based upon the actions of

the Respondents/Libelants. Monies have been seized from the —names' fiduciaries as noted in the Verified Complaint. Evidently no court of competent jurisdiction has been notified, served or engaged in any fashion or manor. Again see Petitioners/Claimants Exhibit D. This is a clear violation/failure of due process circumventing the 4th and 5th Amendments to the Constitution for the United States of America (taking without just compensation).

14. Through the testimony of witnesses and evidence at hand and to be discovered, evidence of a systematic scheme or enterprise is visible which are predicated acts under R.I.C.O. statutes 18 USC § 1961 et. seq. to wit: three or more parties engaged in an unlawful activity to deprive American citizens of their property without just compensation or due process of law pursuant to 18 USC §§ 2, 3, 4, and 241.

15. Under 26 USC § 6902(a) burden of proof. "....burden of proof shall be upon the secretary to show that the Petitioner [the Jones' et al.] is libel as a transferee [or back up withholding agent of tax payer] of property of tax payer, but not show that the tax payer [United States] was libel for the tax. Emphasis added. NOTE: Petitioners/Claimants et. al. are not claiming any

rights to tax court implied or otherwise.

16. In the above statement the court will note that the term United States was inserted after tax payer. The association between the International Monetary Fund and it's contractual member the United States (for definition see 28 USC § 3002 (15) (A) (B) (C)) present a fortior which demands an examination of the contractual arrangement/agreement that in any way hold the Petitioners/Claimants responsible as co-signors to such instrument. This simply precludes the cavalier use of the term tax payer and demands a narrow interpretation of same. The term tax payer for the purposes of this document are not those associated with the common English language. Very simply put, the term tax payer does not apply to -Jones'- in this instant action but refers to the United States in it's corporate capacity in all instances.

17. No indication of any bond or surety has been made by the International Monetary Fund or it's agents. As a matter of fact, no action has been filed before any court of competent jurisdiction. See Exhibit D. The Attorney General (A.G.) for the United States as indicated in the documents before this court is unaware of any action civil, criminal or otherwise pending pursuant

to 26 USC § 7401. See Exhibit E. A possibility exists that property may be concealed, converted or destroyed to preclude the intervention of this Honorable Court. In such instances the proabitions contained in 26 USC § 7421 do not apply. It was not the intention of Congress to circumvent the safe guards contained in the 4th and 5th Amendments of the Constitution for the United States of America and therefore, enacted 5 USC § 706 for the purposes of review of administrative agencies. Pursuant to the United States Attorney's Manual (USAM) § 6-5.330 INJUNCTION ACTIONS: Section 7421(a), provides, generally that no suit for the purpose of restraining the assessment of any tax shall be maintained by any person in any court, whether or not such person is the person against whom such tax was assessed. In light of 26 U.S.C. § 7421, injunctive relief may be had only upon satisfaction of the twofold test laid down in Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962).

18. It is interesting to note that the term **BY ANY PERSON IN ANY COURT** is used in the above cite. The law is dispositive in directing that, "**ALL Property** taken or detained **UNDER ANY REVENUE LAW** of the United States ... shall be deemed in the custody of the law and subject only to the orders and decrees of the court of the United States having jurisdiction thereof." Emphasis

added. Since no court order issuing from a court of competent jurisdiction is evident a question is raised, who receives the property and where did the money go that was in the custody of the law? See 28 USC § 2463. Did the governor of the International Monetary Fund or any of his agents post a bond (28 USC § 2464) in order to protect the interest of the United States of America? Is it reasonable to assume that this court is barred by the Anti-Injunction Act 26 USC § 7421 in protecting the property that is placed in it's custody by the agents of the International Monetary Fund pursuant to the revenue laws of the corporate United States? This Petitioner thinks not. In simple words, the much over used Section 26 USC 7421 is inappropriate as generally applied by the Internal Revenue Service.

19. Upon review of the Unification Act of 1964 and interesting comment was made which bares light on this instant case. This following is not a direct quotation but is simply paraphrased:

> Most attorneys and for that matter most courts are singularly lacking expertise in Admiralty/Maritime Law.

Judicial Canon #1 is extremely important. Due diligence and a complete review of the merits of the case are necessary in the interest of justice. These Pro se litigants are not knowledgeable in the law and rely upon the discretion of the court to apply justice fairly and evenly pursuant to 28 USC

§ 471, Federal Rules of Civil Procedure – Rule 81 and rights and safe guards paid for in the highest premium, the blood of patriots, for the people of the United States of America and their posterity.

Respectfully,

_____
Name Pro se

_____
Name Pro se

On ____ day of _____ 1995 in the State of _____

in the county of _____;

_____and _____ did appear before me with sufficient identification and signed in my presence the above document.

_____
Notary

seal

_____
My commission expires

Name
Name
Address
City & State Zip

Pro se

DISTRICT COURT FOR THE UNITED STATES
DISTRICT OF _____

NAME ALL CAPS and NAME Petitioner/Claimant, v. AGENTS FOR INTERNATIONAL MONETARY FUND INTERNAL REVENUE SERVICE, DISTRICT DIRECTOR, SPECIAL PROCEDURES FUNCTION OFFICER and THEIR PRINCIPAL, GOVERNOR OF INTERNATIONAL MONETARY FUND AKA SECRETARY OF THE TREASURY Respondents/Libelants.	)	Admiralty Case # **IN ADMIRALTY** AFFIDAVIT OF N A M E Judge:

AFFIDAVIT

I _____, upon solemn oath do aver and depose and state for the record under the penalties of perjury of the United States that the following are true and correct to the best of my knowledge and belief.

1. WHO
2. WHAT
3. HOW

4. WHERE
5. WHEN
6. DO NOT INCLUDE "WHY"
7. Follow this blue print for wife. Double space document. do not forget Jurat.

Further the affiant saith not,

_____

NAME Pro se

JURAT

I hereby certify that __(NAME)_____ did appear

before me on ____ day of _____(MONTH)____ 1995 in the county

of _____ and state of _____.

Upon sworn declaration declared the above document to be true and correct to the best of his ability.

_____

Notary

seal

_____

Commission expires

Name
Name
Address
City, State & Zip

Pro se

DISTRICT COURT FOR THE UNITED STATES
DISTRICT OF ———

---

and	
	Admiralty Case #
Petitioner/Claimant,	
	IN ADMIRALTY
vs.	
	IN RE
	PETITION FOR DEFAULT ON FAILURE TO ANSWER GENERAL ADMIRALTY RULE 28
AGENTS FOR INTERNATIONAL MONETARY FUND INTERNAL REVENUE SERVICE, DISTRICT DIRECTOR, SPECIAL PROCEDURES FUNCTION OFFICER and THEIR PRINCIPAL, GOVERNOR OF INTERNATIONAL MONETARY FUND AKA SECRETARY OF THE TREASURY	
	Judge:
Respondents/Libelants.	

COMES NOW ———— and ————, Pro se appearing specially, supplemental rule Federal Rules of Civil Procedure (SFRCP) Rule (E)8 "Restricted Appearance," in the original in the alternative, as a matter of right and privilege and enter their PETITION FOR DEFAULT ON FAILURE TO ANSWER, GENERAL ADMIRALTY RULE (GAR) 28 for the following reasons:

1. The time for Respondents/Libelants has expired, pursuant to GAR 28 to answer.

2. The Respondents/Libelants have filed faulted Notices or caused to be filed faulted "Notice of Federal Tax Lien[s]" in the public record as shown in documents already before this court, absent their verified oath or solemn affirmation of complaint pursuant to Supplemental Rules (B)(1), (C)(2) & (E)(4)(f) or in the alternative F.R.Civ.P.4(e), thereby denying Claimants procedural due process.

3. The action before the court is in GENERAL ADMIRALTY and not SPECIAL ADMIRALTY therefore the court may pronounce the Respondents/Libelants to be in contumacy and default

and thereupon shall proceed to hear the cause ex parte.

See GAR 28 and 39

Respectfully,

_____

Name Pro se

_____

Name Pro se

On ____ day of _____ 1995 in the State of _____

in the County of _____;

_____and _____ did appear before me with sufficient identification and signed in my presence the above document.

_____
Notary

seal

_____
My commission expires

name
name
address
city, state & zip

Pro se

DISTRICT COURT FOR THE UNITED STATES
DISTRICT OF _____

NAME ALL CAPS and NAME ALL CAPS Petitioner/Claimant, v. AGENTS FOR INTERNATIONAL MONETARY FUND INTERNAL REVENUE SERVICE, DISTRICT DIRECTOR, SPECIAL PROCEDURES FUNCTION OFFICER and THEIR PRINCIPAL, GOVERNOR OF INTERNATIONAL MONETARY FUND AKA SECRETARY OF THE TREASURY Respondents/Libelants.	Admiralty Case # IN ADMIRALTY IN RE PETITIONERS' REPLY, Judge:

COMES NOW _____ and _____, Pro se and enter their reply to Respondents/Libelants letter of _____ 1995.

///

PETITIONERS REPLY

1. The Petitioners/Claimants are not in disagreement with the position of the Counsel for the Respondents/Libelants, that the International Monetary Fund has immunity from judicial process. An error has been made on the part of the Clerk of the Court or Respondents Counsel due to a lack of knowledge, which is common place in jurisdictions unfamiliar with Admiralty Process.

> "To the extent that admiralty procedure differs from civil procedure, it is a mystery to most trial and appellate judges, and to the non-specialist lawyer...."
>
> Mr. Justice Jackson.

(See: Petitioners/Claimants LIBEL OF REVIEW, COMPLAINT OF INVOLUNTARY SERVITUDE AND PEONAGE. ANSWER OF _____ AND _____ IN RE...)

2. The Respondents/Libelants can not file a LIBEL in the public record and then claim immunity for their action any more than a State may charge a citizen with a crime and fail to support its charge. The Respondents/Libelants have been given the opportunity to reply and bring forth their proof to support the Libel on the public record and have failed to support their Libel.

IN ADMIRALTY THE BURDEN OF PROOF IS UPON THE LIBELANT[S]

3. The burden of proof in support of the Libel is upon the Libelants. The Documents before the Court clearly show that the Respondents/Libelants have filed a "libel" in the public record. The Action before the Court is in Admiralty, therefore, the law mandates a review of the Libel, i.e., LIBEL OF REVIEW.

4. In the Admiralty Process when the Petitioner finds that a Libel has been filed in the public record and there has been no service of process as required by the Supplemental Rules of Federal Civil Procedure, he may petition the district court for the United States "where the res is located" for a Libel of Review.

5. In this instant action the Petitioners/Claimants are not Plaintiffs. The Petitioners/Claimants have entered their answer in response to the libel and served actual notice to the Court and to the Respondents/Libelants, Governor of the International Monetary fund et. al. as required by the Federal Rules of Court.

PETITIONERS ARE OPPOSED TO EXTENSION OF TIME

6. Due to the error of the Court (Clerk) or the Respondents the Petitioners/ Claimants are opposed to an extension of time for the Governor of the International Monetary Fund et. al. to respond. An extension of time would only increase the amount of damage

already done to these Petitioners.

Respectfully,

_____

Pro se.

CHAPTER THREE

QUIET TITLE

Many States have adopted the Federal Rules of Civil Procedure with some small changes. However, local rules must be consulted before responding to any action.

Remember not to be too fast to file an action unless you can handle the burden of proof. It is very easy to jump the gun and want to get through the legal battle. Unless you have unlimited resources it is suggested that you let the opposing side file the compliant and pay the fees. You can always file a cross compliant at the appropriate time.

In Chapter One our patriot had his home sold at a tax sale. If we look at the sale closely, we will find that the Governor of the IMF was represented by the Special Procedures Function Officer. This Special Procedures Function Officer generally speaking, is stationed in the regional office. Since the United States has not been a party to any of the actions taken thus far, there was no need of a Court Order in the sale of the property. Remember, under 28 USC § 2463, that any property taken under any revenue law is subject only to the orders and decrees of the court. Since most tax sales, such as the one described,

lack a Court Order this should be a clue to the real party in interest, the IMF. The Special Procedures Function Officer (SPFO) issued a "Quit Claim Deed" to the United States Internal Revenue Service. The SPFO was the Grantor to the "United States IRS", the Grantee. It was at this time that the United States became involved in this transaction. Actually what took place is that the IMF under color of law had stolen the property and the IRS was a receiver of stolen goods. Caution, do not involve the United States in your Quiet Title action. You do not want to bring in the Department of Justice, the moment you do, you become a "tax protestor".

Finally, the IRS issues a Quit Claim Deed to the purchaser of the tax lien. We have already discussed Quit Claim Deeds. As you already know, no title was transferred. In order for the purchaser of the lien to have Quiet Title he must perfect said title with a Court Order. At this point the burden of proof falls on the purchaser of the lien when he files the action in the State Court. Since you will be responding to the claims made by the plaintiff in a Quiet Title Action it is difficult to guess what their allegations may be. The following sample pleadings may be of some help. Again, seek competent legal advise. This advise may not always be from an attorney. The following samples do not fall in any order but are for informational use only.

STATE

Name
Name
address
city, state & Zip

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF _____
IN AND FOR THE COUNTY OF _____

NAME IN CAPS	)	
	)	
Plaintiff,	)	Civil No. CV
	)	
V.	)	
	)	**MEMORANDUM IN SUPPORT**
husband and wife names in caps	)	**OF DEFENDANTS' MOTION**
DOES 1 THROUGH 10, and all other	)	**TO STRIKE PLAINTIFFS'**
persons claiming any right,	)	**MEMORANDUM IN**
title, estate, lien or interest	)	**OPPOSITION TO**
in the real property described	)	**DEFENDANTS' MOTION**
in the complaint	)	**MOTION TO DISMISS**
	)	
Defendants	)	
	)	Judge

MEMORANDUM

1. Upon review of opposing counsel's Memorandum in opposition to Defendants' motion to dismiss it is quite evident that the opposing counsel is not knowledgeable in the tax laws and due process necessary for the

service (IRS) to conduct a seizure and disposal of property. I refer the court and opposing counsel to a recent Supreme Court decision decided December 13, 1993 United States v. James Daniel Good Real Property et al. No. 92-1180 as found in the Supreme Court Reporter 114 pgs 492 - 507.

2. In general, due process requires that individuals must receive notice and an opportunity to be heard before government deprives them of property. U.S.C.A. Const. Amend. 5. In this instant case upon review of the exhibits before the court it is obvious that there was a failure of notice as required by law. See certificate of search Exhibit _____.

3. The 4th Amendment places limits on government's power to seize property for purposes of forfeiture, it does not provide sole measure of Constitutional protection that must be afforded property owners in forfeiture proceedings, and consideration must also be given to Due Process Clause of the Fifth Amendment and Fourteenth Amendments. U.S.C.A. Const. Amends. 4, 5, 14.

4. For purposes of determining whether due process required that landowner receive notice and opportunity for hearing before real property

could be subject to civil forfeiture, factor of government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirement would entail, favored imposition of preseizure notice and hearing requirement; traditional reason for seizing personal property, to insure that court retained jurisdiction, was inapplicable in case of real property, and government concern about owner alienating or harming property during pendency of seizure proceedings could be addressed in other ways, such as filing of notice of lis pendens, obtaining of ex parte restraining orders prohibiting damage to property, and as there was already procedure for postseizure challenge by owner, administrative burden of government would not be significantly increased by having hearing occur prior to seizure. U.S.C.A. Const. Amends. 5, 14 ... **James Daniel Good Supra Pg 494.**

5. In this instant case there was no service conducted. No notice as required by the law. No sworn complaint accompanied by an affidavit. All of the actions by the service (IRS) on behalf of the Governor of the International Monetary Fund (IMF) were ex parte.

6. .....Where the Government seizes property not to preserve evidence of

criminal wrongdoing but to assert ownership and control over the property its action must also comply with the Due Process Clause. See e.g. Calero-Toledo v. Pearson Yacht Leasing Co. 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.3d 452; Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556. Pp 498-500. **James Daniel Good Supra Pg 496.**

7. (C) No plausible claim of executive urgency, including the Government's reliance on forfeitures as a means of defraying law enforcement expenses, justifies the summary seizure of real property .... **James Daniel Good Supra Pg 496.**

8. Justice KENNEDY delivered the opinion of the court. "The principle question presented is whether, in the absence exigent circumstances, the Due Process Clause of the Fifth Amendment prohibits the government in a civil forfeiture case from seizing real property without first affording the owner **notice and an opportunity to be heard.** We hold that it does."

9. In an attempt to circumvent the jurisdiction of the court the service (IRS) summarily seizes and disposes of property claiming judicial immunity. Furthermore, it is customary to pyramid claims against their victims and to

falsify records. In the Government Accounting Office Audit of the IRS 1992/93 Pg 5 of audit review, we read that the IRS routinely falsifies records in order to meet its goals.

10. As previously noted in the record before this court the IRS proceeds in REM pursuant to 26 USC § 7323 and attaches a maritime lien in accordance with 26 USC § 6321. This procedure in order to be enforceable must afford an opportunity for the victim to be heard. However, the IRS routinely denies this opportunity to its victims and relies upon the ignorance of the courts and officers of the court in furtherance of their faulted position.

11. [1] The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property. See United States v. $3,850, 461 U.S. 555, 562, n. 12, 103 S.Ct. 2005, 2011, n. 12, 76 L.Ed.2d 143 (1983); Fuentes v. Shevin, 407 U.S. 67, 82, 92 S.Ct. 1983, 1995, 32 L.Ed.2d 556 (1972); Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 342, 89 S.Ct. 1820, 1823, 23 L.Ed.2d 349 (1969) (Harlan, J., concurring); Mullane v. Central Hanover Bank & Trust Co., 339 U.S.

306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950).

12. In James Daniel Good the Government argued that the provisions of one amendment to the Constitution could be used to circumvent safeguard contained in other amendments. the Supreme Court disagreed and rightly so.

13. In order for the IRS to perfect its lien there is a requirement pursuant to 28 USC § 2463 that the court and not the service (IRS) holds custody to the property and therefore may only be conveyed, disposed of etc. by court order or decree. In this instant action since the court (District Court for the United States) was never served, the actions of the service (IRS) are merely ex parte. In James Daniel Good Supra Pg 500 - 501

we read:

> [3] The right to prior notice and a hearing is central to the Constitution's command of due process. "The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment - to minimize substantively unfair or mistaken deprivations of property...." Fuentes v. Shevin, 407 U.S. at 80 - 81, 92 S.Ct. at 1994 - 1995.

14. Since the service (IRS) circumvented the court of competent jurisdiction there is no judicial determination of any kind that the owner of the property

in question did in fact owe a tax. At this time Defendant, —name—, submits to the court documents. Exhibits ____ thru _____. As the court and opposing counsel can clearly see based upon the Government's own records —name— did not owe a tax and to this very day does not owe a tax. It is the opinion of these Defendants that had they been afforded the required due process that even this instant action would have never taken place. Due diligence is imperative when dealing with the lives and property of the people.

15. The practice of ex parte seizure, more over, creates an unacceptable risk..... (Congress)..... it did not intend to deprive innocent owners of their property. The affirmative defense of innocent ownership is allowed by statute. James Daniel Good Supra Pg 501.

16. The ex parte proceeding affords little or no protection to the innocent owner. James Daniel Good Supra Pg 502. Once the IRS's victim is made homeless, deprived of the ability to work and nearly becomes a ward of the state, the difficulty in mounting a defense becomes overwhelming. Currently, the IRS employs approximately 115,000 employees. Also, it is customary for the U.S. Attorney to support the collection activity and to use

all of the resources including but not limited to extensive computer records, transcripts and briefs etc. in an effort to defeat their victim. We read in the U.S. Attorneys Manual that the DOJ and the IRS work in harmony.

17. Considering the overwhelming position held by the IRS it is easily understandable why the population and the courts, to a great degree, fear the IRS. In a previous document that these Defendants filed before this court, the Unification Act of 1964 (34 FRD 325) was paraphrased. However, due to its merit I have taken the time to present a quotation from the Unification Act and in particular from Mr. Justice Jackson.

> 2. To the extent that admiralty procedure differs from civil procedure, it is a mystery to most trial and appellate judges, and to the non-specialist lawyer who finds himself - sometimes to his surprise - involved in a case cognizable only on the admiralty "side" of the court. "Admiralty practice", said Mr. Justice Jackson, "is a unique system of substantive laws and procedures with which members of this Court are singularly deficient in experience." Black Diamond S.S. Corp. v. Stewart & Sons, 336, 403, 69 S.Ct. 622, 93L.Ed. 754 (1949) (dissenting opinion).

Keep in mind that this came from the highest court in the land.

18. It was noted above that the Service (IRS) routinely falsify records in order to meet its goals. An interesting footnote appears in James Daniel Good Supra Pg 502 "We must significantly increase production to reach our budget target.".... "....Failure to achieve the $470 million projection would expose

the departments forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of fiscal year 1990." Executive Office for the United States Attorneys, U.S. Department of Justice, 38 United States Attorneys Bulletin 180 (1990).

19. As noted above the IRS and the Department of Justice work in harmony. Does this mean that in order to meet their goals not only will they falsify records, they will show contempt for the courts, circumvent due process, and engage in ex parte communication to intimidate officers of the court, members of Congress and even local law enforcement? In Joseph Chrisman et al 94-C-427S now before the Tenth Circuit Court these very questions are being reviewed.

20. Because real property cannot abscond, the court's jurisdiction can be preserved without prior seizure. It is true that seizure of the res has long been considered a prerequisite to the initiation of *In rem* forfeiture proceeding. See Republic National Bank of Miami v. United States, 506 U. S. ____, ____, 113 S.Ct. 554, ___, 121 L.Ed.2d 474 (1992); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363, 104 S.Ct. 1099, 1105, 79 L.Ed.2d

361 (1984). This rule had its origin in the court's early admiralty cases, which involved the forfeiture of vessels and other movable personal property. See Taylor v. Carryl, 61 U.S. (20 How.) 583, 599, 15 L.Ed. 1028 (1858); The Brig Ann, 13 U.S. (9 Cranch) 289, 3 L.Ed. 734 (1815); Keene v. United States, 9 U.S. (5 Cranch) 304, 310, 3 L.Ed. 108 (1809). Justice Story, writing for the Court in The Brig Ann, explained the justification for the rule as one of fixing and preserving jurisdiction: "[B]efore judicial cognizance can attach upon a forfeiture in rem,..... there must be a seizure; for until seizure it is impossible to ascertain what is the competent forum." 13 U.S. (9 Cranch), at 291. But when the res is real property, rather than personal goods, the appropriate judicial forum may be determined without actual seizure. James Daniel Good Supra Pg. 503.

21. As previously noted in this courts record the court of competent jurisdiction is the District Court for the United States. Again this court lacks jurisdiction over the issues at barr inasmuch as the lien against the res is in admiralty and presents a **FEDERAL QUESTION** (emphasis added).

22. Requiring the Government to postpone seizure until after an adversary hearing creates no significant administrative burden. A claimant is already

entitled to an adversary hearing before a final judgment of forfeiture. No extra hearing would be required in the typical case, since the Government can wait until after the forfeiture judgment to seize the property. From an administrative standpoint it makes little difference whether that hearing is held before or after the seizure. And any harm that results from delay is minimal in comparison to the injury occasioned by erroneous seizure. James Daniel Good Supra Pg 504.

23. In this instant case the IRS has attempted to dispose of the property and by doing so has made the Plaintiff (___name___) a victim of their unlawful practices. The service (IRS) now relies upon the lack of knowledge of the lower courts to affirm this erroneous activity. As opposing counsel rightly points out title companies are reluctant to insure property conveyed in this manner. It seems that the title companies are aware that it requires a judicial determination in order to convey title. The Defendants do not disagree that the state rightly has the authority over title issues. {{{ this was in this particular case However, the citation by the opposing counsel of Arndt V. Griggs, (1890) is so far off point that it is without merit.}}}}}}

24. Apparently opposing counsel feels secure with an antiquated citation

and a reliance upon the integrity of the IRS. Currently, Congress is reviewing the actions of all the Federal Agencies. The outcry from the American people is such that the Democratic party suffered a tremendous blow during the last election. It is not a trivial thing to observe that the first act of the new Congress was to pass a bill HR 1 that requires Congress to abide by the Constitution and the laws that they pass. Is it any less to expect government agencies to be held to the same standard? These Defendants think not.

25. When reviewing tax statues it is important to view the supporting Code of Federal Regulations (CFR) that are the underlying authority for the title. It is customary for the IRS to cite penalties and interest on a supposed tax debt under 6651(a), 6662 of Title 26 however, upon review of these penalty provisions we find that they have to do with the manufacture and distribution of machine gun parts, alcohol or tobacco products. For years the IRS has listed a kind of tax "1040" on their forms. A review of 26 USC reveals that this kind of tax relates to the non-taxable transfer of certain farm land. Again, the IRS relies upon the ignorance of the people and assigns penalties and interests under the provisions set forth pursuant to 27 CFR part 70. This Defendant has reviewed the IRS Code and finds that there are approximately 123 different "kinds of tax" defined however, "1040" other

than cited above is not listed.

26. It is this Defendant's position that the American people including this Defendant should support their government and pay all lawful taxes. But, when people within government abuse the power entrusted to them it is the responsibility of we the people to resist corruption, fraud and theft.

27. The Plaintiff has failed to support any of his allegations with a judicial determination. Obviously, no judicial determination has been made that —name— is a delinquent tax payer. Failure of the Plaintiff to support his claim or to even rebut the denial of this allegation is dispositive. Therefore any claim that —name— is a delinquent tax payer unsupported by judicial determination should be removed from the record.

28. Counsel for the Plaintiff does not deny the allegation that a felony was committed within the hearing of the court by said counsel pursuant to 26 USC 7213 and again is dispositive. Criminal referral is requested.

29. Plaintiff fails to deny that the real party in interest is the Governor of the International Monetary Fund (IMF) pursuant to the rules of court Rule 8(d)

failure to deny is deemed admitted. Again this position is dispositive.

30. The Defendants noted that it is customary in real estate transactions where one spouse is purchasing property sole and separate to execute a disclaimer deed to eliminate any cloud on the title. Plaintiff fails to deny this and therefore is dispositive. The owner of the property is —name—, sole and separate, a married woman.

31. Defendants have not entered the jurisdiction of the court and are therefore appearing specially and not generally. Plaintiff does not object to this position pursuant to Rule 8(d). The court lacks jurisdiction over the persons of —names — Sui Juris and Alieni Juris respectively.

32. Since the issue before the court posses a federal question the court lacks jurisdiction.

33. It is the position of the IRS in tax sales of real property not to guarantee title to the property. It should be apparent even to the layman upon review of the documents and the evidence before this court the reason behind this position.

34. These Defendants could raise other issues but do not wish to tire the court therefore, they renew their request that their motion be granted to dismiss this case without prejudice and strike Plaintiff's MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS. Inasmuch as Plaintiff's pleading is unresponsive and meritless, and the court lacks jurisdiction.

Respectfully submitted,

Husband's name	wife's name
Pro se	Pro se

Name
Name
address
city, state & Zip

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF _____
IN AND FOR THE COUNTY OF _____

NAME IN CAPS	)	
	)	
Plaintiff,	)	Civil No. CV
	)	
V.	)	
	)	**DEFENDANTS' MOTION TO STRIKE MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**
husband and wife in caps	)	
DOES 1 THROUGH 10, and all other persons claiming any right, title, estate, lien or interest in the real property described in the complaint	)	
	)	
Defendants	)	
	)	Judge

COMES NOW — husband and wife names in caps, pro se, by special appearance and not generally pursuant to the supplemental rules of

admiralty as cited in the record already before the court and moves the court to strike Plaintiffs **MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**.

1. Plaintiff has failed to recognize the issues before the court.

2. Plaintiff did not purchase a condominium but entered into a contractual agreement with the agents for the Governor of the International Monetary Fund (IMF) through the intermediary Internal Revenue Service (IRS). Said service failed to perfect any title to the property in question as the record clearly states and therefore is dispositive.

3. Clearly this court lacks jurisdiction as previously noted in the record. For this court to assume jurisdiction it would have to circumvent the Constitution of the United States, 4th and 5th Amendments and over rule the United States Supreme Court as more fully detailed in Defendants MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS.

4. For the court to assume jurisdiction over the property in question it would do so in violation of Judicial Canon #1.

Respectfully submitted,

husband's name	wife's name
Pro se	Pro se

CHAPTER FOUR

FARE WELL

There are so many factors to consider when answering a libel that one should use caution. It is hoped that the information that has been presented will spark some intense research and the researchers will share their information.

During the construction of this work it was learned that the current Governor of the IMF is Allen Greenspan. Apparently, when Lloyd Benson resigned as Secretary of Treasury, Robert Rubin did not take on the title, Governor of the Fund. A call was placed to the main office of the IMF to discover this information. Our east coast sources report that Lloyd Benson, however, is the defacto Governor of the IMF until Robert Rubin is confirmed. Allen Greenspan is the Governor temporarily. Although this information is believed to be reliable nothing replaces due diligence. Check it out for yourself.

For those of you that are reading the ending first, the IMF did it.

EXHIBITS

1. DIAGRAM I
2. AM JUR 2d ADMIRALTY sec.15
3. SUPPLEMENTAL RULES
4. THE HUNTRESS
5. U.S. v $3,976...
6. U.S. v JAMES DANIEL GOOD
7. REPUBLIC NATIONAL BANK OF MIAMI
8. 12 STAT 319
9. BENEDICTS Sec. 275, LIBEL OF REVIEW
10. BENEDICTS Sec. 51, NOTE 7
11. 26 USCS Sec. 6321
12. 26 USCS Sec. 7323
13. 26 USCS Sec. 7401
14. 28 USCS Sec. 2463
15. CERTIFICATE OF SEARCH
16. IMF IMMUNITY LETTER
17. IMF REPLY TO THE COURT
18. TAX COURT RECORD
19. NOTICE OF TAX LIEN
20. ADMIRALTY QUESTIONAIRE

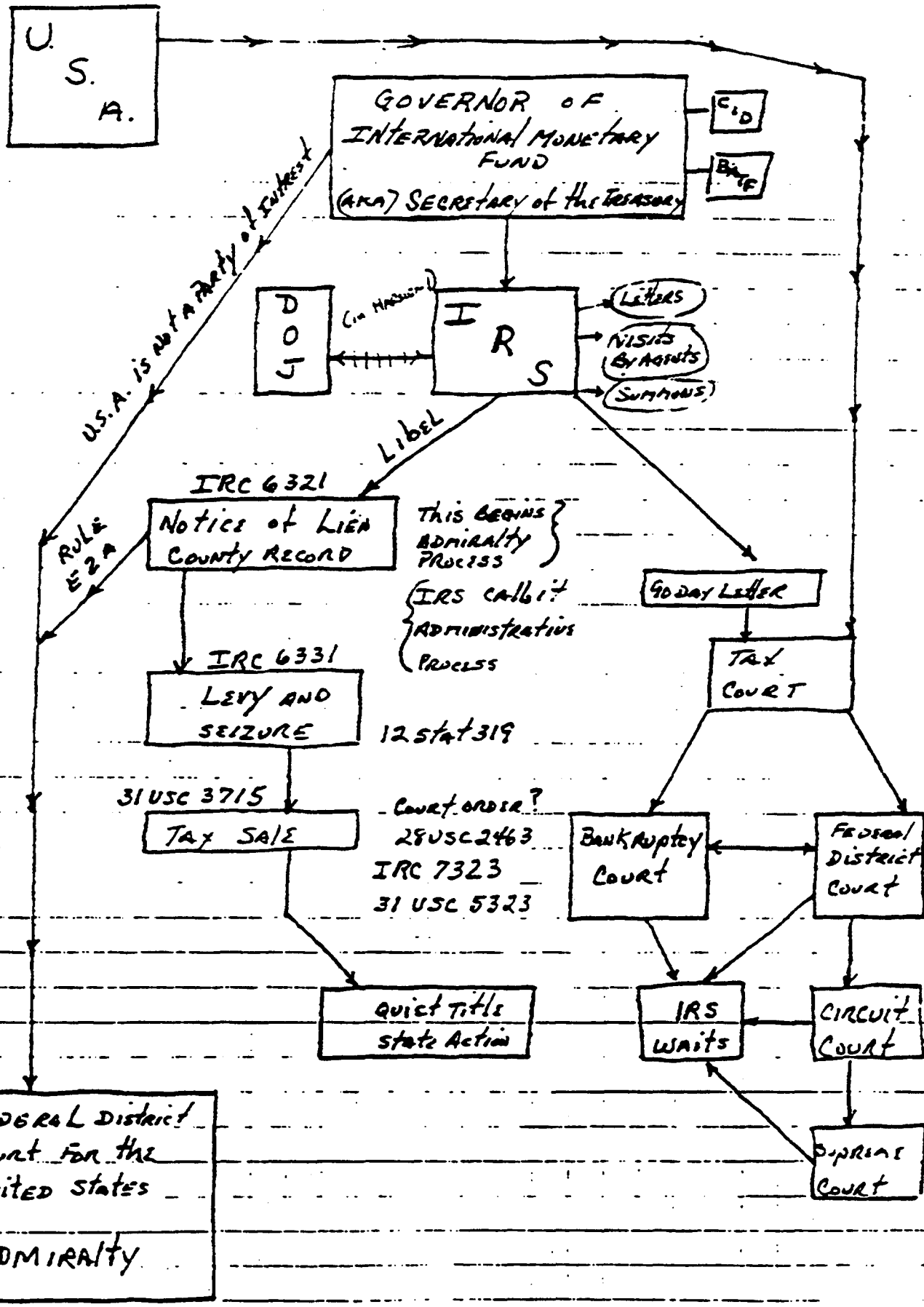

U.S.A.
GOVERNOR OF INTERNATIONAL MONETARY FUND
(AKA) SECRETARY of the TREASURY
C.I.D.
B.A.T.F.
U.S.A. is not a Party of Interest
D O J
Civ. Matters
I R S
Letters
Visits By Agents
Summons
Libel
IRC 6321
Notice of Lien
County Record
This Begins Admiralty Process
RULE E 2 a
IRS calls it Administrative Process
90 Day Letter
Tax Court
IRC 6331
Levy and Seizure
12 Stat 319
31 USC 3715
Tax Sale
Court order?
28 USC 2463
IRC 7323
31 USC 5323
Bankruptcy Court
Federal District Court
Quiet Title State Action
IRS waits
Circuit Court
Supreme Court
FEDERAL District Court for the United States
ADMIRALTY

DIAGRAM I

death actions originally were not, but now are, within the jurisdiction of admiralty.[18] In any event, a wide range of subjects is now definitely within admiralty jurisdiction,[19] particularly those relating to maritime contracts and maritime torts.[20]

§ 16. Relation between jurisdiction and substantive law.

Although this article is primarily concerned with admiralty jurisdiction and procedure, it should be pointed out that there is a relationship between admiralty jurisdiction and the substantive law to be applied. Therefore, whether a matter is adjudicated in an admiralty court or another court is of importance both procedurally and with regard to the merits of the litigation, especially in view of certain principles peculiar to the maritime law as applied by the admiralty courts.[1] For example, the doctrine of contributory negligence is inapplicable in admiralty, and the doctrine of comparative negligence prevails.[2] Another peculiarity of the substantive maritime law, as applied under admiralty rules, is the so-called rule of divided damages—that is, the rule that where two parties are jointly responsible for a tort to a third party, each is primarily liable for only half of the damages.[3]

Admiralty recognizes state law to a limited extent,[4] and applies equitable principles, although it does not have the full powers of a court of equity[5] and is thus more flexible, in determining substantive matters, than a court acting under rigid rules of law.[6]

§ 17. Difference between admiralty and equity jurisdiction.

Admiralty courts are not courts of equity, and a court of admiralty will not enforce an independent equitable claim merely because it pertains to maritime property.[7] However, admiralty courts may apply equitable principles to

arise from time to time that call for reconsideration of the jurisdiction of admiralty. Sound Marine & Mach. Corp. v Westchester County (CA2 NY) 100 F2d 360, cert den 306 US 642, 83 L ed 1042, 59 S Ct 582.

18. § 127, infra.

19. Manro v Almeida, 10 Wheat (US) 473, 6 L ed 369; Case v Woolley, 6 Dana (Ky) 17; Berry v M. F. Donovan & Sons, 120 Me 457, 115 A 250, 25 ALR 1021.

20. The Belfast, 7 Wall (US) 624, 19 L ed 266; Faulhaber v Industrial Com. of Ohio, 64 Ohio App 405, 18 Ohio Ops 171, 29 NE2d 58.

See §§ 60–71, 77–86, infra.

1. Renew v United States (DC Ga) 1 F Supp 256.

Certain principles of the common law are not recognized in admiralty, and it is the duty of courts sitting in admiralty to apply maritime law free from common-law concepts. Re New York Trap Rock Corp. (DC NY) 172 F Supp 638.

Symposium on Maritime Law, 35 Tulane L Rev Dec. 1960.

2. § 187, infra.

3. § 212, infra.

4. § 92, infra.

5. §§ 17, 88, infra.

6. Atlantic Fruit Co. v Red Cross Line (DC NY) 276 F 319, affd (CA2) 5 F2d 218.

7. Swift & Co. Packers v Compania Colombiana Del Caribe, S. A. 339 US 684, 94 L ed 1206, 70 S Ct 861, 19 ALR2d 630; Schoenamsgruber v Hamburg American Line, 294 US 454, 79 L ed 989, 55 S Ct 475, reh den 294 US 734, 79 L ed 1263, 55 S Ct 635; Red Cross Line v Atlantic Fruit Co. 264 US 109, 68 L ed 582, 44 S Ct 274; United States v Cornell S. B. Co. 202 US 184, 50 L ed 987, 26 S Ct 648

Since interpleader is an equitable remedy, an admiralty court has no power to entertain such a proceeding. When an interpleader affects a libel pending in an admiralty court, the equity court having jurisdiction of the bill of interpleader may enjoin prosecution of the libel in admiralty and compel the libelant to litigate his right to the fund in the interpleader proceeding in the equity court. Eagle, Star & British Dominions v Tadlock (DC Cal) 14 F Supp 933.

The equitable remedy of a creditor's bill is foreign to admiralty jurisdiction. Yone Suzuki v Central Argentine R. (CA2 NY) 27 F2d 795, cert den 278 US 652, 73 L ed 563, 49 S Ct 178.

vessel or other maritime property is an historic remedy in controversies over title or right to possession, and in disputes among co-owners over the vessel's employment. The statutory right to limit liability is limited to owners of vessels, and has its own complexities. While the unified federal rules are generally applicable to these distinctive proceedings, certain special rules dealing with them are needed.

Arrest of the person and imprisonment for debt are not included because these remedies are not peculiarly maritime. The practice is not uniform but conforms to state law. See 2 Benedict § 286; 28 USC § 2007; FRCP 64, 69. The relevant provisions of Admiralty Rules 2, 3, and 4 are unnecessary or obsolete.

No attempt is here made to compile a complete and self-contained code governing these distinctively maritime remedies. The more limited objective is to carry forward the relevant provisions of the former Rules of Practice for Admiralty and Maritime Cases, modernized and revised to some extent but still in the context of history and precedent. Accordingly, these Rules are not to be construed as limiting or impairing the traditional power of a district court, exercising the admiralty and maritime jurisdiction, to adapt its procedures and its remedies in the individual case, consistently with these rules, to secure the just, speedy, and inexpensive determination of every action. (See Swift & Co. Packers v Compania Columbiana Del Caribe, S/A, 339 US 684, 94 L Ed 1206, 70 S Ct 861, 19 ALR2d 630 (1950); Rule 1). In addition, of course, the district courts retain the power to make local rules not inconsistent with these rules. See Rule 83; cf. Admiralty Rule 44.

Notes of Advisory Committee on 1985 Amendments to Rules. Since their promulgation in 1966, the Supplemental Rules for Certain Admiralty and Maritime Claims have preserved the special procedures of arrest and attachment unique to admiralty law. In recent years, however, these Rules have been challenged as violating the principles of procedural due process enunciated in the United States Supreme Court's decision in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and later developed in *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). These Supreme Court decisions provide five basic criteria for a constitutional seizure of property: (1) effective notice to persons having interests in the property seized, (2) judicial review prior to attachment, (3) avoidance of conclusory allegations in the complaint, (4) security posted by the plaintiff to protect the owner of the property under attachment, and (5) a meaningful and timely hearing after attachment.

Several commentators have found the Supplemental Rules lacking on some or all five grounds. *E.g.*, Batiza & Partridge, *The Constitutional Challenge to Maritime Seizures*, 26 Loy. L. Rev. 203 (1980); Morse, *The Conflict Between the Supreme Court Admiralty Rules and Sniadach-Fuentes: A Collision Course?*, 3 Fla. St. U.L. Rev. 1 (1975). The federal courts have varied in their disposition of challenges to the Supplemental Rules. The Fourth and Fifth Circuit have affirmed the constitutionality of Rule C. *Amstar Corp. v. S/S Alexandros T.*, 664

F.2d 904 (4th Cir. 1981); *Merchants National Bank of Mobile v. The Dredge General G. L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981), *cert. dismised*, 456 U.S. 966 (1982). However, a district court in the Ninth Circuit found Rule C unconstitutional. *Alyeska Pipeline Service Co. v. The Vessel Bay Ridge*, 509 F. Supp. 1115 (D. Alaska 1981), *appeal dismissed*, 703 F.2d 381 (9th Cir. 1983). Rule B(1) has received similar inconsistent treatment. The Ninth and Eleventh Circuits have upheld its constitutionality. *Polar Shipping, Ltd. v Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982); *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S. A. de Navegacion*, 732 F.2d 1543 (11th Cir. 1984). On the other hand, a Washington district court has found it to be constitutionally deficient. *Grand Bahama Petroleum Co. v. Canadian Transportation Agencies, Ltd.*, 450 F. Supp. 447 (W.D. Wash. 1978). The constitutionality of both rules was questioned in *Techem Chem Co. v M/T Choyo Maru*, 416 F. Supp. 960 (D. Md. 1976). Thus, there is uncertainty as to whether the current rules prescribe constitutionally sound procedures for guidance of courts and counsel. See generally Note, *Due Process in Admiralty Arrest and Attachment*, 56 Tex. L. Rev. 1091 (1978).

Due to the controversy and uncertainty that have surrounded the Supplemental Rules, local admiralty bars and the Maritime Law Association of the United States have sought to strengthen the constitutionality of maritime arrest and attachment by encouraging promulgation of local admiralty rules providing for prompt post-seizure hearings. Some districts also adopted rules calling for judicial scrutiny of applications for arrest or attachment. Nonetheless, the result has been a lack of uniformity and continued concern over the constitutionality of the existing practice. The amendments that follow are intended to provide rules that meet the requirements prescribed by the Supreme Court and to develop uniformity in the admiralty practice.

CROSS REFERENCES

Applicability of Rules of Civil Procedure for District Courts to cases in admiralty, USCS Rules of Civil Procedure, Rule 1.

Pleading special matters in admiralty and maritime claims, USCS Rules of Civil Procedure, Rule 9.

Third-party practice in admiralty and maritime claims, USCS Rules of Civil Procedure, Rule 14.

Jury trial of admiralty and maritime claims, USCS Rules of Civil Procedure, Rule 38.

Applicability to prize proceedings in admiralty, USCS Rules of Civil Procedure, Rule 81.

Jurisdiction and venue of admiralty and maritime claims, USCS Rules of Civil Procedure, Rule 82.

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Federal Procedure L Ed:

Maritime Law and Procedure, Fed Proc, L Ed, § 53:3

Am Jur:

2 Am Jur 2d, Admiralty §§ 133–233.

70 Am Jur 2d, Shipping §§ 331–346.

Am Jur Trials:

7 Am Jur Trials 1, 67–89, Motorboat Accident Litigation.

9 Am Jur Trials 665, 697–701, Seaman's Injuries.

17 Am Jur Trials 501 et seq., Ship Collision Cases.

Forms:

9 Federal Procedural Forms L Ed, Food, Drugs, and Cosmetics, § 31:203.

12 Federal Procedural Forms L Ed, Maritime Law and Procedure §§ 47:2, 47:5, 47:8.

1 Am Jur Pl & Pr Forms (Rev), Admiralty, Forms 21, 31–36, 81, 231.

11 Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 54, 55.

22 Am Jur Pl & Pr Forms (Rev), Shipping, Forms 2–4.

Annotations:

Prevailing party's right to recover counsel fees in admiralty. 8 L Ed 2d 903.

Flotilla or several vessels of same owner as liable under federal statute providing for limitation of shipowner's liability (46 USC § 183(a)). 9 ALR Fed 768.

What is a "vessel" subject to a maritime lien under 46 USCS § 971. 3 ALR Fed 882.

Dismissal of action in admiralty for want of prosecution as res judicata. 54 ALR2d 489.

Estoppel of or waiver by parties or participants of irregularities or defects in sales in proceedings in admiralty. 2 ALR2d 210.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Statutory condemnation proceedings

1. Generally

Supplemental Rule A's provision that Rules of Civil Procedure are applicable to admiralty cases except to extent that they are inconsistent with these Supplemental Rules was pertinent to defendant's assertion that provisions of Rule 65 relating to injunctions and requiring maximum notice of 10 days' duration, and showing of "irreparable injury," where applicable to injunction under Rule F(3); in fact, Rule F(3) order is so much a mere formality as to be in actuality quite unnecessary to accomplish purpose of which it speaks. Re Pacific Far East Line, Inc. (1967, ND Cal) 43 FRD 283, 11 FR Serv 2d 1444.

Proper thrust of Rule 9(h) is to preserve those remedies specifically noted in Supplemental Rules for Certain Admiralty and Maritime Claims. Close v Calmar S.S. Corp. (1968, ED Pa) 44 FRD 398, 11 FR Serv 2d 1030, affd (CA3 Pa) 417 F2d 264, 13 FR Serv 2d 1096.

Motion for summary judgment may be made at any time by adverse party and as such motion stays proceedings until such time as it is either granted or denied, it is consistent to consider such motion prior to requiring compliance with supplemental rules for admiralty claims. United States v Two Hundred & One, Fifty Pound Bags of Furazolidone (1971, DC ND) 52 FRD 222.

Venue of in personam action in admiralty lies wherever court has jurisdiction of parties. H & F Barge Co. v Garber Bros., Inc. (1974, ED La) 65 FRD 399, 20 FR Serv 2d 286.

Admiralty practice now follows Federal Rules of Civil Procedure, which have been specifically

incorporated into Rule A of Supplemental Rules for Certain Admiralty and Maritime Claims, "except to extent that they are inconsistent with these Supplemental Rules." Unilever (Raw Materials), Ltd. v M/T Stolt Boel (1977, SD NY) 77 FRD 384, 25 FR Serv 2d 40.

Constitution forbids Attorney General from seizing real property pursuant to § 301(a)(6) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881(b)) and Supplemental Rules for Certain Admiralty and Maritime Claims, absent exigent circumstances, without prior judicial review. United States v Certain Real Estate Property Located at 4880 S.E. Dixie Highway (1985, SD Fla) 612 F Supp 1492, later proceeding (SD Fla) 628 F Supp 1467.

2. Statutory condemnation proceedings

In case of seizure on land, admiralty procedure does not apply except as to filing libel and obtaining jurisdiction; forfeiture proceeding, after these preliminaries, takes character of law action and is governed by Federal Rules of Civil Procedure. Reynal v United States (1945, CA5 Tex) 153 F2d 929; United States v $5372.85 United States Coin & Currency (1968, SD NY) 283 F Supp 904, 12 FR Serv 2d 1386.

Proceedings to enforce forfeiture of property seized by government agents because allegedly used in violating internal revenue laws against carrying on gambling business without paying special tax are governed by Supplemental Rules for Certain Admiralty and Maritime Claims so far as applicable, but otherwise by Federal Rules of Civil Procedure. United States v $5372.85 United States Coin & Currency (1968, SD NY) 283 F Supp 904, 12 FR Serv 2d 1386.

Words in Rule A "statutory condemnation proceedings" were meant to include forfeiture proceedings, and when seizure is on land proceeding is civil action at law, not criminal proceeding. United States v $5372.85 United States Coin & Currency (1968, SD NY) 283 F Supp 904, 12 FR Serv 2d 1386.

Rule 60(b) providing for relief from judgment in certain circumstances is generally held to be inapplicable to forfeiture proceedings. United States v One 1970 Buick Electra 225, etc. (1972, ND Ohio) 57 FRD 185, 16 FR Serv 2d 1565.

Rule B. Attachment and Garnishment; Special Provisions

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or his attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

(2) Notice to Defendant. No judgment by default shall be entered except upon proof, which may be by affidavit, (a) that the plaintiff or the

garnishee has given notice of the action to the defendant by mailing to him a copy of the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt, or (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4(d) or (i), or (c) that the plaintiff or the garnishee has made diligent efforts to give notice of the action to the defendant and has been unable to do so.

(3) **Answer.**

(a) *By Garnishee.* The garnishee shall serve his answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon him. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in his hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against him. If he admits any debts, credits, or effects, they shall be held in his hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

(b) *By Defendant.* The defendant shall serve his answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. Subdivision (1). This preserves the traditional maritime remedy of attachment and garnishment, and carries forward the relevant substance of Admiralty Rule 2. In addition, or in the alternative, provision is made for the use of similar state remedies made available by the amendment of Rule 4(e) effective July 1, 1963. On the effect of appearance to defend against attachment see Rule E(8).

The rule follows closely the language of Admiralty Rule 2. No change is made with respect to the property subject to attachment. No change is made in the condition that makes the remedy available. The rules have never defined the clause, "if the defendant shall not be found within the district," and no definition is attempted here. The subject seems one best left for the time being to development on a case-by-case basis. The proposal does shift from the marshal (on whom it now rests in theory) to the plaintiff the burden of establishing that the defendant cannot be found in the district.

A change in the context of the practice is brought about by Rule 4(f), which will enable summons to be served throughout the state instead of, as heretofore, only within the district. The Advisory Committee considered whether the rule on attachment and garnishment should be correspondingly changed to permit those remedies only when the defendant cannot be found within the state and concluded that the remedy should not be so limited.

The effect is to enlarge the class of cases in which the plaintiff may proceed by attachment or garnishment although jurisdiction of the person of the defendant may be independently obtained. This is possible at the present time where, for example, a corporate defendant has appointed an agent within the district to accept service of process but is not carrying on activities there sufficient to subject it to jurisdiction (Seawind Compania, S.A. v Crescent Line, Inc., 320 F2d 580 (2d Cir. 1963)), or where, though the foreign corporation's activities in the district are sufficient to subject it personally to the jurisdiction, there is in the district no officer on whom process can be served (United States v Cia Naviera Continental, SA, 178 F Supp 561 (SD NY 1959)).

Process of attachment or garnishment will be limited to the district. See Rule E(3)(a).

Subdivision (2). The former Admiralty Rules did not provide for notice to the defendant in attachment and garnishment proceedings. None is required by the principles of due process, since it is assumed that the garnishee or custodian of the property attached will either notify the defendant or be deprived of the right to plead the judgment as a defense in an action against him by the defendant. Harris v Balk, 198 US 215, 49 L Ed 1023, 25 S Ct 625 (1905); Pennoyer v Neff, 95 US 714, 24 L Ed 565 (1878). Modern conceptions of fairness, however, dictate that actual notice be given to persons known to claim an interest in the property that is the subject of the action where that is reasonably practicable. In attachment and garnishment proceedings the persons whose interests will be affected by the judgment are identified by the complaint. No substantial burden is imposed on the plaintiff by a simple requirement that he notify the defendant of the action by mail. In the usual case the defendant is notified of the pendency of the proceedings by the garnishee or otherwise, and appears to claim the property and to make his answer. Hence notice by mail is not routinely required in all cases, but only in those in which the defendant has not appeared prior to the time when a default judgment is demanded. The rule therefore provides only that no default judgment shall be entered except upon proof of notice, or of inability to give notice despite diligent efforts to do so. Thus the burden of giving notice is further minimized.

In some cases the plaintiff may prefer to give notice by serving process in the usual way instead of simply by mail. (Rule 4(d).) In particular, if the defendant is in a foreign country the plaintiff may wish to utilize the modes of notice recently provided to facilitate compliance with foreign laws and procedures (Rule 4(i)). The rule provides for these alternatives.

The rule does not provide for notice by publication because there is no problem concerning unknown claimants, and publication has little utility in proportion to its expense where the identity of the defendant is known.

Subdivision (3)(a). This subdivision incorporates the substance of Admiralty Rule 36.

The Admiralty Rules were silent as to when the garnishee and the defendant were to answer. See also 2 Benedict ch XXIV.

The rule proceeds on the assumption that uniform and definite periods of time for responsive pleadings should be substituted for return days (see the discussion under Rule C(6), below). Twenty days seems sufficient time for the garnishee to answer (cf. FRCP 12(a)), and an additional 10 days should suffice for the defendant. When allowance is made for the time required for notice to reach the defendant this gives the defendant in attachment and garnishment approximately the same time that defendants have to answer when personally served.

Notes of Advisory Committee on 1985 Amendments to Rules. Rule B(1) has been amended to provide for judicial scrutiny before the issuance of any attachment or garnishment process. Its purpose is to eliminate doubts as to whether the Rule is consistent with the principles of procedural due process enunciated by the Supreme Court in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); and later developed in *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). Such doubts were raised in *Grand Bahama Petroleum Co. v. Canadian Transportation Agencies, Ltd.*, 450 F. Supp. 447 (W.D. Wash. 1978); and *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 552 F. Supp. 771 (S.D. Ga. 1982), which was reversed, 732 F.2d 1543 (11th Cir. 1984). But compare *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982), in which a majority of the panel upheld the constitutionality of Rule B because of the unique commercial context in which it is invoked. The practice described in Rule B(1) has been adopted in some districts by local rule. E.g., N.D. Calif. Local Rule 603.3; W.D. Wash. Local Admiralty Rule 15(d).

The rule envisions that the order will issue when the plaintiff makes a prima facie showing that he has a maritime claim against the defendant in the amount sued for and the defendant is not present in the district. A simple order with conclusory findings is contemplated. The reference to review by the "court" is broad enough to embrace review by a magistrate as well as by a district judge.

The new provision recognizes that in some situations, such as when the judge is unavailable and the ship is about to depart from the jurisdiction, it will be impracticable, if not impossible, to secure the judicial review contemplated by Rule B(1). When "exigent circumstances" exist, the rule enables the plaintiff to secure the issuance of the summons and process of attachment and garnishment, subject to a later showing that the necessary circumstances actually existed. This provision is intended to provide a safety valve without undermining the requirement of pre-attachment scrutiny. Thus, every effort to secure judicial review, including conducting a hearing by telephone, should be pursued before resorting to the exigent-circumstances procedure.

Rule B(1) also has been amended so that the garnishee shall be named in the "process" rather than in the "complaint." This should solve the problem presented in *Filia Compania Naviera, S.A. v. Petroship, S.A.*, 1983 A.M.C. 1 (S.D.N.Y. 1982), and eliminate any need for an additional judicial review of the complaint and affidavit when a garnishee is added.

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Maritime Law and Procedure, Fed Proc, L Ed, §§ 53:12, 23, 67, 69-73, 80, 81, 86-88, 93, 94, 96, 98.

Forms:

12 Federal Procedural Forms L Ed, Maritime Law and Procedure §§ 47:2, 47:5, 47:8, 47:40, 47:45, 47:46, 47:125–47:129, 47:194, 47:195, 47:272, 47:273.

15 Federal Procedural Forms L Ed, Statutes of Limitation, and Other Time Limits § 61:3.

Annotations:

Constitutionality of provision, in Rule B, Supplemental Rules for Certain Admiralty and Maritime Claims, allowing attachment of goods and chattels without prior notice. 63 ALR Fed 651.

Law Review Articles:

Schwartz, Jr., Due Process and Traditional Admiralty Arrest and Attachment Under the Supplemental Rules. 3 Mar Law 229, Fall, 1983.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Purpose
3. Validity
4. Effect of answer or appearance
5. Attachable items
6. —Real property
7. Defendant not "found" within district
8. —Particular circumstances
9. —Affidavit
10. Security
11. Other

1. Generally

Remedy under terms of Supplemental Rule B(1) is completely independent of state law and of any state attachment or garnishment procedures which may be employed by libelant either instead of, or in addition to, process issued under rule. Maryland Trans Corp. v The MS Benares (1970, CA2 NY) 429 F2d 307 (disagreed with by multiple cases as stated in Trans-Asiatic Oil, Ltd., S.A. v Apex Oil Co. (CA1 Puerto Rico) 804 F2d 773).

Maritime garnishment served before garnishee comes into possession of property to be garnished is void. Reiber International, Ltd. v Cargo Carriers (KACZ-CO.), Ltd. (1985, CA2 NY) 759 F2d 262.

District Court has authority, under its inherent power to apply traditional maritime law, to issue writ of attachment; it need not rely on any grant of authority under Rule B(1). Schiffahartsgesellschaft Leonhardt & Co. v A. Bottacchi S.A. de Navegacion (1985, CA11 Ga) 773 F2d 1528.

Jurisdiction of District Court acquired by attachment under Rule B is such that District Court is powerless to impose judgment in event of remand and appeal is moot, where plaintiff asserts no other basis for personal jurisdiction over defendant, District Court dismisses action and releases security, and defendant fails to obtain stay of execution of judgment or to post supersedeas bond. Teyseer Cement Co. v Halla Maritime Corp. (1986, CA9 Wash) 794 F2d 472.

Supplemental Rule B(1) grants court power to render judgment binding on parties to extent of value of attached property when contacts between defendants, their property and United States are sufficient to sustain jurisdiction quasi in rem through means of maritime attachment. Engineering Equipment Co. v S.S. Selene (1978, SD NY) 446 F Supp 706 (disagreed with by multiple cases as stated in Trans-Asiatic Oil, Ltd., S.A. v Apex Oil Co. (CA1 Puerto Rico) 804 F2d 773).

In view of transient nature of maritime property, same procedural due process that is required before deprivation of property occurs in non-maritime action is not required before attachment occurs in maritime action under Rule

B. Day v Temple Drilling Co. (1985, SD Miss) 613 F Supp 194.

2. Purpose

Primary purpose of Supplemental Rule B(1) is to compel personal appearance of nonresident defendant to answer and defend suit brought against him through seizure of any property which might be found in geographical area over which court has jurisdiction; exercise of jurisdiction based on concepts of "sovereignty," that is, power over property, is central to continued vitality of American admiralty jurisprudence; maritime attachment is part and parcel of admiralty jurisprudence and is constitutionally permissible; Supplemental B(1) is direct descendant of Admiralty Rule 2. Shaffer v Heitner (1977) 433 US 186, 53 L Ed 2d 683, 97 S Ct 2569.

Historically, maritime attachment has served 2 purposes: to secure respondent's appearance and to secure satisfaction in case suit is successful. Robinson v O. F. Shearer & Sons, Inc. (1970, CA3 Pa) 429 F2d 83.

Purpose of writ of foreign attachment in admiralty is two-fold: (1) to obtain jurisdiction of names respondent in personam through his property and only to extent of his property; and (2) to obtain such property as security in event that suit against owner is successful. Frontier Acceptance Corp. v United Freight Forwarding Co. (1968, DC NJ) 286 F Supp 367.

Primary purpose of Supplemental Rule B(1) is to compel personal appearance of non-resident defendant to answer and defend suit brought against him through the seizure of any property which might be found in geographical area over which court has jurisdiction. Grand Bahama Petroleum Co. v Canadian Transp. Agencies, Ltd. (1978, WD Wash) 450 F Supp 447, 25 FR Serv 2d 269.

3. Validity

Since District Court had power to issue writ of attachment independent of its authority derived under Rule B(1), its finding that shipowner was accorded due process through preseizure notice and postseizure hearing made ruling on facial constitutionality of Rule B(1) unnecessary and therefore unwarranted. Schiffahartsgesellschaft Leonhardt & Co. v A. Bottacchi S.A. de Navegacion (1985, CA11 Ga) 773 F2d 1528.

Supplemental Rule B(1) is unconstitutional in prescribing procedure insufficient to protect defendants from mistaken deprivation of property, and contention that federal district court lacks power to declare rule of Supreme Court unconstitutional is invalid for reasons that: (1) Supreme Court does not promulgate rules in same manner it decides questions of law and when engaged in rule-making, Court acts only in administrative and not judicial capacity, (2) court is not foreclosed from considering validity, meaning, or consistency of rules written and recommended by advisory committees since it is not possible to anticipate every constitutional objection prior to promulgation; (3) federal district court could consider properly presented constitutional challenge to rule promulgated by Congress and this fact is not altered because Supreme Court promulgated Rule B(1) under powers delegated by Congress, and (4) fact that Rule B(1) may be rule of substance rather than procedure is immaterial. Grand Bahama Petroleum Co. v Canadian Transp. Agencies, Ltd. (1978, WD Wash) 450 F Supp 447, 25 FR Serv 2d 269.

Supplemental Rule B(1) does not violate due process clause of Fifth Amendment. Trans-Asiatic Oil, Ltd., S.A. v Apex Oil Co. (1983, DC Puerto Rico) 604 F Supp 4, affd, remanded (CA1 Puerto Rico) 743 F2d 956, on remand (DC Puerto Rico) 626 F Supp 718, affd (CA1 Puerto Rico) 804 F2d 773.

4. Effect of answer or appearance

Where court issued to marshal writ of maritime attachment pursuant to provisions of Supplemental Rule B(1) of Supplemental Rules for Certain Admiralty and Maritime claims, but before marshal took action defendant filed answer, thereby making general appearance and submitting to in personam jurisdiction of court, defendant's motion to vacate writ of attachment would be granted. Narada Shipping, Ltd. v North Atlantic Oil, Ltd. (1975, SD Ala) 398 F Supp 95.

Filing of general appearance does not defeat right to attachment based upon premise that vessel owner is not found within district. Construction Exporting Enterprises, UNECA v Nikki Maritime, Ltd. (1983, SD NY) 558 F Supp 1372, dismd without op (CA2 NY) 742 F2d 1432.

5. Attachable items

Insurer's obligation to indemnify is not "debt" attachable under Rule B(1); insurer's contractual duty to defend insured is not subject to maritime attachment under Supplemental Rule B(1) since whatever value inheres in this contractual duty of insurer is personal to insured, and, further, contractual obligation which may never require performance is not attachable under present rule governing maritime attachment. Robinson v O. F. Shearer & Sons, Inc. (1970, CA3 Pa) 429 F2d 83.

Traditional use of in personam suit in maritime cases has been preserved in Supplemental

Rule B, and ships are considered "effects" within admiralty practice governing attachment and garnishment. Frontier Acceptance Corp. v United Freight Forwarding Co. (1968, DC NJ) 286 F Supp 367.

While attachment against funds deposited in escrow account as security for defendant's claim against subcharterer in arbitration is proper under Rule B(1), plaintiff seeking writ of attachment must provide bond in amount of $50,000 to secure defendant against any cost and damages, including reasonable attorney fees which defendant may sustain by reason of such attachment if defendant recovers judgment. International Ocean Way Corp. v Hyde Park Navigation, Ltd. (1983, SD NY) 555 F Supp 1047.

Because court has personal jurisdiction over garnishee defendants, it also has jurisdiction over indebtedness owed by garnishee defendants to principal defendant not subject to court's personal jurisdiction, and indebtedness is consequently subject to writ of garnishment pursuant to Rule B. Day v Temple Drilling Co. (1985, SD Miss) 613 F Supp 194.

6. —Real property

It is doubtful that real property within district of suit is subject to successful attachment under Supplemental Rule B(1). Narada Shipping, Ltd. v North Atlantic Oil, Ltd. (1975, SD Ala) 398 F Supp 95.

Constitution forbids Attorney General from seizing real property pursuant to § 301(a)(6) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881(b)) and Supplemental Rules for Certain Admiralty and Maritime Claims, absent exigent circumstances, without prior judicial review. United States v Certain Real Estate Property Located at 4880 S.E. Dixie Highway (1985, SD Fla) 612 F Supp 1492, later proceeding (SD Fla) 628 F Supp 1467.

7. Defendant not "found" within district

Rules do not define expression "found within the district," but in cases construing predecessor rules, requirement was said to present 2-pronged inquiry: first whether defendant could be found within district in terms of jurisdiction, and second, if so, whether it could be found for service of process. Oregon by State Highway Com. v Tug Go Getter (1968, CA9 Or) 398 F2d 873.

On motions to vacate foreign attachments, essential issue before District Court is whether defendant could have been found within district, and trial judge's determination that defendant could have been so found must be affirmed unless he applied erroneous legal standard or his determination of subsidiary facts was clearly erroneous. Oregon by State Highway Com. v Tug Go Getter (1968, CA9 Or) 398 F2d 873.

In admiralty proceeding commenced by filing of libel plaintiff is free to employ any method of service by which defendant can be brought into District Court, one such method being process of maritime attachment and garnishment under Supplemental Rule B(1), but this is available only when defendant cannot be found in district. Maryland Tuna Corp. v The MS Benares (1970, CA2 NY) 429 F2d 307, (disagreed with by multiple cases as stated in Trans-Asiatic Oil, Ltd., S.A. v Apex Oil Co. (CA1 Puerto Rico) 804 F2d 773).

While there could be little doubt that defendant could be found within district for service of process under Rule 4(d) since service could properly have been made upon its managing and general agent within district, court was yet faced with question of whether defendant was subject to court's personal jurisdiction, since it is well established that mere known presence of agent authorized to accept process does not, by itself, preclude foreign attachment; defendant contended that foreign attachment under Supplementary Rule B was improper because it could be found within district, and, in view of affidavits presented as to where breach of contract occurred, court agreed. Antco Shipping Co. v Yukon Compania Naviera, S. A. (1970, SD NY) 318 F Supp 626.

Attachment and garnishment of moneys and other property of defendant in admiralty and maritime claims brought in personam is permitted if defendant shall not be found within district; defendant corporation is "found" within jurisdiction of federal district court if in recent past it has conducted substantial commercial activities in district and probably will continue to do so in future. Oregon Lumber Export Co. v Tohto Shipping Co. (1970, DC Wash) 53 FRD 351.

Maritime attachment is precluded under Admiralty Rule B(1) only if (1) defendants have engaged in sufficient activity in district or cause of action has sufficient contacts with district to permit court to exercise in personam jurisdiction and (2) defendants can be found within geographical confines of district for service of process; attachment will lie unless defendant is present in district in both senses. Integrated Container Service, Inc. v Starlines Container Shipping, Ltd. (1979, SD NY) 476 F Supp 119.

8. —Particular circumstances

Test of presence in jurisdictional sense was satisfied by fact that contracts under litigation had substantial connections with forum state even though defendants had ceased doing business in forum state and no longer had office or

employees there. Integrated Container Service, Inc. v Starlines Container Shipping, Ltd. (1979, SD NY) 476 F Supp 119.

Ability of plaintiff under USCS Rules of Civil Procedure, Rule 4(f), to institute action in Southern District of New York by service, pursuant to agent's designation, upon Secretary of State outside Southern District did not preclude attachment under Admiralty Rule B(1). Integrated Container Service, Inc. v Starlines Container Shipping, Ltd. (1979, SD NY) 476 F Supp 119.

9. —Affidavit

Writ of foreign attachment was properly dissolved where affidavits before District Court showed that defendant had been doing business within district for more than 5 years and that it employed managing agent, showing that plaintiff had not exercised reasonable diligence in signing its affidavit that defendant could not be found within district. Oregon by State Highway Com. v Tug Go Getter (1968, CA9 Or) 398 F2d 873.

Supplemental Rule B(1) places burden of searching for respondent upon libelant, and prerequisite to issuance of writ is that verified complaint with prayer for attachment shall be accompanied by affidavit signed by plaintiff or his attorney that defendant cannot be found within district. Maryland Tuna Corp. v The MS Benares (1970, CA2 NY) 429 F2d 307 (disagreed with by multiple cases as stated in Trans-Asiatic Oil, Ltd., S.A. v Apex Oil Co. (CA1 Puerto Rico) 804 F2d 773).

Requirement that affidavit "shall accompany the complaint" is satisfied when libellant, who has filed verified complaint with prayer for attachment but has proceeded on reasonable belief that respondent can be found within district and later discovers that respondent is not within district, files affidavit required by Rule B(1) within reasonable time after discovery is made. Maryland Tuna Corp. v The MS Benares (1970, CA2 NY) 429 F2d 307 (disagreed with by multiple cases as stated in Trans-Asiatic Oil, Ltd., S.A. v Apex Oil Co. (CA1 Puerto Rico) 804 F2d 773).

10. Security

In context of maritime attachment, procedural due process does not require posting of prejudgment bond; nor does it require preattachment ex parte hearing and judicial issuance of writ of attachment. Schiffahartsgesellschaft Leonhardt & Co. v A. Bottacchi S.A. de Navegacion (1985, CA11 Ga) 773 F2d 1528.

Court has authority to retain security brought before it under Rule B for sole purpose of enforcing judgment received in foreign forum. Teyseer Cement Co. v Halla Maritime Corp. (1984, WD Wash) 583 F Supp 1268, app dismd (CA9 Wash) 794 F2d 472 (disagreed with by multiple cases as stated in Trans-Asiatic Oil, Ltd., S.A. v Apex Oil Co. (CA1 Puerto Rico) 804 F2d 773).

11. Other

Summons to show cause issued by court clerk pursuant to Supplemental Rule C(3) and applicable only to proceedings in rem was erroneously issued and mere surplusage, subject to dismissal on motion at any time because libel stated no claim in rem, and process of maritime attachment and garnishment under Supplemental Rule B(1) in this case was in all respects valid and viable and should not have been dismissed sub silentio by quashing service of process. Maryland Tuna Corp. v The MS Benares (1970, CA2 NY) 429 F2d 307 (disagreed with by multiple cases as stated in Trans-Asiatic Oil, Ltd., S.A. v Apex Oil Co. (CA1 Puerto Rico) 804 F2d 773).

In action based upon defaulted notes arising out of sale and purchase of vessel in which process on defendant was effected by issuance of foreign attachment pursuant to Supplemental Rule B against vessel, "counterclaim" of intervening defendant which made no demand from plaintiff and sought to establish maritime lien against cruiser would be dismissed; Supplemental Rule C mandates that maritime lien against vessel must be sought in in rem proceedings, and principal action was in personam under Supplemental Rule B in which vessel was used as device under foreign attachment to compel owner to respond to plaintiff's suit, not to answer in plaintiff's suit to admiralty in rem claims of others. Frontier Acceptance Corp. v United Freight Forwarding Co. (1968, DC NJ) 286 F Supp 367.

Rule C. Actions in Rem: Special Provisions.

(1) When Available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) **Complaint.** In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) **Judicial Authorization and Process.** Except in actions by the United States for forfeitures for federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or his attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

(4) **Notice.** No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this Rule.

This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) **Ancillary Process.** In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) **Claim and Answer; Interrogatories.** The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. Subdivision (1). This rule is designed not only to preserve the proceeding in rem as it now exists in admiralty cases, but to preserve the substance of Admiralty Rules 13–18. The general reference to enforcement of any maritime lien is believed to state the existing law, and is an improvement over the enumeration in the former Admiralty Rules, which is repetitious and incomplete (e.g., there was no reference to general average). The reference to any maritime lien is intended to include liens created by state law which are enforceable in admiralty.

The main concern of Admiralty Rules 13–18 was with the question whether certain actions might be brought in rem or also, or in the alternative, in personam. Essentially, therefore, these rules deal with questions of substantive law, for in general an action in rem may be brought to enforce any maritime lien, and no action in personam may be brought when the substantive law imposes no personal liability. These rules may be summarized as follows:

1. Cases in which the plaintiff may proceed in rem and/or in personam:
   a. Suits for seamen's wages;
   b. Suits by materialmen for supplies, repairs, etc.;

c. Suits for pilotage;
d. Suits for collision damages;
e. Suits founded on mere maritime hypothecation;
f. Suits for salvage.

2. Cases in which the plaintiff may proceed only in personam:
a. Suits for assault and beating.

3. Cases in which the plaintiff may proceed only in rem:
a. Suits on bottomry bonds.

The coverage is incomplete, since the rules omit mention of many cases in which the plaintiff may proceed in rem or in personam. This revision proceeds on the principle that it is preferable to make a general statement as to the availability of the remedies, leaving out conclusions on matters of substantive law. Clearly it is not necessary to enumerate the cases listed under Item 1, above, nor to try to complete the list.

The rule eliminates the provision of Admiralty Rule 15 that actions for assault and beating may be brought only in personam. A preliminary study fails to disclose any reason for the rule. It is subject to so many exceptions that it is calculated to deceive rather than to inform. A seaman may sue in rem when he has been beaten by a fellow member of the crew so vicious as to render the vessel unseaworthy, The Rolph, 293 Fed 269, affd 299 Fed 52 (9th Cir 1923), or where the theory of the action is that a beating by the master is a breach of the obligation under the shipping articles to treat the seaman with proper kindness, The David Evans, 187 Fed 775 (D Hawaii 1911); and a passenger may sue in rem on the theory that the assault is a breach of the contract of passage, The Western States, 159 Fed 354 (2d Cir 1908). To say that an action for money damages may be brought only in personam seems equivalent to saying that a maritime lien shall not exist; and that, in turn, seems equivalent to announcing a rule of substantive law rather than a rule of procedure. Dropping the rule will leave it to the courts to determine whether a lien exists as a matter of substantive law.

The specific reference to bottomry bonds is omitted because, as a matter of hornbook substantive law, there is no personal liability on such bonds.

Subdivision (2). This incorporates the substance of Admiralty Rules 21 and 22.

Subdivision (3). Derived from Admiralty Rules 10 and 37. The provision that the warrant is to be issued by the clerk is new, but is assumed to state existing law.

There is remarkably little authority bearing on Rule 37, although the subject would seem to be an important one. The rule appears on its face to have provided for a sort of ancillary process, and this may well be the case when tangible property, such as a vessel, is arrested, and intangible property such as freight is incidentally involved. It can easily happen, however, that the only property against which the action may be brought is intangible, as where the owner of a vessel under charter has a lien on subfreights. See 2 Benedict § 299 and cases cited. In such cases it would seem that the order to the person holding the fund is equivalent to original process, taking the place of the warrant for arrest. That being so, it would also seem that (1) there should be some

provision for notice, comparable to that given when tangible property is arrested, and (2) it should not be necessary, as Rule 37 provided, to petition the court for issuance of the process, but that it should issue as of course. Accordingly the substance of Rule 37 is included in the rule covering ordinary process, and notice will be required by Rule C(4). Presumably the rules omit any requirement of notice in these cases because the holder of the funds (e.g., the cargo owner) would be required on general principles (cf. Harris v Balk, 198 US 215, 49 L Ed 1023, 25 S Ct 625 (1905)) to notify his obligee (e.g., the charterer); but in actions in rem such notice seems plainly inadequate because there may be adverse claims to the fund (e.g., there may be liens against the subfreights for seamen's wages, etc.). Compare Admiralty Rule 9.

Subdivision (4). This carries forward the notice provision of Admiralty Rule 10, with one modification. Notice by publication is too expensive and ineffective a formality to be routinely required. When, as usually happens, the vessel or other property is released on bond or otherwise there is no point in publishing notice; the vessel is freed from the claim of the plaintiff and no other interest in the vessel can be affected by the proceedings. If, however, the vessel is not released, general notice is required in order that all persons, including unknown claimants, may appear and be heard, and in order that the judgment in rem shall be binding on all the world.

Subdivision (5). This incorporates the substance of Admiralty Rule 9.

There are remarkably few cases dealing directly with the rule. In The George Prescott, 10 Fed Cas 222 (No. 5,339) (ED NY 1865), the master and crew of a vessel libeled her for wages, and other lienors also filed libels. One of the lienors suggested to the court that prior to the arrest of the vessel the master had removed the sails, and asked that he be ordered to produce them. He admitted removing the sails and selling them, justifying on the ground that he held a mortgage on the vessel. He was ordered to pay the proceeds into court. Cf. United States v The Zarko, 187 F Supp 371 (SD Cal 1960), where an armature belonging to a vessel subject to a preferred ship mortgage was in possession of a repairman claiming a lien.

It is evident that, though the rule has had a limited career in the reported cases, it is a potentially important one. It is also evident that the rule is framed in terms narrower than the principle that supports it. There is no apparent reason for limiting it to ships and their appurtenances (2 Benedict § 299). Also, the reference to "third parties" in the existing rule seems unfortunate. In The George Prescott, the person who removed and sold the sails was a plaintiff in the action, and relief against him was just as necessary as if he had been a stranger.

Another situation in which process of this kind would seem to be useful is that in which the principal property that is the subject of the action is a vessel, but her pending freight is incidentally involved. The warrant of arrest, and notice of its service, should be all that is required by way of original process and notice; ancillary process without notice should suffice as to the incidental intangibles.

The distinction between Admiralty Rules 9 and 37 is not at once apparent, but seems to be this: Where the action was against property that could not be seized by the marshal because it was intangible, the

original process was required to be similar to that issued against a garnishee, and general notice was required (though not provided for by the present rule; cf. Advisory Committee's Note to Rule C(3)). Under Admiralty Rule 9 property had been arrested and general notice had been given, but some of the property had been removed or for some other reason could not be arrested. Here no further notice was necessary.

The rule also makes provision for this kind of situation: The proceeding is against a vessel's pending freight only; summons has been served on the person supposedly holding the funds, and general notice has been given; it develops that another person holds all or part of the funds. Ancillary process should be available here without further notice.

Subdivision (6). Adherence to the practice of return days seems unsatisfactory. The practice varies significantly from district to district. A uniform rule should be provided so that any claimant or defendant can readily determine when he is required to file or serve a claim or answer.

A virtue of the return-day practice is that it requires claimants to come forward and identify themselves at an early stage of the proceedings—before they could fairly be required to answer. The draft is designed to preserve this feature of the present practice by requiring early filing of the claim. The time schedule contemplated in the draft is closely comparable to the present practice in the Southern District of New York, where the claimant has a minimum of 8 days to claim and three weeks thereafter to answer.

This rule also incorporates the substance of Admiralty Rule 25. The present rule's emphasis on "the true and bona fide owner" is omitted, since anyone having the right to possession can claim (2 Benedict § 324).

Notes of Advisory Committee on 1985 Amendments to Rules. Rule C(3) has been amended to provide for judicial scrutiny before the issuance of any warrant of arrest. Its purpose is to eliminate any doubt as to the rule's constitutionality under the *Sniadach* line of cases. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W. T. Grant Co.*, 416 U. S. 600 (1974); and *North Georgia Finishing, Inc. v Di-Chem, Inc.*, 419 U.S. 601 (1975). This was thought desirable even though both the Fourth and the Fifth Circuits have upheld the existing rule. *Amstar Corp. v. S/S Alexandros T.*, 664 F.2d 904 (4th Cir. 1981); *Merchants National Bank of Mobile v. The Dredge General G. L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982). A contrary view was taken by Judge Tate in the *Merchants National Bank* case and by the district court in *Alyeska Pipeline Service Co. v The Vessel Bay Ridge*, 509 F. Supp. 1115 (D. Alaska 1981), appeal dismissed, 703 F.2d 381 (9th Cir. 1983).

The rule envisions that the order will issue upon a prima facie showing that the plaintiff has an action in rem against the defendant in the amount sued for and that the property is within the district. A simple order with conclusory findings is contemplated. The reference to review

by the "court" is broad enough to embrace a magistrate as well as a district judge.

The new provision recognizes that in some situations, such as when a judge is unavailable and the vessel is about to depart from the jurisdiction, it will be impracticable, if not impossible, to secure the judicial review contemplated by Rule C(3). When "exigent circumstances" exist, the rule enables the plaintiff to secure the issuance of the summons and warrant of arrest, subject to a later showing that the necessary circumstances actually existed. This provision is intended to provide a safety valve without undermining the requirement of pre-arrest scrutiny. Thus, every effort to secure judicial review, including conducting a hearing by telephone, should be pursued before invoking the exigent-circumstances procedure.

The foregoing requirements for prior court review or proof of exigent circumstances do not apply to actions by the United States for forfeitures for federal statutory violations. In such actions a prompt hearing is not constitutionally required, *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 103 S.Ct. 2005 (1983); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), and could prejudice the government in its prosecution of the claimants as defendants in parallel criminal proceedings since the forfeiture hearing could be misused by the defendants to obtain by way of civil discovery information to which they would not otherwise be entitled and subject to the government and the courts to the unnecessary burden and expense of two hearings rather than one.

RESEARCH GUIDE

Federal Procedure L Ed:

Maritime Law and Procedure, Fed Proc, L Ed, §§ 53:67-73, 75, 90, 91, 95, 99-101, 717.

Forms:

9 Federal Procedural Forms L Ed, Food, Drugs, and Cosmetics, §§ 31:182, 31:186, 31:188, 31:201–31:203.

12 Federal Procedural Forms L Ed, Maritime Law and Procedure §§ 47:2, 47:5, 47:8, 47:37, 47:41–47:43, 47:45, 47:46, 47:121, 47:123, 47:125–47:130, 47:153, 47:162, 47:173, 47:181, 47:182, 47:191, 47:194, 47:195, 47:201, 47:211–47:213, 47:223, 47:261, 47:293, 47:301, 47:302.

15 Federal Procedural Forms L Ed, Statutes of Limitation, and Other Time Limits § 61:3.

Annotations:

Constitutionality of provision in Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims, allowing in rem seizure of property. 64 ALR Fed 946.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Constitutionality
3. Arrest as prerequisite
4. Requirement that property be within district
5. Complaint
6. Process

7. Answer
8. Notice and hearing
9. —Extraordinary situation exception
10. Submission of claim
11. —Timeliness
12. Particular seizures—vessels
13. —Seizure of funds

1. Generally

Basic purpose of Rule C(6) is to inform court that there is claimant to property before court who wants it back and intends to defend it. United States v Beechcraft Queen Airplane (1986, CA8 Ark) 789 F2d 627.

Exclusionary rule fashioned by courts to protect Fourth Amendment rights of individuals is not available to claimant in condemnation proceeding brought in rem concerning contraband itself; such condemnation can be maintained so long as initial pre-seizure requirements of Supplemental Rule C have been met by government. United States v Article of Food Consisting of 12 Barrels (1979, SD NY) 477 F Supp 1185.

Rule C allows in rem and in personam causes of action to be tried in same proceeding, but in personam action may only be brought against person who may be liable under principle of substantive law. Dowell Div. of Dow Chemical Co. v Franconia Sea Transport, Ltd. (1980, SD NY) 504 F Supp 579, affd without op (CA2 NY) 659 F2d 1058, cert den 454 US 941, 70 L Ed 2d 249, 102 S Ct 478.

2. Constitutionality

Admiralty Rule C is constitutional and does not violate due process requirements of Fifth Amendment where applied to in rem admiralty proceedings because of historical uniformity and unique character of in rem procedures. Merchants Nat. Bank v Dredge General G. L. Gillespie (1981, CA5 La) 663 F2d 1338, 64 ALR Fed 921, cert dismd 456 US 966, 72 L Ed 2d 865, 102 S Ct 2263.

Arrest of vessel under Supplemental Admiralty Rule C is not unconstitutional with respect to search and seizure of vessel pursuant to enforcement of Fishery Conservation and Management Act of 1976 (16 USCS §§ 1801 et seq.). United States v Kaiyo Maru Number 53 (1980, DC Alaska) 503 F Supp 1075, affd (CA9 Alaska) 699 F2d 989.

3. Arrest as prerequisite

Attachment subjecting vessel to jurisdiction of court is prerequisite to finding of in rem liability. Dow Chemical Co. v Barge UM-23B (1970, CA5 La) 424 F2d 307.

In admiralty action to enforce maritime lien pursuant to Supplemental Rule C of Federal Rules of Civil Procedure, no decree can be rendered against res without its arrest. Alyeska Pipeline Service Co. v The Vessel Bay Ridge (1983, CA9 Alaska) 703 F2d 381, cert dismd 467 US 1247, 82 L Ed 2d 852, 104 S Ct 3526 and (disagreed with by multiple cases as stated in Trans-Asiatic Oil, Ltd., S.A. v Apex Oil Co. (CA1 Puerto Rico) 804 F2d 773).

Requirement of Rule C that ship constituting res of admiralty action in rem be arrested was applicable despite ship's having already been before court to respond to third party's action in rem, where bond posted by ship's owner was special bond conditioned solely on payment of judgment in favor of third party. Transorient Navigators Co., S.A. v M/S Southwind (1986, CA5 La) 788 F2d 288.

In absence of arrest of res, decree in rem against res cannot be rendered. Smith v Western Offshore, Inc. (1984, ED La) 590 F Supp 670, 40 FR Serv 2d 480.

4. Requirement that property be within district

Axiom that in rem jurisdiction exists in action only where subject matter of action, or appropriate substitute thereof, is within jurisdiction of court in which action lies, is reflected in requirements of Supplemental Rule C(2) for complaint. American Bank of Wage Claims v Registry of District Court of Guam (1970, CA9 Guam) 431 F2d 1215 (disagreed with by multiple cases as stated in Trans-Asiatic Oil, Ltd., S.A. v Apex Oil Co. (CA1 Puerto Rico) 804 F2d 773).

Where salvor recovered artifacts from sunken Spanish ships in Gulf of Mexico, in Southern District of Texas, and shipped them to Indiana, District Court did not have jurisdiction of his in rem suit in Southern District of Texas for declaration that title to recovered items was vested in him, since items were not actually or constructively present in Southern District of Texas when suit was filed, as required by Rule C(2), and District Court could not rely on rule that where res is accidentally, fraudulently, or improperly removed from district, court's in rem jurisdiction is not destroyed, because District Court here did not originally establish its in rem jurisdiction. Platoro Ltd. v Unidentified Remains of a Vessel (1975, CA5 Tex) 508 F2d 1113.

Supplemental Rule C(2) requires that plaintiff allege in its complaint that vessel involved is within jurisdiction of court or will be during pendency of suit, and clearly does not contemplate vessel's being brought within jurisdiction of court by process of court issuing to owners who are not subject to court's jurisdiction. Thyssen Steel Corp. v Federal Commerce & Navigation Co. (1967, DC NY) 274 F Supp 18.

Issuance by District Court of warrant of arrest to seize property that had been removed from

District, which warrant was ancillary to valid in rem and in personam jurisdiction acquired by court over property in question, was authorized by Supplemental Admiralty Rule C (5). Treasure Salvors, Inc. v Unidentified Wrecked & Abandoned Sailing Vessel (1978, SD Fla) 459 F Supp 507, 26 FR Serv 2d 121, affd (CA5 Fla) 621 F2d 1340, reh den (CA5 Fla) 629 F2d 1350 and affd in part and revd in part on other grounds 458 US 670, 73 L Ed 2d 1057, 102 S Ct 3304, on remand (CA5 Fla) 689 F2d 1254.

Clerk of District Court may issue warrant for arrest of aircraft subject to forfeiture even though aircraft is not within jurisdiction of court at time complaint for forfeiture is filed so long as complaint alleges that aircraft will be located within territorial jurisdiction of court during pendency of action. United States v One (1) Caribou Aircraft Registration No. N-1017-H (1983, DC Puerto Rico) 557 F Supp 379.

Proceeding in rem is against vessel itself, and can be commenced only in judicial district in which vessel is, or is expected soon to be found; in absence of arrest of res, decree in rem against res cannot be rendered. Smith v Western Offshore, Inc. (1984, ED La) 590 F Supp 670, 40 FR Serv 2d 480.

5. Complaint

Consumer Product Safety Commission's adherence to Supplemental Rule C, in filing verified complaint with deputy clerk of District Court describing articles of merchandise and averring that they were banned hazardous substances subject to seizure and condemnation under Federal Hazardous Substances Act, provided sufficient probable cause for issuance of warrant to seize quantities of several different types of children's sleepwear treated with flame retardant at store open to public. United States v Articles of Hazardous Substance (1978, CA4 NC) 588 F2d 39 (disagreed with United States v Device, Labeled "Theramatic" (CA9 Hawaii) 641 F2d 1289, later app (CA9 Hawaii) 715 F2d 1339, cert den 465 US 1025, 79 L Ed 2d 685, 104 S Ct 1281) and later proceeding (CA4 NC) 672 F2d 365, later op (CA4) 681 F2d 934, later proceeding (DC NC) 41 BR 457, 12 BCD 436, 12 CBC2d 200, CCH Bankr L Rptr ¶ 70037, affd (CA4 NC) 796 F2d 723.

Complaint which failed specifically to allege that airplane was in district during action, that it was seized prior to filing of complaint, and where it was seized nevertheless satisfied procedural requirements of Rule C(2) where practical reading of complaint showed that it did sufficiently allege that airplane was in district when suit was filed; furthermore, seizure of airplane before complaint was filed was not required and sufficient proof of seizure was provided by notation on returned warrant of seizure and monition that warning posters had been placed on airplane. United States v Beechcraft Queen Airplane (1986, CA8 Ark) 789 F2d 627.

While cross-claim of intervening defendant against defendant in in personam action in which process had been effected pursuant to Supplemental Rule B, might be academically within newly unified admiralty practice under Federal Rules of Civil Procedure, cross-claim would be dismissed where it lacked compliance with Supplemental Rule C(2) requiring that complaint in rem, albeit denominated as cross claim, shall be verified upon oath or solemn affirmation. Frontier Acceptance Corp. v United Freight Forwarding Co. (1968, DC NJ) 286 F Supp 367.

Complaints in forfeiture which are signed by Assistant United States Attorney based upon his information and belief and which contain verification by Special Agent of U. S. Customs Service based upon both personal knowledge and information and belief satisfy purpose and design of verification of pleadings, i.e., to insure that individual has responsibly investigated allegations and found them to have substance. United States v Banco Cafetero International (1985, SD NY) 608 F Supp 1394, later proceeding (SD NY) 107 FRD 361 and affd (CA2 NY) 797 F2d 1154.

6. Process

Summons to show cause is applicable only to Supplemental Rule C(3); it has no application to claim asserted in libel under Supplemental Rule B, but only to proceedings in rem. Maryland Tuna Corp. v The MS Benares (1970, CA2 NY) 429 F2d 307 (disagreed with by multiple cases as stated in Trans-Asiatic Oil, Ltd., S.A. v Apex Oil Co. (CA1 Puerto Rico) 804 F2d 773).

Where District Court lacked jurisdiction of suit in rem seeking declaration that title to items recovered from sea was vested in salvor, because res was not actually or constructively present in Southern District of Texas where suit was filed, service of process by publication did not operate to establish in rem jurisdiction since salvor had removed items before suit was filed, and under Rule E(3)(a) process could be served only within Southern District of Texas. Platoro, Ltd. v Unidentified Remains of a Vessel (1975, CA5 Tex) 508 F2d 1113.

Maritime garnishment served before garnishee comes into possession of property to be garnished is void. Reibor International, Ltd. v Cargo Carriers (KACZ-CO.), Ltd. (1985, CA2 NY) 759 F2d 262.

Request for stay in order to perfect service on vessel in action in rem under Suits in Admiralty

Act (46 USCS §§ 741 et seq.) had to be denied and claim dismissed where vessel had not been served on day before trial, several months after complaint was filed, since request can be granted only if vessel will be within court's jurisdiction "shortly," which means soon after suit is filed, and certainly before trial date. Norfolk Shipbuilding & Drydock Corp. v USNS Truckee (1985, ED Va) 629 F Supp 779.

Court had in rem jurisdiction over barge despite Government's failure to properly serve process upon barge, which was never seized as required by Rule C, Supplemental Rules for Admiralty and Maritime Claims, where barge owners answered complaint, responded to cross-claim, and filed stipulation without objecting to in rem jurisdiction or bringing motion to dismiss for lack of jurisdiction over barge. United States v Republic Marine, Inc. (1986, CD Ill) 627 F Supp 1425.

7. Answer

Motion to strike answer filed by apparent owner of airplane subject to forfeiture because of its use in illegal drug trade was properly granted where answer was not preceded by verified claim as required by Rule C(6). United States v Beechcraft Queen Airplane (1986, CA8 Ark) 789 F2d 627.

8. Notice and hearing

In limited circumstances general due process requirements of notice and hearing may be postponed until after summary seizure, such as where public interest requires preventing continued illicit use of property and enforcement of criminal sanctions against yacht transporting, or facilitating transportation of controlled substances, including marijuana. Calero-Toledo v Pearson Yacht Leasing Co. (1974) 416 US 663, 40 L Ed 2d 452, 94 S Ct 2080, reh den 417 US 977, 41 L Ed 2d 1148, 94 S Ct 3187.

Rule C satisfies minimum requirements of due process and gives adequate notice of arrest of vessel and affords opportunity to be heard promptly concerning release of vessel to shipowner. Amstar Corp. v S/S Alexandros T. (1981, CA4) 664 F2d 904.

Although vessel owner was not entitled to notice or hearing prior to arrest of its vessel pursuant to Rule C notwithstanding vessel owner's assertion that vessel was disabled and located in complainant's facilities when it was arrested, District Court's failure to hold immediate post-seizure hearing was denial of procedural due process in violation of Fifth Amendment. Neapolitan Navigation, Ltd. v Tracor Marine, Inc. (1985, CA11 Fla) 777 F2d 1427.

Even though requirements necessary to constitute notice requisite for due process in admiralty in rem proceedings are perhaps least demanding known to law, considering worldwide practical effect of judgments entered, still, as in all other areas of law, notice is required. United States v Steel Tank Barge H 1651 (1967, ED La) 272 F Supp 658.

Although it was clear to court that interlocutory sale of barge pursuant to Rule E(9)(b) of Supplemental Rules was conducted in compliance with applicable statutes and rules of procedure, and was reasonably calculated to result in actual notice to owner of barge through seizure itself, publication of monition, and publication of sale, court would nevertheless set aside judicial sale since it was established that barge was under lease and barge owner had no notice of its seizure until after it had been sold. United States v Steel Tank Barge H 1651 (1967, DC La) 272 F Supp 658.

Despite inequity worked by "imputed" notice provisions of Supplemental Rule C, court is bound by Supplemental Rules and decisions interpreting them. Sailing Associates, Inc. v River Bend Marine, Inc. (1985, SD Fla) 621 F Supp 240.

9. —Extraordinary situation exception

Seizure of tow boat pursuant to Rule C does not deprive owner of due process of law inasmuch as seizure falls within "extraordinary situation" exception to general rule prohibiting pre-hearing seizures in action alleging breach of long-term charter of vessel where permission for seizure is sought in order to vest court with in rem jurisdiction, in addition to in personam jurisdiction it already enjoys over vessel's owner. Central Soya Co. v Cox Towing Corp. (1976, ND Miss) 417 F Supp 658.

Where vessel arrest is initiated by private parties, "extraordinary situation" exception of Fuentes or use of seizure to obtain in rem jurisdiction does not legitimize use of Rule C to effectuate arrest absent procedural safeguards mandated by Snaidach-Fuentes and their progeny. Alyeska Pipeline Service Co. v The Bay Ridge (1981, DC Alaska) 509 F Supp 1115, app dismd (CA9 Alaska) 703 F2d 381, cert dismd 467 US 1247, 82 L Ed 2d 852, 104 S Ct 3526 and (disagreed with by multiple cases as stated in Trans-Asiatic Oil, Ltd., S.A. v Apex Oil Co. (CA1 Puerto Rico) 804 F2d 773).

Constitution forbids Attorney General from seizing real property pursuant to § 301(a)(6) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881(b)) and Supplemental Rules for Certain Admiralty and Maritime Claims, absent exigent circumstances, without prior judicial review. United States v

Certain Real Estate Property Located at 4880 S.E. Dixie Highway (1985, SD Fla) 612 F Supp 1492, later proceeding (SD Fla) 628 F Supp 1467.

10. Submission of claim

It is incumbent on intervenor, if it desires return of specific property, to put its ownership clearly in issue before foreclosure and sale by filing its claim in accordance with Rule C(6). Bank of New Orleans & Trust Co v Marine Credit Corp. (1978, CA8 Mo) 583 F2d 1063.

Neither claim to property nor petition for remission or mitigation of forfeiture filed with Drug Enforcement Agency (DEA) during summary forfeiture proceeding will satisfy claim requirement of Supplemental Rule C(6) where such claim and petition (1) were not verified on oath or solemn affirmations and (2) were filed before rather than after process was executed; even if DEA claim could be deemed claim under Rule C(6), claimant's answer in judicial forfeiture proceeding would be untimely because filed more than 20 days thereafter; furthermore, having never been filed in district court and having first been seen by district court when copy was attached to claimant's response to government's motion for summary judgment in judicial forfeiture proceeding, such claim and petition do not serve purpose of notifying court that claimant is entitled to join action by virtue of his foreign claim to property. United States v United States Currency in Amount of $2,857.00 (1985, CA7 Ind) 754 F2d 208.

Claimant's motion for relief from judgment would be denied where he did not apply to intervene in action as party defendant within 10-day limitation provided by Rule C(6). United States v One 1970 Buick Electra 225, etc. (1972, ND Ohio) 57 FRD 185, 16 FR Serv 2d 1565.

Party with security interest in cargo under contract of sale is proper claimant within meaning of Supplemental Rule C(6) of Federal Rules of Civil Procedure. T. J. Stevenson & Co. v 81193 Bags of Flour (1976, SD Ala) 449 F Supp 84, affd in part and revd in part on other grounds (CA5 Ala) 629 F2d 338, 7 Fed Rules Evid Serv 1336, 30 FR Serv 2d 661, 30 UCCRS 865, reh den (CA5 Ala) 651 F2d 779 and reh den (CA5 Ala) 651 F2d 779.

Although plaintiff's motion was not in technical compliance with Rule C(6), affidavits filed with motion which establish sufficient showing of interest in seized goods to challenge government's seizure action, would be sufficient claim required to be filed by Rule C(6). United States v Articles of Hazardous Substance (1978, MD NC) 444 F Supp 1260, affd in part and revd in part on other grounds (CA4 NC) 588 F2d 39 (disagreed with United States v Device, Labeled "Theramatic" (CA9 Hawaii) 641 F2d 1289, later app (CA9 Hawaii) 715 F2d 1339, cert den 465 US 1025, 79 L Ed 2d 685, 104 S Ct 1281) and later proceeding (CA4 NC) 672 F2d 365, later op (CA4) 681 F2d 934, later proceeding (DC NC) 41 BR 457, 12 BCD 436, 12 CBC2d 200, CCH Bankr L Rptr ¶ 70037, affd (CA4 NC) 796 F2d 723.

Court will grant individual additional 10 days to file with Clerk of Court all documents and affidavits supporting his claim to seized airplane, since he timely filed affidavits asserting his claim with Drug Enforcement Administration in accordance with letter he received from that agency, and thus made good faith effort to assert his claim to airplane, although he did not file claim with District Court. United States v 1967 Mooney M20-F Aircraft (1983, ND Ga) 597 F Supp 531.

Because movants' conclusory prayer for return of property is insufficient to constitute "claim" within meaning of Rule C(6), their motion to amend is meritless, since there can be no amendment of claim which does not exist; similarly, because filing of claim is prerequisite to right to file answer and defend on merits, answers filed by movants must be stricken from record, since filing of answers was not preceded by claim. United States v Properties Described in Complaints: 764 Rochelle Drive (1984, ND Ga) 612 F Supp 465, affd without op (CA11 Ga) 779 F2d 58.

11. —Timeliness

Factors which militate in favor of granting additional time under Rule C(6) for filing claim include fact that record is unclear as to when husband and wife became aware of seizure, fact that U.S. Attorney may have encouraged delay by sending them letter asking them to file claim by end of month, and illness and death of husband during this period. United States v $149,345 United States Currency (1984, CA9 Cal) 747 F2d 1278, 40 FR Serv 2d 835.

Nothing in Rule C(6) imposes time limit on exercise of discretion to grant additional time in which to file claim, but court's discretion is not unbounded, and it should be exercised only where goals underlying time restriction and verification requirement are not thwarted. United States v 1982 Yukon Delta Houseboat (1985, CA9 Nev) 774 F2d 1432.

District Court will not permit filing of late claims where record clearly fails to support finding of excusable neglect or good faith attempt to comply with Rule C(6), where no motion for extension was made within 10-day period as permitted under Rule C(6), and where

movants have not asserted meritorious defense to forfeiture action. United States v Properties Described in Complaints: 764 Rochelle Drive (1984, ND Ga) 612 F Supp 465, affd without op (CA11 Ga) 779 F2d 58.

12. Particular seizures—vessels

Seizure of artifacts of sunken 17th century Spanish Galleon in possession of 2 officials of state of Florida is proper under Rule C despite contention that Eleventh Amendment immunizes property from federal court's process. Florida Dept. of State v Treasure Salvors, Inc. (1982) 458 US 670, 73 L Ed 2d 1057, 102 S Ct 3304, on remand (CA5 Fla) 689 F2d 1254.

Due process rights of owners of fishing vessel are not violated by shoreside seizure of vessel and its catch pursuant to Admiralty Rule C for failing to log large quantity of fish and taking prohibited species in violation of Fishery Conservation and Management Act (16 USCS § 1821) where deprivation occurs when vessel is seized at sea and held as part of ongoing investigation of violations of Act and shoreside arrest of vessel does nothing to further deprived claimants of their property. United States v Kaiyo Maru No. 53 (1983, CA9 Alaska) 699 F2d 989.

Upon arrest of vessel, it was error for District Court to order charterer to provide sufficient security to vessel's owner so that owner, in turn, could post security to secure vessel's release; nowhere in procedures governing attachment and release of vessels is there any provision compelling owner to furnish bond or any provision for order requiring charterer to furnish security to owner. Seguros Banvenez, S.A. v S/S Oliver Drescher (1985, CA2 NY) 761 F2d 855.

13. —Seizure of funds

Seamen were entitled to sequestration order pursuant to Supplemental Admiralty Rule C(3) of funds in hands of depository representing demurrage and "lay-up expense," as representing "freight" on which mariner's lien for wages subsists. Caparelli v Proceeds of Freight, etc. (1974, SD NY) 390 F Supp 1345.

Warrants of arrest issued with respect to moneys located in various bank accounts are ineffective to extent that they attempt to attach after-acquired moneys. United States v Banco Cafetero International (1985, SD NY) 608 F Supp 1394, later proceeding (SD NY) 107 FRD 361 and affd (CA2 NY) 797 F2d 1154.

Defendants-in-rem are adequately described in complaints in forfeiture, where they are described as bank accounts of named expropriated banks maintained at named custodial banks, and where number of bank account is set forth in most instances. United States v Banco Cafetero International (1985, SD NY) 608 F Supp 1394, later proceeding (SD NY) 107 FRD 361 and affd (CA2 NY) 797 F2d 1154.

Rule D. Possessory, Petitory, and Partition Actions.

In all actions for possession, partition, and to try title maintainable according to the course of the admiralty practice with respect to a vessel, in all actions so maintainable with respect to the possession of cargo or other maritime property, and in all actions by one or more part owners against the others to obtain security for the return of the vessel from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the vessel for any voyage on giving security for its safe return, the process shall be by a warrant of arrest of the vessel, cargo, or other property, and by notice in the manner provided by Rule B(2) to the adverse party or parties.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. This carries forward the substance of Admiralty Rule 19.

Rule 19 provided the remedy of arrest in controversies involving title and possession in general. See The Tilton, 23 Fed Cas 1277 (No. 14,054) (CCD Mass 1830). In addition it provided that remedy in controversies between co-owners respecting the employment of a vessel. It did not deal comprehensively with controversies between co-owners,

omitting the remedy of partition. Presumably the omission is traceable to the fact that, when the rules were originally promulgated, concepts of substantive law (sometimes stated as concepts of jurisdiction) denied the remedy of partition except where the parties in disagreement were the owners of equal shares. See The Steamboat Orleans, 11 Pet 175, 9 L Ed 677 (US, 1837). The Supreme Court has now removed any doubt as to the jurisdiction of the district courts to partition a vessel, and has held in addition that no fixed principle of federal admiralty law limits the remedy to the case of equal shares. Madruga v Superior Court, 346 US 556, 98 L Ed 290, 74 S Ct 298 (1954). It is therefore appropriate to include a reference to partition in the rule.

RESEARCH GUIDE

Federal Procedure L Ed:

Maritime Law and Procedure, Fed Proc, L Ed, §§ 53:92, 94.

Forms:

12 Federal Procedural Forms L Ed, Maritime Law and Procedure §§ 47:5, 47:272, 47:273, 47:281–47:284.

INTERPRETIVE NOTES AND DECISIONS

Supplemental Rule D is subject to Rule 9(h) of Rules of Civil Procedure and thus requires existence of admiralty jurisdiction. Rule D dealing with right to possession of vessels or other maritime property only; consequently, plaintiff could not obtain relief by motion pursuant to Rule D for order awarding him immediate possession of sloop and directing marshal to turn it over to him, since his claim was based on alleged violation of contract with defendant to build sloop for plaintiff, and agreement providing for construction of ship is not within admiralty jurisdiction. Silver v Sloop Silver Cloud (1966, SD NY) 259 F Supp 187, 3 UCCRS 971.

Petitory suit is defined as one seeking to try title to vessel independently of possession; it requires plaintiff to assert legal title to vessel and mere assertion of equitable interest is not sufficient. Silver v Sloop Silver Cloud (1966, SD NY) 259 F Supp 187, 3 UCCRS 971.

Possessory action is one where party entitled to possession of vessel seeks to recover that vessel; it is brought to reinstate owner of vessel who alleges wrongful deprivation of property, and is to recover possession rather than to obtain original possession. Silver v Sloop Silver Cloud (1966, SD NY) 259 F Supp 187, 3 UCCRS 971.

Rule E. Actions in Rem and Quasi in Rem: General Provisions.

(1) Applicability. Except as otherwise provided, this rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

(2) Complaint; security.

(a) *Complaint.* In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

(b) *Security for Costs.* Subject to the provisions of Rule 54(d) and of relevant statutes, the court may, on the filing of the complaint or on the

appearance of any defendant, claimant, or any other party, or at any later time, require the plaintiff, defendant, claimant, or other party to give security, or additional security, in such sum as the court shall direct to pay all costs and expenses that shall be awarded against him by any interlocutory order or by the final judgment, or on appeal by any appellate court.

(3) Process.

(a) *Territorial Limits of Effective Service.* Process in rem and of maritime attachment and garnishment shall be served only within the district.

(b) *Issuance and Delivery.* Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

(4) Execution of Process; Marshal's Return; Custody of Property; Procedures for Release.

(a) *In General.* Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(b) *Tangible Property.* If tangible property is to be attached or arrested, the marshal shall take it into his possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or his agent. In furtherance of his custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or his deputy or by the clerk that the vessel has been released in accordance with these rules.

(c) *Intangible Property.* If intangible property is to be attached or arrested the marshal shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring him to answer as provided in Rules B(3)(a) and C(6); or he may accept for payment into the registry of the court the amount owned to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(d) *Directions with Respect to Property in Custody.* The marshal may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

(e) *Expenses of Seizing and Keeping Property: Deposit.* These rules do not alter the provisions of Title 28, USC, § 1921, as amended, relative to

the expenses of seizing and keeping property attached or arrested and to the requirement of deposits to cover such expenses.

(f) *Procedure for Release from Arrest or Attachment.* Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.

(5) **Release of Property.**

(a) *Special Bond.* Except in cases of seizures for forfeiture under any law of the United States, whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

(b) *General Bond.* The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by plaintiffs in all actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be indorsed by the clerk with a minute of the actions wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

(c) *Release by Consent or Stipulation; Order of Court or Clerk; Costs.* Any vessel, cargo, or other property in the custody of the marshal may be released forthwith upon his acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or his attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

(d) *Possessory, Petitory, and Partition Actions.* The foregoing provisions of this subdivision (5) do not apply to petitory, possessory, and partition actions. In such cases the property arrested shall be released only by order of the court, on such terms and conditions and on the giving of such security as the court may require.

(6) **Reduction or Impairment of Security.** Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become insufficient, new or additional securities may be required on motion and hearing.

(7) **Security or Counterclaim.** Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security if a private person so situated would have been required to give it.

(8) **Restricted Appearance.** An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4(e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) **Disposition of Property; Sales.**

(a) *Actions for Forfeitures.* In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.

(b) *Interlocutory Sales.* If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, on motion of the defendant or claimant, order delivery of the property to him, upon the giving of security in accordance with these Rules.

(c) *Sales; Proceeds.* All sales of property shall be made by the marshal or his deputy, or other proper officer assigned by the court where the marshal is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. Subdivision (2). Adapted from Admiralty Rule 24. The rule is based on the assumption that there is no more need for security for costs in maritime personal actions than in civil cases generally, but that there is reason to retain the requirement for actions in which property is seized. As to proceedings for limitation of liability see Rule F(1).

Subdivision (3). The Advisory Committee has concluded for practical reasons that process requiring seizure of property should continue to be served only within the geographical limits of the district. Compare Rule B(1), continuing the condition that process of attachment and garnishment may be served only if the defendant is not found within the district.

The provisions of Admiralty Rule 1 concerning the persons by whom process is to be served will be superseded by FRCP 4(c).

Subdivision (4). This rule is intended to preserve the provisions of Admiralty Rules 10 and 36 relating to execution of process, custody of property seized by the marshal, and the marshal's return. It is also designed to make express provision for matters not heretofore covered.

The provision relating to clearance in subdivision (b) is suggested by Admiralty Rule 44 of the District of Maryland.

Subdivision (d) is suggested by English Rule 12, Order 75.

28 USC, § 1921 as amended in 1962 contains detailed provisions relating to the expenses of seizing and preserving property attached or arrested.

Subdivision (5). In addition to Admiralty Rule 11 (see Rule E(9)), the release of property seized on process of attachment or in rem was dealt with by Admiralty Rules 5, 6, 12, and 57, and 28 USC, § 2464 (formerly Rev Stat § 941). The rule consolidates these provisions and makes them uniformly applicable to attachment and garnishment and actions in rem.

The rule restates the substance of Admiralty Rule 5. Admiralty Rule 12 dealt only with ships arrested on in rem process. Since the same ground appears to be covered more generally by 28 USC, § 2464, the subject matter of Rule 12 is omitted. The substance of Admiralty Rule 57 is retained. 28 USC, § 2464 is incorporated with changes of terminology, and with a substantial change as to the amount of the bond. See 2 Benedict § 395 n 1a; The Lotosland, 2 F Supp 42 (SD NY 1933). The provision for general bond is enlarged to include the contingency of attachment as well as arrest of the vessel.

Subdivision (6). Adapted from Admiralty Rule 8.

Subdivision (7). Derived from Admiralty Rule 50.

Title 46, USC, § 783 [now 46 USCS Appx § 783] extends the principle of Rule 50 to the Government when sued under the Public Vessels Act, presumably on the theory that the credit of the Government is the equivalent of the best security. The rule adopts this principle and extends it to all cases in which the Government is defendant although the Suits in Admiralty Act contains no parallel provisions.

Subdivision (8). Under the liberal joinder provisions of unified rules the plaintiff will be enabled to join with maritime actions in rem, or maritime actions in personam with process of attachment and garnishment, claims with respect to which such process is not available, including nonmaritime claims. Unification should not, however, have the result that, in order to defend against an admiralty and maritime claim with respect to which process in rem or quasi in rem has been served, the claimant or defendant must subject himself personally to the jurisdiction of the court with reference to other claims with respect to which such process is not available or has not been served, especially when such other claims are nonmaritime. So far as attachment and garnishment are concerned this principle holds true whether process is issued according to admiralty tradition and the Supplemental Rules or according to Rule 4(e) as incorporated by Rule B(1).

A similar problem may arise with respect to civil actions other than admiralty and maritime claims within the meaning of Rule 9(h). That is to say, in an ordinary civil action, whether maritime or not, there may be joined in one action claims with respect to which process of attachment and garnishment is available under state law and Rule 4(e) and claims with respect to which such process is not available or has not been served. The general Rules of Civil Procedure do not specify whether an appearance in such cases to defend the claim with respect to which process of attachment and garnishment has issued is an appearance for the purposes of the other claims. In that context the question has been considered best left to case-by-case development. Where admiralty and maritime claims within the meaning of Rule 9(h) are concerned, however, it seems important to include a specific provision to avoid an unfortunate and unintended effect of unification. No inferences whatever as to the effect of such an appearance in an ordinary civil action should be drawn from the specific provision here and the absence of such a provision in the general Rules.

Subdivision (9). Adapted from Admiralty Rules 11, 12, and 40. Subdivision (a) is necessary because of various provisions as to disposi-

tion of property in forfeiture proceedings. In addition to particular statutes, note the provisions of 28 USC. §§ 2461–65.

The provision of Admiralty Rule 12 relating to unreasonable delay was limited to ships but should have broader application. See 2 Benedict § 404. Similarly, both Rules 11 and 12 were limited to actions in rem, but should equally apply to attached property.

Notes of Advisory Committee on 1985 Amendments to Rules. Rule E(4)(f) makes available the type of prompt post-seizure hearing in proceedings under Supplemental Rules B and C that the Supreme Court has called for in a number of cases arising in other contexts. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974). Although post-attachment and post-arrest hearings always have been available on motion, an explicit statement emphasizing promptness and elaborating the procedure has been lacking in the Supplemental Rules. Rule E(4)(f) is designed to satisfy the constitutional requirement of due process by guaranteeing to the shipowner a prompt post-seizure hearing at which he can attack the complaint, the arrest, the security demanded, or any other alleged deficiency in the proceedings. The amendment also is intended to eliminate the previously disparate treatment under local rules of defendants whose property has been seized pursuant to Supplemental Rules B and C.

The new Rule E(4)(f) is based on a proposal by the Maritime Law Association of the United States and on local admiralty rules in the Eastern, Northern, and Southern Districts of New York. E.D.N.Y. Local Rule 13; N.D.N.Y. Local Rule 13; S.D.N.Y. Local Rule 12. Similar provisions have been adopted by other maritime districts. E.g., N.D. Calif. Local Rule 603.4; W.D. La. Local Admiralty Rule 21. Rule E(4)(f) will provide uniformity in practice and reduce constitutional uncertainties.

Rule E(4)(f) is triggered by the defendant or any other person with an interest in the property seized. Upon an oral or written application similar to that used in seeking a temporary restraining order, see Rule 65(b), the court is required to hold a hearing as promptly as possible to determine whether to allow the arrest or attachment to stand. The plaintiff has the burden of showing why the seizure should not be vacated. The hearing also may determine the amount of security to be granted or the propriety of imposing counter-security to protect the defendant from an improper seizure.

The foregoing requirements for prior court review or proof of exigent circumstances do not apply to actions by the United States for forfeitures for federal statutory violations. In such actions a prompt hearing is not constitutionally required, *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 103 S.Ct. 2005 (1983); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), and could prejudice the government in its prosecution of the claimants as defendants in parallel criminal proceedings since the forfeiture hearing could be misused by the defendants to obtain by way of civil discovery information to which they would not otherwise be entitled and subject the government and the courts to the unnecessary burden and expense of two hearings rather than one.

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Maritime Law and Procedure, Fed Proc, L Ed §§ 53:66, 74, 75, 78, 79, 95, 97, 102, 106-110, 113-115, 118, 119, 141, 715, 718.

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12 Federal Procedural Forms L Ed, Maritime Law and Procedure §§ 47:2, 47:5, 47:8, 47:40, 47:41, 47:44, 47:47–47:53, 47:121, 47:123, 47:153, 47:181, 47:182, 47:191, 47:211–47:213, 47:223, 47:261, 47:272, 47:273, 47:281–47:283, 47:301, 47:302.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Prior judicial review
3. Pleading
4. Process
5. Security
6. Release of property
7. Disposition of property

1. Generally

Although court's jurisdiction was originally invoked as against intervening claimant in rem only, intervening claimant's "restrictive appearance" under Rules D and E of Supplemental Rules was ineffective to prevent court from obtaining personal jurisdiction over intervening claimant by reason of its appearance in action. Reliable Marine Boiler Repair, Inc. v Mastan Co. (1971, SD NY) 325 F Supp 58.

2. Prior judicial review

In context of maritime attachment, procedural due process does not require posting of preattachment bond; nor does it require preattachment ex parte hearing and judicial issuance of writ of attachment. Schiffahartsgesellschaft Leonhardt & Co. v A. Bottacchi S.A. de Navegacion (1985, CA11 Ga) 773 F2d 1528.

Constitution forbids Attorney General from seizing real property pursuant to § 301(a)(6) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881(b)) and Supplemental Rules for Certain Admiralty and Maritime Claims, absent exigent circumstances, without prior judicial review. United States v Certain Real Estate Property Located at 4880 S.E. Dixie Highway (1985, SD Fla) 612 F Supp 1492, later proceeding (SD Fla) 628 F Supp 1467.

3. Pleading

Complaint under Rule E(2) is sufficient for due process purposes although it is based on hearsay. Schiffahartsgesellschaft Leonhardt & Co. v A. Bottacchi S.A. de Navegacion (1985, CA11 Ga) 773 F2d 1528.

Construction placed upon Rule 9(b) of Federal Rules of Civil Procedure requiring circumstances of action for fraud to be stated with particularity, is helpful in determining meaning of Supplemental Rule E(2)(a); emphasis is on providing defendants with information rather than simply stating technical elements of cause of action. Riverway Co. v Spivey Marine & Harbor Service Co. (1984, SD Ill) 598 F Supp 909.

Complaint states in rem maritime claim with sufficient particularity for purposes of Rule E(2)(a), where it states date, time, place, nature of damaging incident, and alleged wrongful action. Riverway Co. v Spivey Marine & Harbor Service Co. (1984, SD Ill) 598 F Supp 909.

Although complaints which simply allege that moneys in certain bank accounts are subject to forfeiture pursuant to 21 USCS § 881 because they were furnished or intended to be furnished in exchange for controlled substance in violation of Title 21, inter alia, are inadequate and should be amended, such defects cannot be basis to vacate warrants of arrest, where expropriated banks have been apprised of basis of complaints through other means, including discussions with Assistant United States Attorneys, flow chart of tainted moneys' stream, and affidavit of Customs Agent used to support similar warrants of arrest seizing moneys maintained by custodial banks. United States v Banco Cafetero International (1985, SD NY) 608 F Supp 1394, later proceeding (SD NY) 107 FRD 361 and affd (CA2 NY) 797 F2d 1154.

4. Process

Where District Court lacked jurisdiction of suit in rem seeking declaration that title to items recovered from sea was vested in salvor, because res was not actually or constructively present in Southern District of Texas where suit was filed service of process by publication did not operate

to establish in rem jurisdiction since salvor had removed items before suit was filed, and under Rule E(3)(a) process could be served only within Southern District of Texas. Platoro, Ltd. v Unidentified Remains of a Vessel (1975, CA5 Tex) 508 F2d 1113.

Maritime garnishment served before garnishee comes into possession of property to be garnished is void. Reibor International, Ltd. v Cargo Carriers (KACZ-CO.), Ltd. (1985, CA2 NY) 759 F2d 262.

Issuance by District Court of warrant of arrest to seize property that had been removed from District, which warrant was ancillary to valid in rem and in personam jurisdiction acquired by court over property in question, was authorized by Supplemental Admiralty Rule C (5). Treasure Salvors, Inc. v Unidentified Wrecked & Abandoned Sailing Vessel (1978, SD Fla) 459 F Supp 507, 26 FR Serv 2d 121, affd (CA5 Fla) 621 F2d 1340, reh den (CA5 Fla) 629 F2d 1350 and affd in part and revd in part on other grounds 458 US 670, 73 L Ed 2d 1057, 102 S Ct 3304, on remand (CA5 Fla) 689 F2d 1254.

5. Security

If defendants on appeal believed that trial court acted under misapprehension of believing that pendency of counterclaims would require plaintiff-seamen to post bonds, they should attempt to convince trial judge to reconsider his order and permit counterclaims to be reinstated without security under Supplemental Rule E(7). Wallin v Keegan (1970, CA5 Fla) 426 F2d 1313.

Upon arrest of vessel, it was error for District Court to order charterer to provide sufficient security to vessel's owner so that owner, in turn, could post security to secure vessel's release; nowhere in procedures governing attachment and release of vessels is there any provision compelling owner to furnish bond or any provision for order requiring charterer to furnish security to owner. Seguros Banvenez, S.A. v S/S Oliver Drescher (1985, CA2 NY) 761 F2d 855.

In context of maritime attachment, procedural due process does not require posting of preattachment bond; nor does it require preattachment ex parte hearing and judicial issuance of writ of attachment. Schiffahartsgesellschaft Leonhardt & Co. v A. Bottacchi S.A. de Navegacion (1985, CA11 Ga) 773 F2d 1528.

Processes in rem and of maritime attachment represent exceptions to general rule that in absence of statutory authorization plaintiff may not have security for his claim until it is established and reduced to judgment, but these exceptions as reflected in Supplemental Rule E(3), are predicated on basis that res, that is, ship, is within court's territorial jurisdiction at time of seizure, for purposes of effective service of process. Thyssen Steel Corp. v Federal Commerce & Navigation Co. (1967, SD NY) 274 F Supp 18.

Special bond acts as security only as to particular claim precipitating its posting; only plaintiff in action which prompted posting can recovery against bond and bond, even if large enough, is not available to satisfy judgments obtained by others who intervene in suit after bond has been posted and vessel released. Overstreet v Water Vessel "Norkong" (1982, SD Miss) 538 F Supp 53, affd (CA5 Miss) 706 F2d 641.

6. Release of property

If vessel is released on too low a bond as result of fraud, misrepresentation, or mistake sufficient to justify rearrest, court can compel additional security to be posted as precondition to avoiding rearrest; mistake sufficient to justify rearrest requires that it be tinged with fraud or misrepresentation or that it be mistake of court and not that of claimant. Industria Nacional Del Papel, CA. v M/V "Albert F" (1984, CA11 Fla) 730 F2d 622, cert den 469 US 1037, 83 L Ed 2d 404, 105 S Ct 515.

There is no justification for applying Adm R E(7) to broader class of counterclaims than that permitted under Rule 13(a); thus, whether or not claims for wrongful seizure, abuse of process, or malicious prosecution may be asserted as counterclaims in admiralty practice, counter-security under Rule E(7) may not be required for such claims. Incas & Monterey Printing & Packaging, Ltd. v M/V Sang Jin (1984, CA5 Tex) 747 F2d 958, reh den, en banc (CA5 Tex) 751 F2d 1258 and reh den, en banc (CA5 Tex) 751 F2d 1258 and reh den, en banc (CA5 Tex) 751 F2d 1258 and cert den 471 US 1117, 86 L Ed 2d 261, 105 S Ct 2361.

While court does get custody of vessel in proper case when marshal executes warrant against it, writ conveys no proprietary or possessory control to one who has it issued by court since, by simple expedient of posting bond described by 28 USCS § 2464, or by providing appropriate stipulation authorized by Supplemental Rule E, owner can obtain her release and use her as he pleases. Re Moore (1968, ED Mich) 278 F Supp 260.

While Supplemental Rule E(5)(a) does not explicitly direct court to order discharge of attachment upon giving of security nor does it unambiguously place matter within sound discretion of court, predecessor provisions to Rule E(5) indicate that defendant was entitled of right to release of attached property upon posting of adequate sum, and there is nothing in Rule E(5) that indicates any intended change on this point.

Worldwide Carriers, Ltd. v Aris S.S. Co. (1968, SD NY) 290 F Supp 860.

Right to obtain release of arrested property upon posting of adequate security is absolute and not subject to court's discretion. Gerard Constr., Inc. v Motor Vessel Virginia (1979, WD Pa) 480 F Supp 488.

Libelants and their sureties are not bound to contemplate all actions which may conceivably be filed against vessel when they seek its release. Overstreet v Water Vessel "Norkong" (1982, SD Miss) 538 F Supp 53, affd (CA5 Miss) 706 F2d 641.

In action to enforce maritime lien for necessary labor and materials, no security was required of plaintiff under Rule E(7) of Supplemental Rules where security was not necessary to equalize positions of parties and required security would unfairly and unreasonably inhibit plaintiff's prosecution of case; purpose of Rule E(7) is to place parties on equal footing regarding security, not to inhibit plaintiff's prosecution of case; District Court should move with caution and should be particularly reluctant to require security where party is not attempting to secure release of any property. Expert Diesel, Inc. v Yacht "Fishin Fool" (1986, SD Fla) 627 F Supp 432.

7. Disposition of property

Under Supplemental Rule E(9)(b), judicial sale may be held prior to completion of foreclosure action. J. Ray McDermott & Co. v Vessel Morning Star (1972, CA5 Tex) 457 F2d 815, cert den 409 US 948, 34 L Ed 2d 218, 93 S Ct 292.

Rule F. Limitation of Liability.

(1) Time for Filing Complaint; Security. Not later than six months after his receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of his interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at his option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, his interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if he elects to give security, for interest at the rate of 6 per cent per annum from the date of the security.

(2) Complaint. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted, and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage, if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer his interest in the vessel to a trustee, the complaint must further show any

prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) **Claims Against Owner; Injunction.** Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or his property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or his property with respect to any claim subject to limitation in the action.

(4) **Notice to Claimants.** Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at his last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) **Claims and Answer.** Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this Rule. Each claim shall specify the facts upon which the claimant relies in support of his claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability he shall file and serve an answer to the complaint unless his claim has included an answer.

(6) **Information to be Given Claimants.** Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant himself) a list setting forth (a) the name of each claimant, (b) the name and address of his attorney (if he is known to have one), (c) the nature of his claim, i.e., whether property loss, property damage, death, personal injury, etc., and (d) the amount thereof.

(7) **Insufficiency of Fund or Security.** Any claimant may by motion demand that the funds deposited in court or the security given by the

plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

(8) Objections to Claims: Distribution of Fund. Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) Venue; Transfer. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. Subdivision 1. The amendments of 1936 to the Limitation Act superseded to some extent the provisions of Admiralty Rule 51, especially with respect to the time of filing the complaint and with respect to security. The rule here incorporates in substance the 1936 amendment of the Act (46 USC, § 185) [now 96 USCS Appx § 185] with a slight modification to make it clear that the complaint may be filed at any time not later than six months after a claim has been lodged with the owner.

Subdivision (2). Derived from Admiralty Rules 51 and 53.

Subdivision (3). This is derived from the last sentence of 46 USC § 185 [now 46 USCS Appx § 185] and the last paragraph of Admiralty Rule 51.

Subdivision (4). Derived from Admiralty Rule 51.

Subdivision (5). Derived from Admiralty Rules 52 and 53.

Subdivision (6). Derived from Admiralty Rule 52.

Subdivision (7). Derived from Admiralty Rule 52 and 46 USC, § 185 [now 46 USCS Appx § 185].

Subdivision (8). Derived from Admiralty Rule 52.

Subdivision (9). Derived from Admiralty Rule 54. The provision for transfer is revised to conform closely to the language of 28 USC §§ 1404(a) and 1406(a), though it retains the existing rule's provision for transfer to any district for convenience. The revision also makes clear what has been doubted: that the court may transfer if venue is wrongly laid.

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Forms:

9 Federal Procedural Forms L Ed, Food, Drugs, and Cosmetics, § 31:186.

12 Federal Procedural Forms L Ed, Maritime Law and Procedure §§ 47:5, 47:232, 47:236, 47:237, 47:241–47:245.

15 Federal Procedural Forms L Ed, Statutes of Limitation, and Other Time Limits § 61:3.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Security
3. Pleading and process
4. —Timeliness
5. Venue and transfer
6. Injunctions

1. Generally

No provision in Admiralty Rule F supports requirement that preexisting encumbrances be satisfied prior to bringing of suit for exoneration of liability. Rodco Marine Services, Inc. v Miglicrio (1981, CA5 La) 651 F2d 1101.

Federal District Court did not have jurisdiction of petition for limitation of liability where vessel involved in serious accident was not upon high seas or other public navigable water of United States. Re River Queen (1967, WD Ark) 275 F Supp 403, affd (CA8 Ark) 402 F2d 977.

District Court's exercise of admiralty jurisdiction over action by gasoline supplier for exoneration or limitation of liability in regard to claims arising out of explosion and fire accident at gasoline tank farm when tank overflowed while gasoline was being off loaded from barge into tank has effect of staying parties from proceeding in state court as they would otherwise be entitled to do. Ashland Oil, Inc. v Third Nat. Bank (1983, ED Ky) 557 F Supp 862.

Rule F is designed to shorten period for bringing limitation proceeding; 6-month bar forces shipowner to decide promptly whether to seek to limit his liability, he is not permitted to wait until later stages of litigation when tide of events might turn against him. Re Complaint of N.Y.T.R. Transp. Corp. (1985, ED NY) 105 FRD 144.

2. Security

Since interests of mortgagee under preferred ship mortgage accrued prior to voyage and thus were not subject to limitation, mortgagor, in postforeclosure proceeding under 46 USCS Appx § 183 for limitation of liability, was not entitled to have proceeds of foreclosure sale designated as security required by paragraph (1) of Supplemental Rule F. Petition of Zebroid Trawling Corp. (1970, CA1 Mass) 428 F2d 226.

District Court may require limitation petitioner to deposit cash or post corporate surety

bond in amount or value of interest in vessel or surrender requisite vessel in order to continue to benefit by provisions of limitation of liability statute (46 USCS Appx § 185). New York Marine Managers Inc. v Helena Marine Service (1985, CA8 Ark) 758 F2d 313, cert den (US) 88 L Ed 2d 122, 106 S Ct 148.

Motion under Rule F(7) that security posted should be increased to include some portion of hull and machinery insurance coverage, together with personal injury liability insurance sufficient to cover claimant's claims, would be denied. Re Pacific Inland Navigation Co. (1967, DC Hawaii) 263 F Supp 915.

District Court would approve letter of undertaking given by foreign underwriter as security for limitation fund subject, however, to absolute right of any claimant to reject such form of security in which case plaintiff would be required to post security in accordance with requirements of court's General Rule 31 in order to continue to benefit by provisions of limitation of liability statute (46 USCS Appx §§ 183 et seq.). Re Compania Naviera Marasia S. A. (1979, SD NY) 466 F Supp 900.

3. Pleading and process

Motion by claimants, in action by vessel owner to limit liability, seeking to require plaintiff to furnish subject matter information made requisite to limitation complaint by express, disjunctive provisions of Rule F(2) would be granted, claimants being entitled to separate statement of vessel and pending freight values, and specific requirements of Rule F(2) in these respects differing in their particularity from more liberal notice pleading of Federal Civil Procedure Rule 8. Re Twenty Grand Offshore, Inc. (1970, SD Fla) 313 F Supp 851.

Supplemental Rule F(5) contemplates prior or contemporaneous claim as prerequisite to answer contesting plaintiff's right to limitation of liability. Re Twenty Grand Offshore, Inc. (1970, SD Fla) 313 F Supp 851.

Under Supplemental Rule F(5), claimant, at least usually, has option to file combined claim and answer. Re Twenty Grand Offshore, Inc. (1970, SD Fla) 313 F Supp 851.

Individual has no standing to raise equal protection challenge to notice provisions of Admiralty Rule F(4) where harm flows not from inadequate postal service but from fraud of family member who did have notice; furthermore, provisions of Rule F(4) are reasonably calculated to reach persons who through decedent's last known address, or by being otherwise known to court, have interest in prosecuting death claim. Chatterjee v Dye (1981, ED Pa) 511 F Supp 183

4. —Timeliness

Order extending time for filing of claims in limitation proceeding is not appealable. World Tradeways Shipping, Ltd. v Nimpex International, Inc. (1967, CA2 NY) 373 F2d 860, cert den 389 US 901, 19 L Ed 2d 224, 88 S Ct 228.

So long as limitation proceeding is pending and undetermined, and rights of parties are not adversely affected, court will freely grant permission to file late claims upon showing of reasons therefor. Jappinen v Canada S.S. Lines, Ltd. (1969, CA6 Ohio) 417 F2d 189.

In case where appellant seaman did not receive notice of pending limitation proceeding instituted under Supplemental Rule F(1) by owner of vessel, District Court abused its discretion under Supplemental Rule F(4) in denying motion of seaman to file late. Sagatume v Lampsis Navigation, Ltd. (1978, CA2 NY) 579 F2d 222.

Denial to injured deckhand of leave to file late claim under Rule F(4) was not abuse of discretion, where, notwithstanding deckhand's representation that he had only constructive notice of action by reason of newspaper publication until he was given actual notice by counsel few weeks prior to filing his motion, trial would be delayed if owner and operator of vessels were required to defend against late claim by previously unknown claimant, counsel who gave actual notice to deckhand had been involved in limitation proceeding from its inception, and grant of motion would result in at least potential prejudice to individual who had filed timely claim. American Commercial Lines, Inc. v United States (1984, CA8 Mo) 746 F2d 1351.

Rule F(4) provides that for cause shown court may enlarge time within which claims may be filed, and in this respect Rule F is identical with its predecessor in admiralty rules, under which it was generally held that so long as limitation proceedings were pending and undetermined, and rights of parties were not adversely affected, permission to file late claims would be freely granted, although they might be subordinated to timely claims against limitation fund. Petition of Flinchum (1969, DC Md) 303 F Supp 971.

In view of confusion surrounding forum non conveniens motion and consolidation of actions, court properly grants claimants' motion pursuant to Rule F(4) to file claims nunc pro tunc with same force and effect as if claims had been filed before deadline previously set. Groeneveld Co. v M.V. Nopal Explorer (1984, SD NY) 587 F Supp 136.

5. Venue and transfer

Despite libelant's concealed motive in seeking relief in admiralty courts of United States in preference to prosecuting action filed in Canada,

that in proceeding for limitation of liability value affixed to offending vessel would be greater in United States than in Canada. American libelant in American admiralty court may not be relegated, under principles of forum non conveniens, to courts of foreign country to enforce claim unless injustice to defendant would result from trial in Federal District Court, and latter court should retain jurisdiction. Poseidon Schiffahrt, G. M. B. H. v M/S/Netuno (1973, CA5 Ga) 474 F2d 203, on remand (SD Ga) 361 F Supp 412.

Venue of petition for limitation of liability was properly laid within district under Supplemental Rule F(9) where both vessels were located within judicial district and no other suits were pending elsewhere, and motion to transfer action to another district would be denied where arguments favoring either forum led to stalemate, and movant had not met burden which was his upon motion for transfer. Re Petition of Alamo Chemical Transp. Co. (1970, SD Tex) 323 F Supp 789.

Where vessel has not been attached or arrested to answer for any claim with respect to which owner seeks to limit his liability, and he has not been sued with respect to any such claim and vessel is not within any district, complaint may be filed in any Judicial District, and in such case can be transferred to any district if such transfer would be for convenience of parties and witnesses and in interest of justice, burden of establishing that action should be transferred being on moving party. Re Fenwick Island, Inc. (1971, ED NC) 330 F Supp 1191.

In action for exoneration from or limitation of liability due to sinking of vessel in which lives were lost, although decedents are stipulated to have resided in Virginia and their personal representatives and survivors still live there, and claimants have number of potential witnesses to call who reside in Virginia, motion to transfer case from North Carolina district to contiguous district in Virginia would be denied where vessel sank off North Carolina coast and several of plaintiff's prospective witnesses lived in North Carolina district. Re Fenwick Island, Inc. (1971, ED NC) 330 F Supp 1191.

Although nominally plaintiff in limitation proceedings, vessel owner should bear burden of showing that forum he has selected is more convenient than that originally selected by cargo claimants; limitation proceeding would be transferred from Southern District of New York to Western District of Washington pursuant to Rule F(9) motion where latter forum was somewhat more convenient and vessel owner failed to satisfy burden of justifying retention in Southern District of New York. Complaint of Far Eastern Shipping Co. (1978, SD NY) 460 F Supp 107.

6. Injunctions

Once sole claimant has acknowledged court's right to try "limitation" features of petition, waived any claim of res judicata relevant to issue of limited liability based upon any judgment obtained in jury trial, and expressed no objection to sufficiency of fund or method of computing it, District Court should dissolve injunction and permit claimant to file separate action on Jones Act (46 USCS §§ 688 et seq.) claim. Newton v Shipman (1983, CA9 Or) 718 F2d 959, 37 FR Serv 2d 1142.

Injunctive provisions of statutes and Supplemental Rule F are directed against and limited to claimants or potential claimants in particular limitation proceeding, and fact that plaintiff in one proceeding is potential claimant in another proceeding growing out of same disaster does not empower court to compel plaintiff in one to become claimant in other and enjoin him from proceeding in foreign court. Petition of A/S J. Ludwig Mowinckels Rederi (1967, SD NY) 268 F Supp 682, aff'd (CA2 NY) 422 F2d 728.

While preliminary injunctions and temporary restraining orders are by nature discretionary with court, Rule F(3) order is mandatory because on application of plaintiff "court shall enjoin" further prosecution of other actions. Re Pacific Far East Line, Inc. (1967, ND Cal) 43 FRD 283, 11 FR Serv 2d 1444.

Where government contended that order secured by plaintiff pursuant to Supplemental Rule F(3) enjoining prosecution of actions outside limitation proceeding was invalid because plaintiff failed to comply with provisions of Rule 65 governing applications for injunctions, court noted that Rule 65 was directed by its terms only to preliminary injunctions and temporary restraining orders, and that Rule F(3) order was neither "preliminary" nor "temporary"; it was order having permanence and finality required by statutory mandate in 46 USCS § 815 and repeated in Rule F(3) that upon compliance with requirements as to limitation of liability all claims and proceedings against owner with respect to matter in question "shall cease." Re Pacific Far East Line, Inc. (1967, ND Cal) 43 FRD 283, 11 FR Serv 2d 1444.

Martin v. Hunter's Lessee
14 U.S. 304

ERROR TO THE COURT OF APPEALS
OF THE STATE OF VIRGINIA

[14 U.S. 305]

This was a writ of error to the Court of appeals of the state of Virginia, founded upon the refusal of that Court to obey the mandate of this Court, requiring the judgment rendered in this same cause, at February Term, 1813, to be carried into due execution. The following is the judgment of the Court of appeals, rendered on the mandate:

> The Court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not **[14 U.S. 306]** extend to this Court under a sound construction of the Constitution of the United States; that so much of the 25th section of the act of Congress, to establish the judicial courts of the United States as extends the appellate jurisdiction of the Supreme Court to this Court is not in pursuance of the Constitution of the United States. That the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non judice* in relation to this Court, and that obedience to its mandate be declined by the Court.

The original suit was an action of ejectment, brought by the defendant in error in one of the district courts of Virginia, holden at Winchester, for the recovery of a parcel of land, situate within that tract, called the Northern Neck of Virginia, and part and parcel thereof. A declaration in ejectment was served (April, 1791) on the tenants in possession, whereupon Denny Fairfax (late Denny Martin), a British subject, holding the land in question under the devise of the late Thomas Lord Fairfax, was admitted to defend the suit, and plead the general issue, upon the usual terms of confessing lease, entry, and ouster, &c., and agreeing to insist, at the trial, on the title only, &c. The facts being settled in the form of a case agreed to be taken and considered as a special verdict, the Court, on consideration thereof, gave judgment (24th of April, 1794) in favour of the defendant in ejectment. From that judgment the plaintiff in ejectment (now defendant in error) appealed to the Court of Appeals, **[14 U.S. 307]** being the highest court of law of Virginia. At April term, 1810, the Court of appeals reversed the judgment of the district Court and gave judgment for the then appellant, now defendant in error, and thereupon the case was removed into this Court.

Statement of the facts as settled by the case agreed.

1st. The title of the late Lord Fairfax to all that entire territory and tract of land called the Northern Neck of Virginia, the nature of his estate in the same, as he inherited it, and the purport of the several charters and grants from the Kings Charles II. and James II., under which his ancestor held, are agreed to be truly recited in an Act of the Assembly of Virginia, passed in the year 1736,

[Vide Rev.Code, v. 1. ch. 3. p. 5] "For the confirming and better securing the titles to lands in the Northern Neck, held under the Rt. Hon. Thomas Lord Fairfax," &c.

From the recitals of the act, it appears that the first letters patent (1 Car. II.) granting the land in question to Ralph Lord Hopton and others, being surrendered in order to have the grant renewed, with alterations, the Earl of St. Albans and others (partly survivors of, and partly purchasers under, the first patentees) obtained new letters patent (2 Car. II) for the same land and appurtenances, and by the same description, but with additional privileges and reservations, &c.

The estate granted is described to be,

> All that entire tract, territory, or parcel of land, situate, &c., and bounded by, and within the heads of, the Rivers Rappahannock, &c., together with the rivers themselves, and all the islands, &c., and all woods, underwoods, timber, &c., **[14 U.S. 308]** mines of gold and silver, lead, tin, &c., and quarries of stone and coal, &c., to have, hold, and enjoy the said tract of land, &c. to the said [patentees], their heirs and assigns forever, to their only use and behoof, and to no other use, intent, or purpose whatsoever.

There is reserved to the crown the annual rent of 6l. 13s. 4d. "in lieu of all services and demands whatsoever;" also one-fifth part of all gold, and one-tenth part of all silver mines.

To the absolute title and seisin in fee of the land and its appurtenance, and the beneficial use and enjoyment of the same, assured to the patentees, as tenants *in capite*, by the most direct and abundant terms of conveyancing, there are superadded certain collateral powers of baronial dominion; reserving, however, to the Governor, Council and Assembly of Virginia the exclusive authority in all the military concerns of the granted territory, and the power to impose taxes on the persons and property of its inhabitants for the public and common defence of the colony, as well as a general jurisdiction over the patentees, their heirs and assigns, and all other inhabitants of the said territory.

In the enumeration of privileges specifically granted to the patentees, their heirs and assigns, is that

> freely and without molestation of the King, to give, grant, or by any ways or means, sell or alien all and singular the granted premises, and every part and parcel thereof, to any person or persons being willing to contract for, or buy, the same.

There is also a condition to avoid the grant, as to so much of the granted premises as should not be **[14 U.S. 309]** possessed, inhabited, or planted, by the means or procurement of the patentees, their heirs or assigns, in the space of 21 years.

The third and last of the letters patent referred to (4 Jac. II) after reciting a sale and conveyance of the granted premises by the former patentees, to

Thomas Lord Culpepper, "who was thereby become sole owner and proprietor thereof, in fee simple," proceeds to confirm the same to Lord Culpepper, in fee simple, and to release him from the said condition, for having the lands inhabited or planted as aforesaid.

The said act of assembly then recites that Thomas Lord Fairfax, heir at law of Lord Culpepper, had become "sole proprietor of the said territory, with the appurtenances, and the above-recited letters patent."

By another act of assembly, passed in the year 1748 (Rev.Code, v. 1. ch. 4. p. 10), certain grants from the crown, made while the exact boundaries of the Northern Neck were doubtful, for lands which proved to be within those boundaries, as then recently settled and determined, were, with the express consent of Lord Fairfax, confirmed to the grantees, to be held, nevertheless, of him, and all the rents, services, profits, and emoluments (reserved by such grants) to be paid and performed to him.

In another Act of Assembly, passed May, 1779, for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands, there is the following clause, *viz.* (*vide* Chy.Rev. of 1783, ch. 13. s. 6. p. 98.)

> And that the **[14 U.S. 310]** proprietors of land within this Commonwealth may no longer be subject to any servile, feudal, or precarious tenure, and to prevent the danger to a free state from perpetual revenue, be it enacted, that the royal mines, quit-rents, and all other reservations and conditions in the patents or grants of land from the crown of England, under the former government, shall be, and are hereby declared null and void; and that all lands thereby respectively granted shall be held in absolute and unconditional property, to all intents and purposes whatsoever, in the same manner with the lands hereafter granted by the Commonwealth, by virtue of this act.

2d. As respects the actual exercise of his proprietary rights by Lord Fairfax.

It is agreed that he did, in the year 1748, open and conduct, at his own expense, an office within the Northern Neck for granting and conveying what he described and called the waste and ungranted lands therein, upon certain terms, and according to certain rules by him established and published; that he did, from time to time, grant parcels of such lands in fee (the deeds being registered at his said office, in books kept for that purpose, by his own clerks and agents); that, according to the uniform tenor of such grants, he did, styling himself proprietor of the Northern Neck, &c., in consideration of a certain composition to him paid, and of certain annual rents therein reserved, grant, &c., with a clause of reentry for non-payment of the rent, & c.; that he also demised, for lives and terms of years, parcels of the same description of lands, also reserving annual **[14 U.S. 311]** rents; that he kept his said office open for the purposes aforesaid, from the year 1748 till his death, in December, 1781; during the whole of which period, and before, he exercised the right of granting

in fee, and demising for lives and terms of years, as aforesaid, and received and enjoyed the rents annually, as they accrued, as well under the grants in fee, as under the leases for lives and years. It is also agreed that Lord Fairfax died seised of lands in the Northern Neck equal to about 300,000 acres, which had been granted by him in fee, to one T. B. Martin, upon the same terms and conditions, and in the same form, as the other grants in fee before described, which lands were, soon after being so granted, reconveyed to Lord Fairfax in fee.

3d. Lord Fairfax, being a citizen and inhabitant of Virginia, died in the month of December, 1781, and, by his last will and testament, duly made and published, devised the whole of his lands, &c., called, or known by the name of the Northern Neck of Virginia, in fee, to Denny Fairfax, (the original defendant in ejectment), by the name and description of the Reverend Denny Martin, &c., upon condition of his taking the name and arms of Fairfax, &c., and it is admitted that he fully complied with the conditions of the devise.

4th. It is agreed that Denny Fairfax, the devisee, was a native-born British subject, and never became a citizen of the United States, nor any one of them, but always resided in England, as well during the Revolutionary War as from his birth, about the year 1750, to his death, which happened some time between **[14 U.S. 312]** the years 1796 and 1803, as appears from the record of the proceedings in the Court of appeals.

It is also admitted that Lord Fairfax left, at his death, a nephew named Thomas Bryan Martin, who was always a citizen of Virginia, being the younger brother of the said devisee, and the second son of a sister of the said Lord Fairfax; which sister was still living, and had always been a British subject.

5th. The land demanded by this ejectment being agreed to be part and parcel of the said territory and tract of land called the Northern Neck, and to be a part of that description of lands within the Northern Neck, called and described by Lord Fairfax as "waste and ungranted," and being also agreed never to have been escheated and seised into the hands of the Commonwealth of Virginia, pursuant to certain acts of assembly concerning escheators, and never to have been the subject of any inquest of office, was contained and included in a certain patent, bearing date the 30th of April, 1789, under the hand of the then Governor, and the seal of the Commonwealth of Virginia, purporting that the land in question is granted by the said Commonwealth unto David Hunter (the lessor of the plaintiff in ejectment) and his heirs forever, by virtue and in consideration of a land office treasury warrant, issued the 23d of January, 1788. The said lessor of the plaintiff in ejectment is, and always has been, a citizen of Virginia; and in pursuance of his said patent, entered into the land in question, and was thereof possessed, prior to the institution of the said action of ejectment. **[14 U.S. 313]**

6th. The definitive treaty of peace concluded in the year 1783, and the

treaty of amity, commerce, and navigation, of 1794, between the United States of America and Great Britain, and also the several acts of the Assembly of Virginia concerning the premises are referred to as making a part of the case agreed.

Upon this state of facts, the judgment of the Court of appeals of Virginia was reversed by this Court, at February term, 1813, and thereupon the mandate above mentioned was issued to the Court of appeals, which being disobeyed, the cause was again brought before this Court. [14 U.S. 323]

STORY, J., lead opinion

STORY, J., delivered the opinion of the Court.

This is a writ of error from the Court of Appeals of Virginia founded upon the refusal of that Court to obey the mandate of this Court requiring the judgment rendered in this very cause, at February Term, 1813, to be carried into due execution. The following is the judgment of the Court of Appeals rendered on the mandate:

> The Court is unanimously of opinion, that the appellate power of the Supreme Court of the United States does not extend to this Court, under a sound construction of the Constitution of the United States; that so much of the 25th section of the act of Congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this Court, is not in pursuance of the Constitution of the [14 U.S. 324] United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non judice* in relation to this Court, and that obedience to its mandate be declined by the Court.

The questions involved in this judgment are of great importance and delicacy. Perhaps it is not too much to affirm that, upon their right decision rest some of the most solid principles which have hitherto been supposed to sustain and protect the Constitution itself. The great respectability, too, of the Court whose decisions we are called upon to review, and the entire deference which we entertain for the learning and ability of that Court, add much to the difficulty of the task which has so unwelcomely fallen upon us. It is, however, a source of consolation, that we have had the assistance of most able and learned arguments to aid our inquiries; and that the opinion which is now to be pronounced has been weighed with every solicitude to come to a correct result, and matured after solemn deliberation.

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The Constitution of the United States was ordained and established not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government [14

U.S. 325] with all the powers which they might deem proper and necessary, to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the States the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact, to make the powers of the State governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The Constitution was not, therefore, necessarily carved out of existing State sovereignties, nor a surrender of powers already existing in State institutions, for the powers of the States depend upon their own Constitutions, and the people of every State had the right to modify and restrain them according to their own views of the policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the State governments by their respective Constitutions remained unaltered and unimpaired except so far as they were granted to the Government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognised by one of the articles in amendment of the Constitution, which declares that

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. [14 U.S. 326]

The government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms, and where a power is expressly given in general terms, it is not to be restrained to particular cases unless that construction grow out of the context expressly or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter, and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature from time to [14 U.S. 327] time to adopt its own means to effectuate

legitimate objects and to mould and model the exercise of its powers as its own wisdom and the public interests, should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the Constitution so far as regards the great points in controversy.

The third article of the Constitution is that which must principally attract our attention. The 1st. section declares,

> The judicial power of the United States shall be vested in one Supreme Court, and in such other inferior Courts as the Congress may, from time to time, ordain and establish.

The 2d section declares, that

> The judicial power shall extend to all cases in law or equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under the grants of different States; and between a State or the citizens thereof, and foreign States, citizens, or subjects.

It then proceeds to declare, that

> in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. **[14 U.S. 328]** In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations, as the Congress shall make.

Such is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people solemnly declared, in establishing one great department of that Government which was, in many respects, national, and in all, supreme. It is a part of the very same instrument which was to act not merely upon individuals, but upon States, and to deprive them altogether of the exercise of some powers of sovereignty and to restrain and regulate them in the exercise of others.

Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the Legislature. Its obligatory force is so imperative, that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States shall be vested (not may be vested) in one Supreme Court, and in such inferior Courts as Congress may, from time to time, ordain and establish. Could Congress have lawfully refused to create a Supreme Court, or to vest in it the constitutional jurisdiction?

> The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive, for their services, a

compensation which shall not be diminished during their continuance in office.

Could Congress create or limit any other tenure of [14 U.S. 329] the judicial office? Could they refuse to pay at stated times the stipulated salary, or diminish it during the continuance in office? But one answer can be given to these questions: it must be in the negative. The object of the Constitution was to establish three great departments of Government -- the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the Constitution. How, otherwise, could crimes against the United States be tried and punished? How could causes between two States be heard and determined? The judicial power must, therefore, be vested in some court by Congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the Constitution, they might defeat the Constitution itself, a construction which would lead to such a result cannot be sound.

The same expression, "shall be vested," occurs in other parts of the Constitution in defining the powers of the other coordinate branches of the Government. The first article declares that "all legislative powers herein granted shall be vested in a Congress of the United States." Will it be contended that the legislative power is not absolutely vested? that the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that "the [14 U.S. 330] executive power shall be vested in a President of the United States of America." Could Congress vest it in any other person, or is it to await their good pleasure whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department?

If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all, for the Constitution has not singled out any class on which Congress are bound to act in preference to others.

The next consideration is as to the Courts in which the judicial power shall be vested. It is manifest that a Supreme Court must be established; but whether it be equally obligatory to establish inferior Courts is a question of some difficulty. If Congress may lawfully omit to establish inferior Courts, it might follow that, in some of the enumerated cases, the judicial power could nowhere exist. The Supreme Court can have original jurisdiction in two classes of cases only, *viz.*, in cases affecting ambassadors, other public ministers and consuls, and in cases in which a State is a party. Congress cannot vest any

portion of the judicial power of the United States except in Courts ordained and established by [14 U.S. 331] itself, and if, in any of the cases enumerated in the Constitution, the State courts did not then possess jurisdiction, the appellate jurisdiction of the Supreme Court (admitting that it could act on State courts) could not reach those cases, and, consequently, the injunction of the Constitution that the judicial power "shall be vested," would be disobeyed. It would seem therefore to follow that Congress are bound to create some inferior Courts in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance. They might establish one or more inferior Courts; they might parcel out the jurisdiction among such Courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be at all times vested, either in an original or appellate form, in some Courts created under its authority.

This construction will be fortified by an attentive examination of the second section of the third article. The words are "the judicial power shall extend," &c. Much minute and elaborate criticism has been employed upon these words. It has been argued that they are equivalent to the words "may extend," and that "extend" means to widen to new cases not before within the scope of the power. For the reason which have been already stated, we are of opinion that the words are used in an imperative sense. They import an absolute grant of judicial power. They cannot have a relative signification applicable to powers already granted, for the American people [14 U.S. 332] had not made any previous grant. The Constitution was for a new Government, organized with new substantive powers, and not a mere supplementary charter to a Government already existing. The Confederation was a compact between States, and its structure and powers were wholly unlike those of the National Government. The Constitution was an act of the people of the United States to supersede the Confederation, and not to be ingrafted on it, as a stock through which it was to receive life and nourishment.

If, indeed, the relative signification could be fixed upon the term "extend," it could not (as we shall hereafter see) subserve the purposes of the argument in support of which it has been adduced. This imperative sense of the words "shall extend" is strengthened by the context. It is declared that, "in all cases affecting ambassadors, &c., that the Supreme Court shall have original jurisdiction." Could Congress withhold original jurisdiction in these cases from the Supreme Court? The clause proceeds --

> in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

The very exception here shows that the framers of the Constitution used the words in an imperative sense. What necessity could there exist for this exception if the preceding words were not used in that sense? Without such exception, Congress would, by the preceding words, have possessed a

complete power to regulate the appellate jurisdiction, if the language were [14 U.S. 333] only equivalent to the words "may have" appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable Congress to regulate and restrain the appellate power, as the public interests might, from time to time, require.

Other clauses in the Constitution might be brought in aid of this construction, but a minute examination of them cannot be necessary, and would occupy too much time. It will be found that whenever a particular object is to be effected, the language of the Constitution is always imperative, and cannot be disregarded without violating the first principles of public duty. On the other hand, the legislative powers are given in language which implies discretion, as, from the nature of legislative power, such a discretion must ever be exercised.

It being, then, established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the Constitution itself. The judicial power shall extend to all the cases enumerated in the Constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may therefore extend to them in the shape of original or appellate jurisdiction, or both, for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.

In what cases (if any) is this judicial power exclusive, or exclusive at the election of Congress? It will be observed that there are two classes of cases enumerated [14 U.S. 334] in the Constitution between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class, the expression is, and that the judicial power shall extend to all cases; but in the subsequent part of the clause which embraces all the other cases of national cognizance, and forms the second class, the word "all" is dropped, seemingly *ex industria.* Here the judicial authority is to extend to controversies (not to all controversies) to which the United States shall be a party, &c. From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason, and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases, and in the latter class to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

The vital importance of all the cases enumerated in the first class to the national sovereignty might warrant such a distinction. In the first place, as to

cases arriving under the Constitution, laws, and treaties of the United States. Here the State courts [14 U.S. 335] could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the State courts previous to the adoption of the Constitution, and it could not afterwards be directly conferred on them, for the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would therefore be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations, and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not therefore to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever.

A different policy might well be adopted in reference to the second class of cases, for although it might be fit that the judicial power should extend [14 U.S. 336] to all controversies to which the United States should be a party, yet this power night not have been imperatively given, least it should imply a right to take cognizance of original suits brought against the United States as defendants in their own Courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will to judicial cognizance, either to enforce rights or to prevent wrongs; and as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which Congress might, in their wisdom, choose to apply. It is also worthy of remark that Congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases, the jurisdiction is not limited except by the subject matter; in the second, it is made materially to depend upon the value in controversy.

We do not, however, profess to place any implicit reliance upon the distinction which has here been stated and endeavoured to be illustrated. It has the rather been brought into view in deference to the legislative opinion, which has so long acted upon, and enforced this distinction. But there is, certainly, vast weight in the argument which has been urged that the Constitution is imperative upon Congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the Supreme and inferior courts created under its own authority. At all events, whether the one construction or the

other prevail, it is manifest that the judicial power of the [14 U.S. 337] United States is unavoidably, in some cases, exclusive of all State authority, and in all others, may be made so at the election of Congress. No part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to State tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance, and it can only be in those cases where, previous to the Constitution, State tribunals possessed jurisdiction independent of national authority that they can now constitutionally exercise a concurrent jurisdiction. Congress, throughout the Judicial Act, and particularly in the 9th, 11th, and 13th sections, have legislated upon the supposition that, in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own Courts.

But even admitting that the language of the Constitution is not mandatory, and that Congress may constitutionally omit to vest the judicial power in Courts of the United States, it cannot be denied that, when it is vested, it may be exercised to the utmost constitutional extent.

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction, subject, however, to such exceptions and regulations as Congress may prescribe. It is therefore capable of embracing every case enumerated in the Constitution which is not exclusively to be decided by way of original [14 U.S. 338] jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may therefore be exercised by Congress under every variety of form of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the Constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this Court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over State tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular Courts. The words are, "the judicial power (which includes appellate power) shall extend to all cases," &c., and "in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the [14 U.S. 339]

text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the Constitution meant to limit the appellate jurisdiction to cases pending in the Courts of the United States, it would necessarily follow that the jurisdiction of these Courts would, in all the cases enumerated in the Constitution, be exclusive of State tribunals. How otherwise could the jurisdiction extend to all cases arising under the Constitution, laws, and treaties of the United States, or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by State tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some, cases. If State tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the Constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive, and this not only when the *casus foederis* should arise directly, but when it should arise incidentally in cases pending in State courts. This construction would abridge the jurisdiction of such Court far more than has been ever contemplated in any act of Congress.

On the other hand, if, as has been contended, a discretion be vested in Congress to establish or not to establish inferior Courts, at their own pleasure, and [14 U.S. 340] Congress should not establish such Courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon unless it could act upon cases pending in the State courts. Under such circumstances it must be held that the appellate power would extend to State courts, for the Constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other Courts. Any other construction, upon this supposition, would involve this strange contradiction that a discretionary power vested in Congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the Constitution in relation to the whole appellate power.

But it is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might, but would, arise in the State courts in the exercise of their ordinary jurisdiction. With this view, the sixth article declares, that

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

It is obvious that this obligation is imperative upon the State judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable

to the case in judgment. They were not to decide merely [14 U.S. 341] according to the laws or Constitution of the State, but according to the Constitution, laws and treaties of the United States -- "the supreme law of the land."

A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the State courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same State, and performance thereof is sought in the courts of that State; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose at the trial the defendant sets up in his defence a tender under a State law making paper money a good tender, or a State law impairing the obligation of such contract, which law, if binding, would defeat the suit. The Constitution of the United States has declared that no State shall make any thing but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If Congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the State court proceed to hear and determine it? Can a mere plea in defence be, of itself, a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a State court, and the defendant should allege in his defence that the crime was created by an *ex post facto* act of the State, must not the State court, in the exercise of a jurisdiction which has already rightfully attached, have a [14 U.S. 342] right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position, and unless the State courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs of a most enormous magnitude would inevitably ensue.

It must therefore be conceded that the Constitution not only contemplated, but meant to provide for, cases within the scope of the judicial power of the United States which might yet depend before State tribunals. It was foreseen that, in the exercise of their ordinary jurisdiction, State courts would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the State courts, which (as has been already shown) may occur; it must therefore extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to State tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution.

It has been argued that such an appellate jurisdiction over State courts is inconsistent with the genius [14 U.S. 343] of our Governments, and the spirit of the

Constitution. That the latter was never designed to act upon State sovereignties, but only upon the people, and that, if the power exists, it will materially impair the sovereignty of the States, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the Constitution was not designed to operate upon States in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the States. Surely, when such essential portions of State sovereignty are taken away or prohibited to be exercised, it cannot be correctly asserted that the Constitution does not act upon the States. The language of the Constitution is also imperative upon the States as to the performance of many duties. It is imperative upon the State legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of President and Vice-President. And in these as well as some other cases, Congress have a right to revise, amend, or supersede the laws which may be passed by State legislatures. When therefore the States are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the States are, in some [14 U.S. 344] respects, under the control of Congress, and in every case are, under the Constitution, bound by the paramount authority of the United States, it is certainly difficult to support the argument that the appellate power over the decisions of State courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of State judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the Constitution, and if they should unintentionally transcend their authority or misconstrue the Constitution, there is no more reason for giving their judgments an absolute and irresistible force than for giving it to the acts of the other coordinate departments of State sovereignty.

The argument urged from the possibility of the abuse of the revising power is equally unsatisfactory. It is always a doubtful course to argue against the use or existence of a power from the possibility of its abuse. It is still more difficult by such an argument to ingraft upon a general power a restriction [14 U.S. 345] which is not to be found in the terms in which it is given. From the very nature

of things, the absolute right of decision, in the last resort, must rest somewhere -- wherever it may be vested, it is susceptible of abuse. In all questions of jurisdiction, the inferior or appellate court must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter.

It has been further argued against the existence of this appellate power that it would form a novelty in our judicial institutions. This is certainly a mistake. I n the Articles of Confederation, an instrument framed with infinitely more deference to State rights and State jealousies, a power was given to Congress to establish "courts for revising and determining, finally, appeals in all cases of captures." It is remarkable that no power was given to entertain original jurisdiction in such cases, and consequently the appellate power (although not so expressed in terms) was altogether to be exercised in revising the decisions of State tribunals. This was, undoubtedly, so far a surrender of State sovereignty, but it never was supposed to be a power fraught with public danger or destructive of the independence of State judges. On the contrary, it was supposed to be a power indispensable to the public safety, inasmuch as our national rights might otherwise be compromitted and our national peace been dangered. Under the present Constitution, the prize jurisdiction is confined to the courts of the United States, and a power to revise the decisions of State courts, if they should assert jurisdiction over prize causes, cannot be less [14 U.S. 346] important or less useful than it was under the Confederation.

In this connexion, we are led again to the construction of the words of the Constitution, "the judicial power shall extend," &c. If, as has been contended at the bar, the term "extend" have a relative signification, and mean to widen an existing power, it will then follow, that, as the confederation gave an appellate power over State tribunals, the Constitution enlarged or widened that appellate power to all the other cases in which jurisdiction is given to the Courts of the United States. It is not presumed that the learned counsel would choose to adopt such a conclusion.

It is further argued that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own Courts, first because State judges are bound by an oath to support the Constitution of the United States, and must be presumed to be men of learning and integrity, and secondly because Congress must have an unquestionable right to remove all cases within the scope of the judicial power from the State courts to the courts of the United States at any time before final judgment, though not after final judgment. As to the first reason -- admitting that the judges of the State courts are, and always will be, of as much learning, integrity, and wisdom as those of the courts of the United States (which we very cheerfully admit), it does not aid the argument. It is manifest that the Constitution has proceeded upon a theory of its own, and given or withheld [14 U.S. 347] powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The Constitution has

presumed (whether rightly or wrongly we do not inquire) that State attachments, State prejudices, State jealousies, and State interests might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between States, between citizens of different States, between citizens claiming grants under different States, between a State and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned why some, at least, of those cases should not have been left to the cognizance of the State courts. In respect to the other enumerated cases -- the cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction -- reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity, of uniformity of decisions [14 U.S. 348] throughout the whole United States upon all subjects within the purview of the Constitution. Judges of equal learning and integrity in different States might differently interpret a statute or a treaty of the United States, or even the Constitution itself; if there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States. The public mischiefs that would attend such a State of things would be truly deplorable, and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy has now become fact, and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration, which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow that, as the plaintiff may always elect the State court, the defendant [14 U.S. 349] may be deprived of all the security which the Constitution intended in aid of his rights. Such a State of things can in no respect be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted

Congress possess to remove suits from State courts to the national Courts, and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original, jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the Constitution to any particular mode or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner must be subject to its absolute legislative control. A writ of error is indeed but a process which removes the record of one court to the possession of another court, [14 U.S. 350] and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied by the legislature to interlocutory as well as final judgments. And if the right of removal from State courts exist before judgment, because it is included in the appellate power, it must for the same reason exist after judgment. And if the appellate power by the Constitution does not include cases pending in State courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections therefore exist as to the right of removal before judgment as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of State tribunals.

The remedy, too, of removal of suits would be utterly inadequate to the purposes of the Constitution if it could act only on the parties, and not upon the State courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and in respect to civil suits, there would, in many cases, be rights without corresponding remedies. If State courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the [14 U.S. 351] state decisions would be paramount to the Constitution; and though, in civil suits, the courts of the United States might act upon the parties, yet the State courts might act in the same way, and this conflict of jurisdictions would not only jeopardise private rights, but bring into

imminent peril the public interests.

On the whole, the Court are of opinion that the appellate power of the United States does extend to cases pending in the State courts, and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases by a writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power, and we dare not interpose a limitation where the people have not been disposed to create one.

Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact that this exposition of the Constitution, extending its appellate power to State courts, was, previous to its adoption, uniformly and publicly avowed by its friends and admitted by its enemies as the basis of their respective reasonings, both in and out of the State conventions. It is an historical fact that, at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It [14 U.S. 352] is an historical fact that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened State courts, and these judicial decisions of the Supreme Court through so long a period do, as we think, place the doctrine upon a foundation of authority which cannot be shaken without delivering over the subject to perpetual and irremediable doubts.

The next question which has been argued is whether the case at bar be within the purview of the 25th section of the Judiciary Act, so that this Court may rightfully sustain the present writ of error. This section, stripped of passages unimportant in this inquiry, enacts, in substance, that a final judgment or decree in any suit in the highest court of law or equity of a State, where is drawn in question the validity of a treaty or statute of, or an authority excised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws, of the United States, and the decision is in favour of such their validity, or of the Constitution, or of a treaty or statute of, or commission held under, the United [14 U.S. 353] States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause of the said Constitution, treaty, statute, or commission, may be reexamined and reversed or affirmed in the Supreme Court of the United States

upon a writ of error in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a Circuit Court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears upon the face of the record, and immediately respects the before-mentioned question of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute.

That the present writ of error is founded upon a judgment of the Court below which drew in question and denied the validity of a statute of the United States is incontrovertible, for it is apparent upon the face of the record. That this judgment is final upon the rights of the parties is equally true, for if well founded, the former judgment of that court was of conclusive authority, and the former judgment of this Court utterly void. The decision was therefore equivalent to a perpetual stay of proceedings upon [14 U.S. 354] the mandate, and a perpetual denial of all the rights acquired under it. The case, then, falls directly within the terms of the Act. It is a final judgment in a suit in a State court denying the validity of a statute of the United States, and unless a distinction can be made between proceedings under a mandate and proceedings in an original suit, a writ of error is the proper remedy to revise that judgment. In our opinion, no legal distinction exists between the cases.

In causes remanded to the Circuit Courts, if the mandate be not correctly executed, a writ of error or appeal has always been supposed to be a proper remedy, and has been recognized as such in the former decisions of this Court. The statute gives the same effect to writs of error from the judgments of State courts as of the Circuit Courts, and in its terms provides for proceedings where the same cause may be a second time brought up on writ of error before the Supreme Court. There is no limitation or description of the cases to which the second writ of error may be applied, and it ought therefore to be coextensive with the cases which fall within the mischiefs of the statute. It will hardly be denied that this cause stands in that predicament; and if so, then the appellate jurisdiction of this Court has rightfully attached.

But it is contended, that the former judgment of this Court was rendered upon a case not within the purview of this section of the Judicial Act, and that, as it was pronounced by an incompetent jurisdiction, it was utterly void, and cannot be a sufficient foundation [14 U.S. 355] to sustain any subsequent proceedings. To this argument several answers may be given. In the first place, it is not admitted that, upon this writ of error, the former record is before us. The error now assigned is not in the former proceedings, but in the judgment rendered upon the mandate issued after the former judgment. The question now litigated is not upon the construction of a treaty, but upon the

constitutionality of a statute of the United States, which is clearly within our jurisdiction. In the next place, in ordinary cases a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this Court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this Court can revise its own judgments. In several cases which have been formerly adjudged in this Court, the same point was argued by counsel, and expressly overruled. It was solemnly held that a final judgment of this Court was conclusive upon the parties, and could not be reexamined.

In this case, however, from motives of a public nature, we are entirely willing to wave all objections and to go back and reexamine the question of jurisdiction as it stood upon the record formerly in judgment. We have great confidence that our jurisdiction will, on a careful examination, stand confirmed as well upon principle as authority. It will be recollected that the action was an ejectment for a parcel of land in the Northern Neck, formerly belonging to [14 U.S. 356] Lord Fairfax. The original plaintiff claimed the land under a patent granted to him by the State of Virginia in 1789, under a title supposed to be vested in that State by escheat or forfeiture. The original defendant claimed the land as devisee under the will of Lord Fairfax. The parties agreed to a special statement of facts in the nature of a special verdict, upon which the District Court of Winchester, in 1793, gave a general judgment for the defendant, which judgment was afterwards reversed in 1810 by the Court of Appeals, and a general judgment was rendered for the plaintiff; and from this last judgment a writ of error was brought to the Supreme Court. The statement of facts contained a regular deduction of the title of Lord Fairfax until his death, in 1781, and also the title of his devisee. It also contained a regular deduction of the title of the plaintiff, under the State of Virginia, and further referred to the treaty of peace of 1783, and to the acts of Virginia respecting the lands of Lord Fairfax, and the supposed escheat or forfeiture thereof, as component parts of the case. No facts disconnected with the titles thus set up by the parties were alleged on either side. It is apparent from this summary explanation that the title thus set up by the plaintiff might be open to other objections; but the title of the defendant was perfect and complete if it was protected by the treaty of 1783. If therefore this Court had authority to examine into the whole record, and to decide upon the legal validity of the title of the defendant, as well as its application to the treaty of peace, it would be a case within the express purview [14 U.S. 357] of the 25th section of the Act, for there was nothing in the record upon which the Court below could have decided but upon the title as connected with the treaty; and if the title was otherwise good, its sufficiency must have depended altogether upon its protection under the treaty. Under such circumstances it was strictly a suit where was drawn in question the construction of a treaty, and the decision was against the title specially set up or claimed by the defendant. It would fall, then, within the very terms of the

Act.

The objection urged at the bar is that this Court cannot inquire into the title, but simply into the correctness of the construction put upon the treaty by the Court of Appeals, and that their judgment is not reexaminable here unless it appear on the face of the record that some construction was put upon the treaty. If therefore that court might have decided the case upon the invalidity of the title (and, *non constat,* that they did not) independent of the treaty, there is an end of the appellate jurisdiction of this Court. In support of this objection, much stress is laid upon the last clause of the section, which declares that no other cause shall be regarded as a ground of reversal than such as appears on the face of the record and immediately respects the construction of the treaty, &c., in dispute.

If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction; and there are the strongest [14 U.S. 358] reasons against it founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against the title set up by the party. It is therefore the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title before the Court can construe the treaty in reference to that title. If the Court below should decide, that the title was bad, and therefore not protected by the treaty, must not this Court have a power to decide the title to be good, and therefore protected by the treaty? Is not the treaty, in both instances, equally construed, and the title of the party, in reference to the treaty, equally ascertained and decided? Nor does the clause relied on in the objection impugn this construction. It requires that the error upon which the Appellate Court is to decide shall appear on the face of the record, and immediately respect the questions before mentioned in the section. One of the questions is as to the construction of a treaty upon a title specially set up by a party, and every error that immediately respects [14 U.S. 359] that question must, of course, be within the cognizance, of the Court. The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question; any error therefore in respect to that title must be reexaminable, or the case could never be presented to the Court.

The restraining clause was manifestly intended for a very different purpose. It was foreseen that the parties might claim under various titles, and might assert various defences altogether independent of each other. The Court might

admit or reject evidence applicable to one particular title, and not to all, and, in such cases, it was the intention of Congress to limit what would otherwise have unquestionably attached to the Court, the right of revising all the points involved in the cause. It therefore restrains this right to such errors as respect the questions specified in the section; and, in this view, it has an appropriate sense, consistent with the preceding clauses. We are therefore satisfied that, upon principle, the case was rightfully before us, and if the point were perfectly new, we should not hesitate to assert the jurisdiction.

But the point has been already decided by this Court upon solemn argument. In *Smith v. The State of Maryland*, 6 Cranch 286, precisely the same objection was taken by counsel, and overruled by the unanimous opinion of the Court. That case was, in some respects, stronger than the present; for the court below decided expressly that the party had no title, and therefore the treaty could not operate [14 U.S. 360] upon it. This Court entered into an examination of that question, and, being of the same opinion, affirmed the judgment. There cannot, then, be an authority which could more completely govern the present question.

It has been asserted at the bar that, in point of fact, the Court of Appeals did not decide either upon the treaty or the title apparent upon the record, but upon a compromise made under an act of the legislature of Virginia. If it be true (as we are informed) that this was a private act, to take effect only upon a certain condition, *viz.*, the execution of a deed of release of certain lands, which was matter *in pais*, it is somewhat difficult to understand how the Court could take judicial cognizance of the act or of the performance of the condition, unless spread upon the record. At all events, we are bound to consider that the Court did decide upon the facts actually before them. The treaty of peace was not necessary to have been stated, for it was the supreme law of the land, of which all Courts must take notice. And at the time of the decision in the Court of Appeals and in this Court, another treaty had intervened, which attached itself to the title in controversy and, of course, must have been the supreme law to govern the decision if it should be found applicable to the case. It was in this view that this Court did not deem it necessary to rest its former decision upon the treaty of peace, believing that the title of the defendant was, at all events, perfect under the treaty of 1794. [14 U.S. 361]

The remaining questions respect more the practice than the principles of this Court. The forms of process and the modes of proceeding in the exercise of jurisdiction are, with few exceptions, left by the Legislature to be regulated and changed as this Court may, in its discretion, deem expedient. By a rule of this Court, the return of a copy of a record of the proper court, under the seal of that court, annexed to the writ of error, is declared to be "a sufficient compliance with the mandate of the writ." The record in this case is duly certified by the clerk of the Court of Appeals and annexed to the writ of error. The objection therefore which has been urged to the sufficiency of the return

cannot prevail.

Another objection is that it does not appear that the judge who granted the writ of error did, upon issuing the citation, take the bond required by the 22d section of the Judiciary Act.

We consider that provision as merely directory to the judge; and that an omission does not avoid the writ of error. If any party be prejudiced by the omission, this Court can grant him summary relief by imposing such terms on the other party as, under all the circumstances, may be legal and proper. But there is nothing in the record by which we can judicially know whether a bond has been taken or not, for the statute does not require the bond to be returned to this Court, and it might with equal propriety be lodged in the Court below, who would ordinarily execute the judgment to be rendered on the writ. And the presumption of law is, until the contrary **[14 U.S. 362]** appears, that every judge who signs a citation has obeyed the injunctions of the Act.

We have thus gone over all the principal questions in the cause, and we deliver our judgment with entire confidence that it is consistent with the Constitution and laws of the land.

We have not thought it incumbent on us to give any opinion upon the question, whether this Court have authority to issue a writ of mandamus to the Court of Appeals to enforce the former judgments, as we do not think it necessarily involved in the decision of this cause.

It is the opinion of the whole Court that the judgment of the Court of Appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the District Court, held at Winchester, be, and the same is hereby, affirmed.

JOHNSON, J., separate opinion

JOHNSON, J.

It will be observed in this case that the Court disavows all intention to decide on the right to issue compulsory process to the State courts, thus leaving us, in my opinion, where the Constitution and laws place us -- supreme over persons and cases as far as our judicial powers extend, but not asserting any compulsory control over the State tribunals.

In this view I acquiesce in their opinion, but not altogether in the reasoning or opinion of my brother who delivered it. Few minds are accustomed to the same habit of thinking, and our conclusions are most satisfactory to ourselves when arrived at in our own way. **[14 U.S. 363]**

I have another reason for expressing my opinion on this occasion. I view this question as one of the most momentous importance; as one which may affect, in its consequences, the permanence of the American Union. It presents

an instance of collision between the judicial powers of the Union, and one of the greatest States in the Union, on a point the most delicate and difficult to be adjusted. On the one hand, the General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force, which acts upon the physical powers of man, or judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority. The former is happily unknown to the genius of our Constitution except as far as it shall be sanctioned by the latter, but let the latter be obstructed in its progress by an opposition which it cannot overcome or put by, and the resort must be to the former, or government is no more.

On the other hand, so firmly am I persuaded that the American people can no longer enjoy the blessings of a free government whenever the State sovereignties shall be prostrated at the feet of the General Government, nor the proud consciousness of equality and security any longer than the independence of judicial power shall be maintained consecrated and intangible, that I could borrow the language of a celebrated orator and exclaim, "I rejoice that Virginia has resisted."

Yet here I must claim the privilege of expressing [14 U.S. 364] my regret, that the opposition of the high and truly respected tribunal of that State had not been marked with a little more moderation. The only point necessary to be decided in the case then before them was "whether they were bound to obey the mandate emanating from this Court?" But, in the judgment entered on their minutes, they have affirmed that the case was, in this Court, *coram non judice*, or, in other words, that this Court had not jurisdiction over it.

This is assuming a truly alarming latitude of judicial power. Where is it to end? It is an acknowledged principle of, I believe, every Court in the world that not only the decisions, but everything done under the judicial process of courts not having jurisdiction are, *ipso facto*, void. Are, then, the judgments of this Court to be reviewed in every court of the Union? and is every recovery of money, every change of property, that has taken place under our process to be considered as null, void, and tortious?

We pretend not to more infallibility than other courts composed of the same frail materials which compose this. It would be the height of affectation to close our minds upon the recollection that we have been extracted from the same seminaries in which originated the learned men who preside over the State tribunals. But there is one claim which we can with confidence assert in our own name upon those tribunals -- the profound, uniform, and unaffected respect which this Court has always exhibited for State decisions give us strong pretensions to judicial comity. And another claim I may assert, in the name of the American people; in this Court, every State in [14 U.S. 365] the Union is represented; we are constituted by the voice of the Union, and when decisions take place which nothing but a spirit to give ground and harmonize can

reconcile, ours is the superior claim upon the comity of the State tribunals. It is the nature of the human mind to press a favourite hypothesis too far, but magnanimity will always be ready to sacrifice the pride of opinion to public welfare.

In the case before us, the collision has been, on our part, wholly unsolicited. The exercise of this appellate jurisdiction over the State decisions has long been acquiesced in, and when the writ of error in this case was allowed by the President of the Court of Appeals of Virginia, we were sanctioned in supposing that we were to meet with the same acquiescence there. Had that Court refused to grant the writ in the first instance, or had the question of jurisdiction, or on the mode of exercising jurisdiction, been made here originally, we should have been put on our guard, and might have so modelled the process of the Court as to strip it of the offensive form of a mandate. In this case it might have been brought down to what probably the 25th section of the Judiciary Act meant it should be, to-wit, an alternative judgment either that the State court may finally proceed at its option to carry into effect the judgment of this Court or, if it declined doing so, that then this Court would proceed itself to execute it. The language, sense, and operation of the 25th section on this subject merit particular attention. In the preceding section, which has relation to causes brought up by writ of error from the Circuit Courts [14 U.S. 366] of the United States, this Court is instructed not to issue executions, but to send a special mandate to the Circuit Court to award execution thereupon. In case of the Circuit Court's refusal to obey such mandate, there could be no doubt as to the ulterior measures; compulsory process might, unquestionably, be resorted to. Nor, indeed, was there any reason to suppose that they ever would refuse, and therefore there is no provision made for authorizing this Court to execute its own judgment in cases of that description. But not so in cases brought up from the State courts; the framers of that law plainly foresaw that the State courts might refuse, and not being willing to leave ground for the implication that compulsory process must be resorted to, because no specific provision was made, they have provided the means, by authorizing this Court, in case of reversal of the State decision, to execute its own judgment. In case of reversal, only was this necessary, for, in case of affirmance, this collision could not arise. It is true that the words of this section are that this Court may, in their discretion, proceed to execute its own judgment. But these words were very properly put in, that it might not be made imperative upon this Court to proceed indiscriminately in this way, as it could only be necessary in case of the refusal of the State courts, and this idea is fully confirmed by the words of the 13th section, which restrict this Court in issuing the writ of mandamus, so as to confine it expressly to those Courts which are constituted by the United States. [14 U.S. 367]

In this point of view, the Legislature is completely vindicated from all intention to violate the independence of the State judiciaries. Nor can this Court, with any more correctness, have imputed to it similar intentions. The

form of the mandate issued in this case is that known to appellate tribunals, and used in the ordinary cases of writs of error from the courts of the United States. It will, perhaps, not be too much, in such cases, to expect of those who are conversant in the forms, fictions, and technicality of the law not to give the process of courts too literal a construction. They should be considered with a view to the ends they are intended to answer and the law and practice in which they originate. In this view, the mandate was no more than a mode of submitting to that court the option which the 25th section holds out to them.

Had the decision of the Court of Virginia been confined to the point of their legal obligation to carry the judgment of this Court into effect, I should have thought it unnecessary to make any further observations in this cause. But we are called upon to vindicate our general revising power, and its due exercise in this particular case.

Here, that I may not be charged with arguing upon a hypothetical case, it is necessary to ascertain what the real question is which this Court is now called to decide on.

In doing this, it is necessary to do what, although, in the abstract, of very questionable propriety, appears to be generally acquiesced in, to-wit, to review the case as it originally came up to this Court [14 U.S. 368] on the former writ of error. The cause, then, came up upon a case stated between the parties, and under the practice of that State, having the effect of a special verdict. The case stated brings into view the treaty of peace with Great Britain, and then proceeds to present the various laws of Virginia and the facts upon which the parties found their respective titles. It then presents no particular question, but refers generally to the law arising out of the case. The original decision was obtained prior to the Treaty of 1794, but before the case was adjudicated in this Court, the Treaty of 1794 had been concluded.

The difficulties of the case arise under the construction of the 25th section above alluded to, which, as far as it relates to this case, is in these words:

> A final judgment or decree in any suit, in the highest Court of law or equity of a State in which a decision in the suit could be had, . . . where is drawn in question the construction of any clause of the Constitution or of a treaty, . . . and the decision is against the title set up or claimed by either party under such clause, may be reexamined and reversed, or affirmed. . . . But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid than such as appears on the face of the record and immediately respects the before-mentioned questions of validity or construction of the said treaties,

&c.

The first point decided under this state of the case was that, the judgment being a part of the record, if that judgment was not such as, upon that case, it ought to have been, it was an error apparent on the [14 U.S. 369] face of the record. But it was contended that the case there stated presented a number of points upon which the decision below may have been founded, and that it did

not therefore necessarily appear to have been an error immediately respecting a question on the construction of a treaty. But the Court held that, as the reference was general to the law arising out of the case, if one question arose which called for the construction of a treaty, and the decision negatived the right set up under it, this Court will reverse that decision, and that it is the duty of the party who would avoid the inconvenience of this principle so to mould the case as to obviate the ambiguity. And under this point arises the question whether this Court can inquire into the title of the party, or whether they are so restricted in their judicial powers as to be confined to decide on the operation of a treaty upon a title previously ascertained to exist.

If there is any one point in the case on which an opinion may be given with confidence, it is this, whether we consider the letter of the statute, or the spirit, intent, or meaning, of the Constitution and of the legislature, as expressed in the 27th section, it is equally clear that the title is the primary object to which the attention of the Court is called in every such case. The words are, "and the decision be against the title," so set up, not against the construction of the treaty contended for by the party setting up the title. And how could it be otherwise? The title may exist notwithstanding the decision of the State courts to the contrary, and, in that case, the [14 U.S. 370] party is entitled to the benefits intended to be secured by the treaty. The decision to his prejudice may have been the result of those very errors, partialities, or defects in State jurisprudence against which the Constitution intended to protect the individual. And if the contrary doctrine be assumed, what is the consequence? This Court may then be called upon to decide on a mere hypothetical case -- to give a construction to a treaty without first deciding whether there was any interest on which that treaty, whatever be its proper construction, would operate. This difficulty was felt and weighed in the case of *Smith and the State of Maryland,* and that decision was founded upon the idea that this Court was not thus restricted.

But another difficulty presented itself: the Treaty of 1794 had become the supreme law of the land since the judgment rendered in the Court below. The defendant, who was at that time an alien, had now become confirmed in his rights under that treaty. This would have been no objection to the correctness of the original judgment. Were we, then, at liberty to notice that treaty in rendering the judgment of this Court?

Having dissented from the opinion of this Court in the original case on the question of title, this difficulty did not present itself in my way in the view I then took of the case. But the majority of this Court determined that, as a public law, the treaty was a part of the law of every case depending in this Court; that, as such, it was not necessary that it should be spread upon the record, and that it was obligatory [14 U.S. 371] upon this Court, in rendering judgment upon this writ of error, notwithstanding the original judgment may have been otherwise unimpeachable. And to this opinion I yielded my hearty consent, for it cannot be maintained that this Court is bound to give a judgment

unlawful at the time of rendering it, in consideration that the same judgment would have been lawful at any prior time. What judgment can now be lawfully rendered between the parties is the question to which the attention of the Court is called. And if the law which sanctioned the original judgment expire pending an appeal, this Court has repeatedly reversed the judgment below, although rendered whilst the law existed. So, too, if the plaintiff in error die pending suit, and his land descend on an alien, it cannot be contended that this Court will maintain the suit in right of the judgment in favour of his ancestor, notwithstanding his present disability.

It must here be recollected that this is an action of ejectment. If the term formally declared upon expires pending the action, the Court will permit the plaintiff to amend by extending the term -- why? Because, although the right may have been in him at the commencement of the suit, it has ceased before judgment, and, without this amendment, he could not have judgment. But suppose the suit were really instituted to obtain possession of a leasehold, and the lease expire before judgment, would the Court permit the party to amend in opposition to the right of the case? On the contrary, if the term formally declared on were more extensive than the [14 U.S. 372] lease in which the legal title was founded, could they give judgment for more than costs? It must be recollected that, under this judgment, a writ of restitution is the fruit of the law. This, in its very nature, has relation to, and must be founded upon, a present existing right at the time of judgment. And whatever be the cause which takes this right away, the remedy must, in the reason and nature of things, fall with it.

When all these incidental points are disposed of, we find the question finally reduced to this -- does the judicial power of the United States extend to the revision of decisions of State courts in cases arising under treaties? But in order to generalize the question and present it in the true form in which it presents itself in this case, we will inquire whether the Constitution sanctions the exercise of a revising power over the decisions of State tribunals in those cases to which the judicial power of the United States extends?

And here it appears to me that the great difficulty is on the other side. That the real doubt is whether the State tribunals can constitutionally exercise jurisdiction in any of the cases to which the judicial power of the United States extends.

Some cession of judicial power is contemplated by the third article of the Constitution; that which is ceded can no longer be retained. In one of the Circuit Courts of the United States, it has been decided (with what correctness I will not say) that the cession of a power to pass an uniform act of bankruptcy, although not acted on by the United States, deprives [14 U.S. 373] the States of the power of passing laws to that effect. With regard to the admiralty and maritime jurisdiction, it would be difficult to prove that the States could resume it if the United States should abolish the Courts vested with that jurisdiction; yet it is blended with the other cases of jurisdiction in the second section of the

third article, and ceded in the same words. But it is contended that the second section of the third article contains no express cession of jurisdiction; that it only vests a power in Congress to assume jurisdiction to the extent therein expressed. And under this head arose the discussion on the construction proper to be given to that article.

On this part of the case, I shall not pause long. The rules of construction, where the nature of the instrument is ascertained, are familiar to every one. To me, the Constitution appears, in every line of it, to be a contract which, in legal language, may be denominated tripartite. The parties are the people, the States, and the United States. It is returning in a circle to contend that it professes to be the exclusive act of the people, for what have the people done but to form this compact? That the States are recognised as parties to it is evident from various passages, and particularly that in which the United States guaranty to each State a republican form of Government.

The security and happiness of the whole was the object, and, to prevent dissention and collision, each surrendered those powers which might make them dangerous to each other. Well aware of the sensitive [14 U.S. 374] irritability of sovereign States, where their wills or interests clash, they placed themselves, with regard to each other, on the footing of sovereigns upon the ocean, where power is mutually conceded to act upon the individual, but the national vessel must remain unviolated. And to remove all ground for jealousy and complaint, they relinquish the privilege of being any longer the exclusive arbiters of their own justice where the rights of others come in question or the great interests of the whole may be affected by those feelings, partialities, or prejudices, which they meant to put down forever.

Nor shall I enter into a minute discussion on the meaning of the language of this section. I have seldom found much good result from hypercritical severity in examining the distinct force of words. Language is essentially defective in precision, more so than those are aware of who are not in the habit of subjecting it to philological analysis. In the case before us, for instance, a rigid construction might be made which would annihilate the powers intended to be ceded. The words are, "shall extend to;" now that which extends to does not necessarily include in, so that the circle may enlarge until it reaches the objects that limit it, and yet not take them in. But the plain and obvious sense and meaning of the word "shall," in this sentence, is in the future sense, and has nothing imperative in it. The language of the framers of the Constitution is "We are about forming a General Government -- when that Government is formed, its powers shall extend," &c. I therefore see nothing imperative in this clause, and certainly [14 U.S. 375] it would have been very unnecessary to use the word in that sense; for, as there was no controlling power constituted, it would only, if used in an imperative sense, have imposed a moral obligation to act. But the same result arises from using it in a future sense, and the Constitution everywhere assumes as a postulate that wherever power is given, it will be used, or at least used as far as the interests of the American people require it, if

not from the natural proneness of man to the exercise of power, at least from a sense of duty and the obligation of an oath.

Nor can I see any difference in the effect of the words used in this section, as to the scope of the jurisdiction of the United States' courts over the cases of the first and second description comprised in that section. "Shall extend to controversies," appears to me as comprehensive in effect as "shall extend to all cases." For if the judicial power extend "to controversies between citizen and alien," &c., to what controversies of that description does it not extend? If no case can be pointed out which is excepted, it then extends to all controversies.

But I will assume the construction as a sound one that the cession of power to the General Government means no more than that they may assume the exercise of it whenever they think it advisable. It is clear that Congress have hitherto acted under that impression, and my own opinion is in favour of its correctness. But does it not then follow that the jurisdiction of the State court, within the range ceded to the General Government, is permitted, and [14 U.S. 376] may be withdrawn whenever Congress think proper to do so? As it is a principle that everyone may renounce a right introduced for his benefit, we will admit that, as Congress have not assumed such jurisdiction, the State courts may constitutionally exercise jurisdiction in such cases. Yet surely the general power to withdraw the exercise of it includes in it the right to modify, limit, and restrain that exercise.

> This is my domain, put not your foot upon it; if you do, you are subject to my laws; I have a right to exclude you altogether; I have, then, a right to prescribe the terms of your admission to a participation. As long as you conform to my laws, participate in peace, but I reserve to myself the right of judging how far your acts are conformable to my laws.

Analogy, then, to the ordinary exercise of sovereign authority would sustain the exercise of this controlling or revising power.

But it is argued that a power to assume jurisdiction to the constitutional extent does not necessarily carry with it a right to exercise appellate power over the State tribunals.

This is a momentous questions, and one on which I shall reserve myself uncommitted for each particular case as it shall occur. It is enough, at present, to have shown that Congress has not asserted, and this Court has not attempted, to exercise that kind of authority *in personam* over the State courts which would place them in the relation of an inferior responsible body without their own acquiescence. And I have too much confidence in the State tribunals to believe that a case ever will occur in which it will be necessary [14 U.S. 377] for the General Government to assume a controlling power over these tribunals. But is it difficult to suppose a case which will call loudly for some remedy or restraint? Suppose a foreign minister or an officer acting regularly under authority from the United States, seized today, tried tomorrow, and hurried the next day to execution. Such cases may occur, and have occurred, in other

countries. The angry vindictive passions of men have too often made their way into judicial tribunals, and we cannot hope forever to escape their baleful influence. In the case supposed, there ought to be a power somewhere to restrain or punish, or the Union must be dissolved. At present, the uncontrollable exercise of criminal jurisdiction is most securely confided to the State tribunals. The Courts of the United States are vested with no power to scrutinize into the proceedings of the State courts in criminal cases; on the contrary, the General Government has, in more than one instance, exhibited their confidence by a wish to vest them with the execution of their own penal law. And extreme, indeed, I flatter myself, must be the case in which the General Government could ever be induced to assert this right. If ever such a case should occur, it will be time enough to decide upon their constitutional power to do so.

But we know that, by the 3d article of the Constitution, judicial power, to a certain extent, is vested in the General Government, and that, by the same instrument, power is given to pass all laws necessary to carry into effect the provisions of the Constitution. At present, it is only necessary to vindicate the [14 U.S. 378] laws which they have passed affecting civil cases pending in State tribunals.

In legislating on this subject, Congress, in the true spirit of the Constitution, have proposed to secure to everyone the full benefit of the Constitution without forcing any one necessarily into the courts of the United States. With this view, in one class of cases, they have not taken away absolutely from the State courts all the cases to which their judicial power extends, but left it to the plaintiff to bring his action there originally if he choose, or to the defendant to force the plaintiff into the courts of the United States where they have jurisdiction, and the former has instituted his suit in the State courts. In this case, they have not made it legal for the defendant to plead to the jurisdiction, the effect of which would be to put an end to the plaintiff's suit and oblige him, probably at great risk or expense, to institute a new action; but the Act has given him a right to obtain an order for a removal, on a petition to the State court, upon which the cause, with all its existing advantages, is transferred to the Circuit Court of the United States. This, I presume, can be subject to no objection, as the Legislature has an unquestionable right to make the ground of removal a ground of plea to the jurisdiction, and the Court must then do no more than it is now called upon to do, to-wit, give an order or a judgment, or call it what we will, in favour of that defendant. And so far from asserting the inferiority of the State tribunal, this act is rather that of a superior, inasmuch as the Circuit Court of the United States becomes bound, [14 U.S. 379] by that order, to take jurisdiction of the case. This method, so much more unlikely to affect official delicacy than that which is resorted to in the other class of cases, might perhaps have been more happily applied to all the cases which the Legislature thought it advisable to remove from the State courts. But the other class of cases, in which the present is

included, was proposed to be provided for in a different manner. And here, again, the Legislature of the Union evince their confidence in the State tribunals, for they do not attempt to give original cognizance to their own Circuit Courts of such cases, or to remove them by petition and order; but still believing that their decisions will be generally satisfactory, a writ of error is not given immediately as a question within the jurisdiction of the United States shall occur, but only in case the decision shall finally, in the Court of the last resort, be against the title set up under the Constitution, treaty, &c.

In this act I can see nothing which amounts to an assertion of the inferiority or dependence of the State tribunals. The presiding judge of the State court is himself authorized to issue the writ of error, if he will, and thus give jurisdiction to the Supreme Court; and if he thinks proper to decline it, no compulsory process is provided by law to oblige him. The party who imagines himself aggrieved is then at liberty to apply to a judge of the United States, who issues the writ of error, which (whatever the form) is, in substance, no more than a mode of compelling the opposite party to appear before this Court and maintain the legality of his judgment obtained before the [14 U.S. 380] state tribunal. An exemplification of a record is the common property of every one who chooses to apply and pay for it, and thus the case and the parties are brought before us; and so far is the court itself from being brought under the revising power of this Court that nothing but the case, as presented by the record and pleadings of the parties, is considered, and the opinions of the court are never resorted to unless for the purpose of assisting this Court in forming their own opinions.

The absolute necessity that there was for Congress to exercise something of a revising power over cases and parties in the State courts will appear from this consideration.

Suppose the whole extent of the judicial power of the United States vested in their own courts, yet such a provision would not answer all the ends of the Constitution, for two reasons:

1st. Although the plaintiff may, in such case, have the full benefit of the Constitution extended to him, yet the defendant would not, as the plaintiff might force him into the court of the State at his election.

2dly. Supposing it possible so to legislate as to give the courts of the United States original jurisdiction in all cases arising under the Constitution, laws, &c., in the words of the 2d section of the 3d article (a point on which I have some doubt, and which in time might perhaps, under some *quo minus* fiction or a willing construction, greatly accumulate the jurisdiction of those Courts), yet a very large class of cases would remain unprovided for. Incidental questions would often arise, and as a Court of competent [14 U.S. 381] jurisdiction in the principal case must decide all such questions, whatever laws they arise under, endless might be the diversity of decisions throughout the

Union upon the Constitution, treaties, and laws of the United States, a subject on which the tranquillity of the Union, internally and externally, may materially depend.

I should feel the more hesitation in adopting the opinions which I express in this case were I not firmly convinced that they are practical, and may be acted upon without compromitting the harmony of the Union or bringing humility upon the State tribunals. God forbid that the judicial power in these States should ever for a moment, even in its humblest departments, feel a doubt of its own independence. Whilst adjudicating on a subject which the laws of the country assign finally to the revising power of another tribunal, it can feel no such doubt. An anxiety to do justice is ever relieved by the knowledge that what we do is not final between the parties. And no sense of dependence can be felt from the knowledge that the parties, not the Court, may be summoned before another tribunal. With this view, by means of laws, avoiding judgments obtained in the State courts in cases over which Congress has constitutionally assumed jurisdiction, and inflicting penalties on parties who shall contumaciously persist in infringing the constitutional rights of others -- under a liberal extension of the writ of injunction and the habeas corpus *ad subjiciendum*, I flatter myself that the full extent of the constitutional revising power may be secured to the United States, and the [14 U.S. 382] benefits of it to the individual, without ever resorting to compulsory or restrictive process upon the State tribunals; a right which, I repeat again, Congress has not asserted, nor has this Court asserted, nor does there appear any necessity for asserting.

The remaining points in the case being mere questions of practice, I shall make no remarks upon them.

Judgment affirmed.

Cases citing this case . . .

The following 40 case(s) in the USSC+ database cite this case:

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3. Federal Civil Procedure ⇨2444

Court would grant claimant's motion to set aside default entered in forfeiture proceeding under Internal Revenue Laws and final judgment subsequently entered to permit claimant to be heard with respect to his claim that he had no knowledge of forfeiture proceeding until after final decree had been entered. 26 U.S.C.A. (I.R.C.1954) §§ 4401 et seq., 4411, 4412, 4421, 7302, 7323, 7327; Admiralty Rules, rules 2, 10, 21, 28 U.S.C.A.; 28 U.S.C.A. § 1355.

Robert M. Morgenthau, U. S. Atty. for Southern District of New York, for United States of America; Dawnald R. Henderson, Asst. U. S. Atty., of counsel.

McCall & Leone, New York City, for claimant William J. Fennell; Gerome J. Leone, New York City, of counsel.

WYATT, District Judge.

This is a motion by William J. Fennell for an order vacating and setting aside the decree of forfeiture filed herein on December 29, 1964 and permitting movant Fennell as claimant to file an answer to the libel and thus to place in issue the question of forfeiture so that a trial may be had on that issue.

The underlying facts do not appear to be in dispute.

On June 5, 1964, Fennell was arrested at his home in Yonkers, New York, pursuant to a warrant issued by the Commissioner on a complaint charging violations of 26 U.S.C. § 4401 et seq. (failing to pay the tax imposed on wagers). A search of his home turned up $3,976.62 in United States currency which was seized as property allegedly used in violation of the Internal Revenue Law. 26 U.S.C. § 7302. The Ford station wagon described in the caption was also seized at the same time for the same claimed violation.

On August 14, 1964 a "libel of information" (see Supreme Court Admiralty Rule 21; 28 U.S.C. § 1355; 26 U.S.C. § 7323) was filed by the United States Attorney. The libel alleged that the Ford station wagon and the currency were intended for use by Fennell in the business of accepting wagers without his having paid a tax and without having registered, all in violation of 26 U.S.C. §§ 4411, 4412, 4421.

Pursuant to the libel of information, a monition issued from this Court on August 14, 1964. It directed the Marshal to take the goods into his custody and to give notice to all claimants to appear on September 8, 1964. Supreme Court Admiralty Rule 10. In accordance with Rule 2 of the Admiralty Rules of this Court, notice was published in proper form in the New York Journal American on September 1, 1964 giving the required one week notice of appearance. Actual notice was not given to Fennell.

On the return date of the monition (September 8, 1964), no claims having been filed, default was duly noted.

Under date of October 28, 1964, a "Petition for Remission or Mitigation of Forfeiture" was sent for Fennell to the Director of the Alcohol and Tobacco Tax Division, Internal Revenue Service, United States Treasury Department, Washington, D. C. (26 U.S.C. § 7327; 19 U.S.C. § 1608). Petitioner Fennell claimed that he was entitled "to a remission or mitigation of the funds because [the] source of the [funds] were innocent and legal". This petition was denied by the Attorney General.

On December 29, 1964 a "Final Decree" was made and filed in this Court. The decree recited that the "* * * default of all persons having been noted and no answer having been filed * * * [the] motor vehicle above * * * [is] forefeited to the United States of America." Doubtless by inadvertence no forfeiture of the currency was ordered in the decree. The decree directed that the United States Marshal "deliver the said currency and motor vehicle to the Regional Commissioner, Internal Revenue Service, Treasury Department, New

York, N. Y. * * *" (40 U.S.C. § 304i).

[1] A motion to set aside or vacate a "default" or "default judgment" entered in a forfeiture proceeding is governed by Fed.R.Civ.P. 55 and 60. Although (presumably for the purpose of obtaining jurisdiction (see 26 U.S.C. § 7323 (a)) the action is initially commenced as a proceeding in admiralty, after jurisdiction is obtained the proceeding takes on the character of a civil action at law. Fed.R.Civ.P. 81(a) (2); Reynal v. United States, 153 F.2d 929, 931 (5th Cir. 1945); see 7 Moore's Federal Practice § 81.05(6). Thus at least at this stage of the proceedings the Federal Rules of Civil Procedure control.

Fed.R.Civ.P. 55(c) provides:

> "Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

Fed.R.Civ.P. 60(b) provides in relevant part:

> "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * *."

[2, 3] There seems to be no jurisdictional obstacle which would prevent this Court from setting aside its decree made after default. All that is here asked by the movant is an opportunity to be heard. Under the circumstance, it seems that this Court can act. See United States v. The San Leonardo, 51 F.Supp. 107 (E.D.N.Y.1942); The Rio Grande, 23 Wall. 458, 90 U.S. 458, 23 L.Ed. 158 (1874); The Little Charles, 26 Fed.Cas. 979, No. 15,612 (1818).

In support of the motion, movant swears that he "learned the details of the forfeiture proceeding for the first time on February 3, 1965" and "had no notice, direct or indirect (except by newspaper publication which I did not see and which I could not recognize had I seen it) of any proceeding that would require me to appear and file a claim on September 8, 1964".

The merits of the claim of Fennell to the property are of no present concern to this Court and nothing contained herein is meant to indicate any opinion thereon.

All that the Court presently proposes to do is to afford movant an opportunity promptly to litigate the question of forfeiture.

The default entered on September 8, 1964 is set aside and the final decree of this Court filed on December 29, 1964 is vacated. Movant is allowed to file a claim to the property and an answer to the libel on or before April 1, 1965.

So ordered.

UNITED STATES of America, Plaintiff,

v.

Leon I. BOSS, Boss and Company, Limited, and Central Trading, Inc., Defendants.

United States District Court
S. D. New York.
April 28, 1965.

Action wherein defendant moved to dismiss and direct judgment against the United States on ground that it had failed to serve answers to interrogatories. The District Court, Levet, J., held that complaint would not be dismissed on

United States v. James Daniel Good Real Property
No. 92-1180
Argued October 6, 1993
Decided December 13, 1993
510 U.S. 43

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Syllabus

Four and one-half years after police found drugs and drug paraphernalia in claimant Good's home and he pleaded guilty to promoting a harmful drug in violation of Hawaii law, the United States filed an *in rem* action in the Federal District Court, seeking forfeiture of his house and land, under 21 U.S.C. § 881(a)(7), on the ground that the property had been used to commit or facilitate the commission of a federal drug offense. Following an *ex parte* proceeding, a Magistrate Judge issued a warrant authorizing the property's seizure, and the Government seized the property without prior notice to Good or an adversary proceeding. In his claim for the property and answer to the Government's complaint, Good asserted that he was deprived of his property without due process of law and that the action was invalid because it had not been timely commenced. The District Court ordered that the property be forfeited, but the Court of Appeals reversed. It held that the seizure without prior notice and a hearing violated the Due Process Clause, and remanded the case for a determination whether the action, although filed within the five-year period provided by 19 U.S.C. § 1621, was untimely because the Government failed to follow the internal notification and reporting requirements of §§ 1602-1604.

Held:

1. Absent exigent circumstances, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture. Pp. 48-62.

(a) The seizure of Good's property implicates two "'explicit textual source[s] of constitutional protection,'" the Fourth Amendment and the Fifth. *Soldal v. Cook County,* 506 U.S. 56, 70. While the Fourth Amendment places limits on the Government's power to seize property for purposes of forfeiture, it does not provide the sole measure of constitutional protection that must be afforded property owners in forfeiture proceedings. *Gerstein v. Pugh,* 420 U.S. 103; *Graham v. Connor,* 490 U.S. 386, distinguished. Where the Government seizes property not to preserve evidence of criminal wrongdoing, but to assert ownership and control over the property, its action must also comply with the Due [510 U.S. 44] Process Clause. *See, e.g., Calero-Toledo v.*

Pearson Yacht Leasing Co., 416 U.S. 663; *Fuentes v. Shevin*, 407 U.S. 67. Pp. 48-52.

(b) An exception to the general rule requiring predeprivation notice and hearing is justified only in extraordinary situations. *Id.* at 82. Using the three-part inquiry set forth in *Mathews v. Eldridge*, 424 U.S. 319 -- consideration of the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose, *id.* at 335 -- the seizure of real property for purposes of civil forfeiture does not justify such an exception. Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance, *cf., e.g., United States v. Karo*, 468 U.S. 705, 714-715, that weighs heavily in the *Mathews* balance. Moreover, the practice of *ex parte* seizure creates an unacceptable risk of error, since the proceeding affords little or no protection to an innocent owner, who may not be deprived of property under § 881(a)(7). Nor does the governmental interest at stake here present a pressing need for prompt action. Because real property cannot abscond, a court's jurisdiction can be preserved without prior seizure simply by posting notice on the property and leaving a copy of the process with the occupant. In addition, the Government's legitimate interests at the inception of a forfeiture proceeding -- preventing the property from being sold, destroyed, or used for further illegal activity before the forfeiture judgment -- can be secured through measures less intrusive than seizure: a *lis pendens* notice to prevent the property's sale, a restraining order to prevent its destruction, and search and arrest warrants to forestall further illegal activity. Since a claimant is already entitled to a hearing before final judgment, requiring the Government to postpone seizure until after an adversary hearing creates no significant administrative burden, and any harm from the delay is minimal compared to the injury occasioned by erroneous seizure. Pp. 52-59.

(c) No plausible claim of executive urgency, including the Government's reliance on forfeitures as a means of defraying law enforcement expenses, justifies the summary seizure of real property under § 881(a)(7). *Cf. Phillips v. Commissioner*, 283 U.S. 589. Pp. 59-61.

2. Courts may not dismiss a forfeiture action filed within the five-year statute of limitations for noncompliance with the timing requirements of §§ 1602-1604. Congress' failure to specify a consequence for noncompliance implies that it intended the responsible officials administering the Act to have discretion to determine what disciplinary measures are appropriate when their subordinates fail to discharge their statutory [510 U.S. 45] duties, and the federal courts should not, in the ordinary course, impose their own coercive sanction, *see, e.g., United States v. Montalvo-Murillo*, 495 U.S. 711, 717-721. Pp.

62-65.

971 F.2d 1376, affirmed in part, reversed in part, and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court with respect to Parts I and III, and the opinion of the Court with respect to Parts II and IV, in which BLACKMUN, STEVENS, SOUTER, and GINSBURG, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined, and in which O'CONNOR, J., joined as to Parts II and III, *post,* p. 65. O'CONNOR, J., *post,* p. 73, and THOMAS, J., *post,* p. 80, filed opinions concurring in part and dissenting in part. **[510 U.S. 46]**

KENNEDY, J., lead opinion

JUSTICE KENNEDY delivered the opinion of the Court.

The principal question presented is whether, in the absence of exigent circumstances, the Due Process Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard. We hold that it does.

A second issue in the case concerns the timeliness of the forfeiture action. We hold that filing suit for forfeiture within the statute of limitations suffices to make the action timely, and that the cause should not be dismissed for failure to comply with certain other statutory directives for expeditious prosecution in forfeiture cases.

I

On January 31, 1985, Hawaii police officers executed a search warrant at the home of claimant James Daniel Good. The search uncovered about 89 pounds of marijuana, marijuana seeds, vials containing hashish oil, and drug paraphernalia. About six months later, Good pleaded guilty to promoting a harmful drug in the second degree, in violation of Hawaii law. Haw.Rev.Stat. § 712-1245(1)(b) (1985). He was sentenced to one year in jail and five years' probation, and fined $1,000. Good was also required to forfeit to the State $3,187 in cash found on the premises.

On August 8, 1989, four and one-half years after the drugs were found, the United States filed an *in rem* action in the United States District Court for the District of Hawaii, seeking to forfeit Good's house and the four-acre parcel on which it was situated. The United States sought forfeiture under 21 U.S.C. § 881(a)(7), on the ground that the property had been used to commit or facilitate the commission of a federal drug offense. {1} **[510 U.S. 47]**

On August 18, 1989, in an *ex parte* proceeding, a United States Magistrate Judge found that the Government had established probable cause to believe Good's property was subject to forfeiture under § 881(a)(7). A warrant of

arrest *in rem* was issued, authorizing seizure of the property. The warrant was based on an affidavit recounting the fact of Good's conviction and the evidence discovered during the January, 1985, search of his home by Hawaii police.

The Government seized the property on August 21, 1989, without prior notice to Good or an adversary hearing. At the time of the seizure, Good was renting his home to tenants for $900 per month. The Government permitted the tenants to remain on the premises subject to an occupancy agreement, but directed the payment of future rents to the United States Marshal.

Good filed a claim for the property and an answer to the Government's complaint. He asserted that the seizure deprived him of his property without due process of law and that the forfeiture action was invalid because it had not been timely commenced under the statute. The District Court granted the Government's motion for summary judgment and entered an order forfeiting the property.

The Court of Appeals for the Ninth Circuit affirmed in part, reversed in part, and remanded for further proceedings. 971 F.2d 1376 (1992). The court was unanimous in holding that the seizure of Good's property, without prior notice and a hearing, violated the Due Process Clause. **[510 U.S. 48]**

In a divided decision, the Court of Appeals further held that the District Court erred in finding the action timely. The Court of Appeals ruled that the 5-year statute of limitations in 19 U.S.C. § 1621 is only an "outer limit" for filing a forfeiture action, and that further limits are imposed by 19 U.S.C. §§ 1602-1604. 971 F.2d at 1378-1382. Those provisions, the court reasoned, impose a "series of internal notification and reporting requirements," under which

> customs agents must report to customs officers, customs officers must report to the United States attorney, and the Attorney General must "immediately" and "forthwith" bring a forfeiture action if he believes that one is warranted.

Id. at 1379 (citations omitted). The Court of Appeals ruled that failure to comply with these internal reporting rules could require dismissal of the forfeiture action as untimely. The court remanded the case for a determination whether the Government had satisfied its obligation to make prompt reports. *Id.* at 1382.

We granted certiorari, 507 U.S. 983 (1993), to resolve a conflict among the Courts of Appeals on the constitutional question presented. *Compare United States v. Premises and Real Property at 4492 South Livonia Road,* 889 F.2d 1258 (CA2 1989), *with United States v. A Single Family Residence and Real Property,* 803 F.2d 625 (CA11 1986). We now affirm the due process ruling and reverse the ruling on the timeliness question.

II

The Due Process Clause of the Fifth Amendment guarantees that "[n]o

person shall . . . be deprived of life, liberty, or property, without due process of law." Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property. *See United States v. $8,850,* 461 U.S. 555, 562, n. 12 (1983); *Fuentes v. Shevin,* 407 U.S. 67, 82 (1972); *Sniadach v. Family Finance Corp. of Bay View,* **[510 U.S. 49]** 395 U.S. 337, 342 (1969) (Harlan, J., concurring); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950). The Government does not, and could not, dispute that the seizure of Good's home and four-acre parcel deprived him of property interests protected by the Due Process Clause. By the Government's own submission, the seizure gave it the right to charge rent, to condition occupancy, and even to evict the occupants. Instead, the Government argues that it afforded Good all the process the Constitution requires. The Government makes two separate points in this regard. First, it contends that compliance with the Fourth Amendment suffices when the Government seizes property for purposes of forfeiture. In the alternative, it argues that the seizure of real property under the drug forfeiture laws justifies an exception to the usual due process requirement of preseizure notice and hearing. We turn to these issues.

A

The Government argues that, because civil forfeiture serves a "law enforcement purpos[e]," Brief for United States 13, the Government need comply only with the Fourth Amendment when seizing forfeitable property. We disagree. The Fourth Amendment does place restrictions on seizures conducted for purposes of civil forfeiture, *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 696 (1965) (holding that the exclusionary rule applies to civil forfeiture), but it does not follow that the Fourth Amendment is the *sole* constitutional provision in question when the Government seizes property subject to forfeiture.

We have rejected the view that the applicability of one constitutional amendment preempts the guarantees of another. As explained in *Soldal v. Cook County,* 506 U.S. 56, 70 (1992):

> Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations **[510 U.S. 50]** are alleged, we are not in the habit of identifying, as a preliminary matter, the claim's "dominant" character. Rather, we examine each constitutional provision in turn.

Here, as in *Soldal,* the seizure of property implicates two "'explicit textual source[s] of constitutional protection,'" the Fourth Amendment and the Fifth. *Ibid.* The proper question is not which Amendment controls but whether either Amendment is violated.

Nevertheless, the Government asserts that, when property is seized for forfeiture, the Fourth Amendment provides the full measure of process due under the Fifth. The Government relies on *Gerstein v. Pugh,* 420 U.S. 103

(1975), and *Graham v. Connor,* 490 U.S. 386 (1989), in support of this proposition. That reliance is misplaced. *Gerstein* and *Graham* concerned not the seizure of property, but the arrest or detention of criminal suspects, subjects we have considered to be governed by the provisions of the Fourth Amendment without reference to other constitutional guarantees. In addition, also unlike the seizure presented by this case, the arrest or detention of a suspect occurs as part of the regular criminal process, where other safeguards ordinarily ensure compliance with due process. *Gerstein* held that the Fourth Amendment, rather than the Due Process Clause, determines the requisite post-arrest proceedings when individuals are detained on criminal charges. Exclusive reliance on the Fourth Amendment is appropriate in the arrest context, we explained, because the Amendment was "tailored explicitly for the criminal justice system," and its

> balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases.

Gerstein, supra, at 125, n. 27. Furthermore, we noted that the protections afforded during an arrest and initial detention are "only the *first* stage of an elaborate system, unique in jurisprudence, [510 U.S. 51] designed to safeguard the rights of those accused of criminal conduct." *Ibid.* (emphasis in original).

So too, in *Graham* we held that claims of excessive force in the course of an arrest or investigatory stop should be evaluated under the Fourth Amendment reasonableness standard, not under the "more generalized notion of `substantive due process.'" 490 U.S. at 395. Because the degree of force used to effect a seizure is one determinant of its reasonableness, and because the Fourth Amendment guarantees citizens the right "to be secure in their persons . . . against unreasonable . . . seizures," we held that a claim of excessive force in the course of such a seizure is "most properly characterized as one invoking the protections of the Fourth Amendment." 490 U.S. at 394. Neither *Gerstein* nor *Graham,* however, provides support for the proposition that the Fourth Amendment is the beginning and end of the constitutional inquiry whenever a seizure occurs. That proposition is inconsistent with the approach we took in *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974), which examined the constitutionality of *ex parte* seizures of forfeitable property under general principles of due process, rather than the Fourth Amendment. And it is at odds with our reliance on the Due Process Clause to analyze prejudgment seizure and sequestration of personal property. *See, e. g., Fuentes v. Shevin,* 407 U.S. 67 (1972); *Mitchell v. W. T. Grant Co.,* 416 U.S. 600 (1974).

It is true, of course, that the Fourth Amendment applies to searches and seizures in the civil context, and may serve to resolve the legality of these governmental actions without reference to other constitutional provisions. *See Camara v. Municipal Court of San Francisco,* 387 U.S. 523 (1967) (holding that a warrant based on probable cause is required for administrative search of

residences for safety inspections); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (holding that federal regulations authorizing railroads to conduct blood and urine tests of certain [510 U.S. 52] employees, without a warrant and without reasonable suspicion, do not violate the Fourth Amendment prohibition against unreasonable searches and seizures). But the purpose and effect of the Government's action in the present case go beyond the traditional meaning of search or seizure. Here the Government seized property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself. Our cases establish that government action of this consequence must comply with the Due Process Clauses of the Fifth and Fourteenth Amendments.

Though the Fourth Amendment places limits on the Government's power to seize property for purposes of forfeiture, it does not provide the sole measure of constitutional protection that must be afforded property owners in forfeiture proceedings. So even assuming that the Fourth Amendment were satisfied in this case, it remains for us to determine whether the seizure complied with our well settled jurisprudence under the Due Process Clause.

B

Whether *ex parte* seizures of forfeitable property satisfy the Due Process Clause is a question we last confronted in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), which held that the Government could seize a yacht subject to civil forfeiture without affording prior notice or hearing. Central to our analysis in *Calero-Toledo* was the fact that a yacht was the "sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." *Id.* at 679. The ease with which an owner could frustrate the Government's interests in the forfeitable property created a "'special need for very prompt action'" that justified the postponement of notice and hearing until after the seizure. *Id.* at 678 (quoting *Fuentes*, 407 U.S. at 91).

We had no occasion in *Calero-Toledo* to decide whether the same considerations apply to the forfeiture of real property, [510 U.S. 53] which, by its very nature, can be neither moved nor concealed. In fact, when *Calero-Toledo* was decided, both the Puerto Rican statute, P.R.Laws Ann., Tit. 24, § 2512 (Supp. 1973), and the federal forfeiture statute upon which it was modeled, 21 U.S.C. § 881 (1970 ed.), authorized the forfeiture of personal property only. It was not until 1984, ten years later, that Congress amended § 881 to authorize the forfeiture of real property. *See* 21 U.S.C. § 881(a)(7); Pub.L. 98-473, § 306, 98 Stat. 2050.

The right to prior notice and a hearing is central to the Constitution's command of due process.

> The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of

> property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property. . . .

Fuentes v. Shevin, 407 U.S. at 80-81.

We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in "`extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" *Id.* at 82 (quoting *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971)); *United States v. $8,850,* 461 U.S. at 562, n. 12. Whether the seizure of real property for purposes of civil forfeiture justifies such an exception requires an examination of the competing interests at stake, along with the promptness and adequacy of later proceedings. The three-part inquiry set forth in *Mathews v. Eldridge,* 424 U.S. 319 (1976), provides guidance in this regard. The *Mathews* analysis requires us to consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose. *Id.* at 335.

Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of [510 U.S. 54] historic and continuing importance. *Cf. United States v. Karo,* 468 U.S. 705, 714-715 (1984); *Payton v. New York,* 445 U.S. 573, 590 (1980). The seizure deprived Good of valuable rights of ownership, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents. All that the seizure left him, by the Government's own submission, was the right to bring a claim for the return of title at some unscheduled future hearing.

In *Fuentes,* we held that the loss of kitchen appliances and household furniture was significant enough to warrant a predeprivation hearing. 407 U.S. at 70-71. And in *Connecticut v. Doehr,* 500 U.S. 1 (1991), we held that a state statute authorizing prejudgment attachment of real estate without prior notice or hearing was unconstitutional, in the absence of extraordinary circumstances, even though the attachment did not interfere with the owner's use or possession and did not affect, as a general matter, rentals from existing leaseholds.

The seizure of a home produces a far greater deprivation than the loss of furniture, or even attachment. It gives the Government not only the right to prohibit sale, but also the right to evict occupants, to modify the property, to condition occupancy, to receive rents, and to supersede the owner in all rights pertaining to the use, possession, and enjoyment of the property.

The Government makes much of the fact that Good was renting his home to tenants, and contends that the tangible effect of the seizure was limited to taking the $900 a month he was due in rent. But even if this were the only deprivation at issue, it would not render the loss insignificant or unworthy of

due process protection. The rent represents a significant portion of the exploitable economic value of Good's home. It cannot be classified as *de minimis* for purposes of procedural due process. In sum, the private [510 U.S. 55] interests at stake in the seizure of real property weigh heavily in the *Mathews* balance.

The practice of *ex parte* seizure, moreover, creates an unacceptable risk of error. Although Congress designed the drug forfeiture statute to be a powerful instrument in enforcement of the drug laws, it did not intend to deprive innocent owners of their property. The affirmative defense of innocent ownership is allowed by statute. *See* 21 U.S.C. § 881(a)(7) ("[N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner").

The *ex parte* preseizure proceeding affords little or no protection to the innocent owner. In issuing a warrant of seizure, the magistrate judge need determine only that there is probable cause to believe that the real property was "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a felony narcotics offense. *Ibid.* The Government is not required to offer any evidence on the question of innocent ownership or other potential defenses a claimant might have. *See, e.g., Austin v. United States,* 509 U.S. 602 (1993) (holding that forfeitures under 21 U.S.C. §§ 881(a)(4) and (a)(7) are subject to the limitations of the Excessive Fines Clause). Nor would that inquiry, in the *ex parte* stage, suffice to protect the innocent owner's interests.

> [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172 (1951) (Frankfurter, J., concurring) (footnotes omitted).

The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking. That protection is of particular importance here, [510 U.S. 56] where the Government has a direct pecuniary interest in the outcome of the proceeding.{2} *See Harmelin v. Michigan,* 501 U.S. 957, 979, n. 9 (1991) (opinion of Scalia, J.) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit"). Moreover, the availability of a postseizure hearing may be no recompense for losses caused by erroneous seizure. Given the congested civil dockets in federal courts, a claimant may not receive an adversary hearing until many months after the seizure. And even if the ultimate judicial decision is that the claimant was an innocent owner, or that the Government lacked probable cause, this determination, coming months after the seizure, "would not cure the temporary deprivation that an earlier hearing might have prevented." *Doehr,*

424 U.S. at 15.

This brings us to the third consideration under *Mathews,*

> the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. The governmental interest we consider here is not some general interest in forfeiting property, but the specific interest in seizing real property before the forfeiture hearing. The question in the civil forfeiture context is whether *ex parte* seizure is justified by a pressing need for prompt action. *See Fuentes,* 407 U.S. at 91. We find no pressing need here. **[510 U.S. 57]**

This is apparent by comparison to *Calero-Toledo,* where the Government's interest in immediate seizure of a yacht subject to civil forfeiture justified dispensing with the usual requirement of prior notice and hearing. Two essential considerations informed our ruling in that case: first, immediate seizure was necessary to establish the court's jurisdiction over the property, 416 U.S. at 679, and second, the yacht might have disappeared had the Government given advance warning of the forfeiture action. *Ibid. See also United States v. Von Neumann,* 474 U.S. 242, 251 (1986) (no preseizure hearing is required when customs officials seize an automobile at the border). Neither of these factors is present when the target of forfeiture is real property.

Because real property cannot abscond, the court's jurisdiction can be preserved without prior seizure. It is true that seizure of the *res* has long been considered a prerequisite to the initiation of *in rem* forfeiture proceedings. *See Republic Nat. Bank of Miami v. United States,* 506 U.S. 80, 84 (1992); *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 363 (1984). This rule had its origins in the Court's early admiralty cases, which involved the forfeiture of vessels and other movable personal property. *See Taylor v. Carryl,* 20 How. 583, 599 (1858); *The Brig Ann,* 9 Cranch 289 (1815); *Keene v. United States,* 5 Cranch 304, 310 (1809). Justice Story, writing for the Court in *The Brig Ann,* explained the justification for the rule as one of fixing and preserving jurisdiction:

> [B]efore judicial cognizance can attach upon a forfeiture *in rem,* . . . there must be a seizure; for until seizure, it is impossible to ascertain what is the competent forum.

9 Cranch at 291. But when the *res* is real property, rather than personal goods, the appropriate judicial forum may be determined without actual seizure.

As *The Brig Ann* held, all that is necessary "[i]n order to institute and perfect proceedings *in rem,* [is] that the thing should be actually or constructively within the reach of the Court." *Ibid.* And as we noted last Term,

> [f]airly read, **[510 U.S. 58]** *The Brig Ann* simply restates the rule that the court must

> have actual or constructive control of the *res* when an *in rem* forfeiture suit is initiated.

Republic Nat. Bank, supra, at 87. In the case of real property, the *res* may be brought within the reach of the court simply by posting notice on the property and leaving a copy of the process with the occupant. In fact, the rules which govern forfeiture proceedings under § 881 already permit process to be executed on real property without physical seizure:

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

Rule E(4)(b), Supplemental Rules for Certain Admiralty and Maritime Claims. *See also United States v. TWP 17 R 4, Certain Real Property in Maine,* 970 F.2d 984, 986, and n. 4 (CA1 1992).

Nor is the *ex parte* seizure of real property necessary to accomplish the statutory purpose of § 881(a)(7). The Government's legitimate interests at the inception of forfeiture proceedings are to ensure that the property not be sold, destroyed, or used for further illegal activity prior to the forfeiture judgment. These legitimate interests can be secured without seizing the subject property.

Sale of the property can be prevented by filing a notice of *lis pendens* as authorized by state law when the forfeiture proceedings commence. 28 U.S.C. § 1964; *and see* Haw.Rev.Stat. § 634-51 (1985) (*lis pendens* provision). If there is evidence, in a particular case, that an owner is likely to destroy his property when advised of the pending action, the Government may obtain an *ex parte* restraining order, or other appropriate relief, upon a proper showing in district court. *See* Fed.Rule Civ.Proc. 65; *United States v. Premises* [510 U.S. 59] *and Real Property at 4492 South Livonia Road,* 889 F.2d 1258, 1265 (CA2 1989). The Government's policy of leaving occupants in possession of real property under an occupancy agreement pending the final forfeiture ruling demonstrates that there is no serious concern about destruction in the ordinary case. *See* Brief for United States 13, n. 6 (citing Directive No. 90-10 (Oct. 9, 1990), Executive Office for Asset Forfeiture, Office of Deputy Attorney General). Finally, the Government can forestall further illegal activity with search and arrest warrants obtained in the ordinary course.

In the usual case, the Government thus has various means, short of seizure, to protect its legitimate interests in forfeitable real property. There is no reason to take the additional step of asserting control over the property without first affording notice and an adversary hearing.

Requiring the Government to postpone seizure until after an adversary hearing creates no significant administrative burden. A claimant is already entitled to an adversary hearing before a final judgment of forfeiture. No extra

hearing would be required in the typical case, since the Government can wait until after the forfeiture judgment to seize the property. From an administrative standpoint, it makes little difference whether that hearing is held before or after the seizure. And any harm that results from delay is minimal in comparison to the injury occasioned by erroneous seizure.

C

It is true that, in cases decided over a century ago, we permitted the *ex parte* seizure of real property when the Government was collecting debts or revenue. *See, e.g., Springer v. United States,* 102 U.S. 586, 593-594 (1881); *Murray's Lessee v. Hoboken Land & Improvement Co.,* 18 How. 272 (1856). Without revisiting these cases, it suffices to say that their apparent rationale -- like that for allowing summary seizures during wartime, *see Stoehr v. Wallace,* 255 [510 U.S. 60] U.S. 239 (1921); *Bowles v. Willingham,* 321 U.S. 503 (1944), and seizures of contaminated food, *see North American Cold Storage Co. v. Chicago,* 211 U.S. 306 (1908) -- was one of executive urgency. "The prompt payment of taxes," we noted, "may be vital to the existence of a government." *Springer, supra,* at 594. *See also G. M. Leasing Corp. v. United States,* 429 U.S. 338, 352, n. 18 (1977) ("The rationale underlying [the revenue] decisions, of course, is that the very existence of government depends upon the prompt collection of the revenues").

A like rationale justified the *ex parte* seizure of tax-delinquent distilleries in the late nineteenth century, *see, e.g., United States v. Stowell,* 133 U.S. 1 (1890); *Dobbins's Distillery v. United States,* 96 U.S. 395 (1878), since, before passage of the Sixteenth Amendment, the Federal Government relied heavily on liquor, customs, and tobacco taxes to generate operating revenues. In 1902, for example, nearly 75 percent of total federal revenues -- $479 million out of a total of $653 million -- was raised from taxes on liquor, customs, and tobacco. *See* U.S. Bureau of Census, Historical Statistics of the United States, Colonial Times to the Present 1122 (1976).

The federal income tax code adopted in the first quarter of this century, however, afforded the taxpayer notice and an opportunity to be heard by the Board of Tax Appeals before the Government could seize property for nonpayment of taxes. *See* Revenue Act of 1921, 42 Stat. 265-266; Revenue Act of 1924, 43 Stat. 297. In *Phillips v. Commissioner,* 283 U.S. 589 (1931), the Court relied upon the availability, and adequacy, of these preseizure administrative procedures in holding that no judicial hearing was required prior to the seizure of property. *Id.* at 597-599 (citing Act of February 26, 1926, ch. 27, § 274(a), 44 Stat. 9, 55; Act of May 29, 1928, ch. 852, §§ 272(a), 601, 45 Stat. 791, 852, 872). These constraints on the Commissioner could be overridden, but only when the Commissioner made a determination that a jeopardy assessment was necessary. 283 U.S. at 598. Writing for a unanimous [510 U.S. 61] Court, Justice Brandeis explained that, under the tax laws

> [f]ormal notice of the tax liability is thus given; the Commissioner is required to

> answer; and there is a complete hearing *de novo*. . . . These provisions amply protect the [taxpayer] against improper administrative action.

Id. at 598-599; *see also Commissioner v. Shapiro*, 424 U.S. 614, 631 (1976) ("[In] the *Phillips* case . . . , the taxpayer's assets could not have been taken or frozen . . . until he had either had, or waived his right to, a full and final adjudication of his tax liability before the Tax Court (then the Board of Tax Appeals)").

Similar provisions remain in force today. The current Internal Revenue Code prohibits the Government from levying upon a deficient taxpayer's property without first affording the taxpayer notice and an opportunity for a hearing, unless exigent circumstances indicate that delay will jeopardize the collection of taxes due. *See* 26 U.S.C. §§ 6212, 6213, 6851, 6861.

Just as the urgencies that justified summary seizure of property in the 19th century had dissipated by the time of *Phillips*, neither is there a plausible claim of urgency today to justify the summary seizure of real property under § 881(a)(7). Although the Government relies to some extent on forfeitures as a means of defraying law enforcement expenses, it does not, and we think could not, justify the prehearing seizure of forfeitable real property as necessary for the protection of its revenues.

D

The constitutional limitations we enforce in this case apply to real property in general, not simply to residences. That said, the case before us well illustrates an essential principle: individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it. **[510 U.S. 62]**

Finally, the suggestion that this one petitioner must lose because his conviction was known at the time of seizure, and because he raises an as applied challenge to the statute, founders on a bedrock proposition: fair procedures are not confined to the innocent. The question before us is the legality of the seizure, not the strength of the Government's case.

In sum, based upon the importance of the private interests at risk and the absence of countervailing Government needs, we hold that the seizure of real property under § 881(a)(7) is not one of those extraordinary instances that justify the postponement of notice and hearing. Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.{3}

To establish exigent circumstances, the Government must show that less restrictive measures -- *i.e.*, a *lis pendens*, restraining order, or bond -- would not suffice to protect the Government's interests in preventing the sale,

destruction, or continued unlawful use of the real property. We agree with the Court of Appeals that no showing of exigent circumstances has been made in this case, and we affirm its ruling that the *ex parte* seizure of Good's real property violated due process.

III

We turn now to the question whether a court must dismiss a forfeiture action that the Government filed within the statute [510 U.S. 63] of limitations, but without complying with certain other statutory timing directives.

Section 881(d) of Title 21 incorporates the "provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws." The customs laws, in turn, set forth various timing requirements. Section 1621 of Title 19 contains the statute of limitations:

> No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered.

All agree that the Government filed its action within the statutory period.

The customs laws also contain a series of internal requirements relating to the timing of forfeitures. Section 1602 of Title 19 requires that a customs agent "report immediately" to a customs officer every seizure for violation of the customs laws, and every violation of the customs laws. Section 1603 requires that the customs officer "report promptly" such seizures or violations to the United States attorney. And § 1604 requires the Attorney General "forthwith to cause the proper proceedings to be commenced" if it appears probable that any fine, penalty, or forfeiture has been incurred. The Court of Appeals held, over a dissent, that failure to comply with these internal timing requirements mandates dismissal of the forfeiture action. We disagree.

We have long recognized that

> many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them . . . do not limit their power or render its exercise in disregard of the requisitions ineffectual.

French v. Edwards, 13 Wall. 506, 511 (1872). We have held that, if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not, in the ordinary course, impose their own coercive sanction. *See United States v. Montalvo-Murillo,* 495 U.S. 711, 717-721 (1990); *Brock v. Pierce County,* 476 U.S. 253, [510 U.S. 64] 259-262 (1986); *see also St. Regis Mohawk Tribe v. Brock,* 769 F.2d 37, 41 (CA2 1985) (Friendly, J.).

In *Montalvo-Murillo,* for example, we considered the Bail Reform Act of 1984, which requires an "immediat[e]" hearing upon a pretrial detainee's "first

appearance before the judicial officer." 18 U.S.C. § 3142(f). Because

> [n]either the timing requirements nor any other part of the Act [could] be read to require, or even suggest, that a timing error must result in release of a person who should otherwise be detained,

we held that the federal courts could not release a person pending trial solely because the hearing had not been held "immediately." 495 U.S. at 716-717. We stated that

> [t]here is no presumption or general rule that, for every duty imposed upon the court or the Government and its prosecutors, there must exist some corollary punitive sanction for departures or omissions, even if negligent.

Id. at 717 (citing *French, supra,* at 511). To the contrary, we stated that

> [w]e do not agree that we should, or can, invent a remedy to satisfy some perceived need to coerce the courts and the Government into complying with the statutory time limits.

495 U.S. at 721.

Similarly, in *Brock, supra,* we considered a statute requiring that the Secretary of Labor begin an investigation within 120 days of receiving information about the misuse of federal funds. The respondent there argued that failure to act within the specified time period divested the Secretary of authority to investigate a claim after the time limit had passed. We rejected that contention, relying on the fact that the statute did not specify a consequence for a failure to comply with the timing provision. *Id.* at 258-262.

Under our precedents, the failure of Congress to specify a consequence for noncompliance with the timing requirements of 19 U.S.C. §§ 1602-1604 implies that Congress intended the responsible officials administering the Act to have discretion to determine what disciplinary measures are appropriate when their subordinates fail to discharge their statutory **[510 U.S. 65]** duties. Examination of the structure and history of the internal timing provisions at issue in this case supports the conclusion that the courts should not dismiss a forfeiture action for noncompliance. Because § 1621 contains a statute of limitations -- the usual legal protection against stale claims -- we doubt Congress intended to require dismissal of a forfeiture action for noncompliance with the internal timing requirements of §§ 1602-1604. *Cf. United States v. $8,850,* 461 U.S. at 563, n. 13.

Statutes requiring customs officials to proceed with dispatch have existed at least since 1799. *See* Act of Mar. 2, 1799, § 89, 1 Stat. 695-696. These directives help to ensure that the Government is prompt in obtaining revenue from forfeited property. It would make little sense to interpret directives designed to ensure the expeditious collection of revenues in a way that renders the Government unable, in certain circumstances, to obtain its revenues at all.

We hold that courts may not dismiss a forfeiture action filed within the

five-year statute of limitations for noncompliance with the internal timing requirements of §§ 1602-1604. The Government filed the action in this case within the five-year statute of limitations, and that sufficed to make it timely. We reverse the contrary holding of the Court of Appeals.

IV

The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

REHNQUIST, J., concurring and dissenting

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA joins, and JUSTICE O'CONNOR joins in Part II and III, concurring in part and dissenting in part.

I concur in Parts I and III of the Court's opinion and dissent with respect to Part II. The Court today departs from longstanding historical precedent and concludes that *ex parte* warrant requirement under the Fourth Amendment [510 U.S. 66] fails to afford adequate due process protection to property owners who have been convicted of a crime that renders their real property susceptible to civil forfeiture under 21 U.S.C. § 881(a)(7). It reaches this conclusion although no such adversary hearing is required to deprive a criminal defendant of his liberty before trial. And its reasoning casts doubt upon long-settled law relating to seizure of property to enforce income tax liability. I dissent from this ill-considered and disruptive decision.

I

The Court applies the three-factor balancing test for evaluating procedural due process claims set out in *Mathews v. Eldridge,* 424 U.S. 319 (1976), to reach its unprecedented holding. I reject the majority's expansive application of *Mathews. Mathews* involved a due process challenge to the adequacy of administrative procedures established for the purpose of terminating Social Security disability benefits, and the *Mathews* balancing test was first conceived to address due process claims arising in the context of modern administrative law. No historical practices existed in this context for the Court to consider. The Court has expressly rejected the notion that the *Mathews* balancing test constitutes a "one size fits all" formula for deciding every due process claim that comes before the Court. *See Medina v. California,* 505 U.S. 437 (1992).(holding that the Due Process Clause has limited operation beyond the specific guarantees enumerated in the Bill of Rights). More importantly, the Court does not work on a clean slate in the civil forfeiture context involved here. It has long sanctioned summary proceedings in civil forfeitures. *See, e.g., Dobbins's Distillery v. United States,* 96 U.S. 395 (1878) (upholding seizure of a distillery by executive officers based on *ex parte warrant*); and *G.M. Leasing Corp. v. United States,* 429 U.S. 338 (1977) (upholding

warrantless automobile seizures). [510 U.S. 67]

A

The Court's fixation on *Mathews* sharply conflicts with both historical practice and the specific textual source of the Fourth Amendment's "reasonableness" inquiry. The Fourth Amendment strikes a balance between the people's security in their persons, houses, papers, and effects and the public interest in effecting searches and seizures for law enforcement purposes. *Zurcher v. Stanford Daily,* 436 U.S. 547, 559 (1978); *see also Maryland v. Buie, 494 U.S. 325, 331 (1990);* and *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 619 (1989). Compliance with the standards and procedures prescribed by the Fourth Amendment constitutes all the "process" that is "due" to respondent Good under the Fifth Amendment in the forfeiture context. We made this very point in *Gerstein v. Pugh,* 420 U.S. 103 (1975), with respect to procedures for detaining a criminal defendant pending trial:

> The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person *or property* in criminal cases, including the detention of suspects pending trial.

Id. at 125 (emphasis added). The *Gerstein* Court went on to decide that, while there must be a determination of probable cause by a neutral magistrate in order to detain an arrested suspect prior to trial, such a determination could be made in a nonadversarial proceeding, based on hearsay and written testimony. *Id.* at 120. It is paradoxical indeed to hold that a criminal defendant can be temporarily deprived of liberty on the basis of an *ex parte* [510 U.S. 68] probable cause determination, yet respondent Good cannot be temporarily deprived of property on the same basis. As we said in *United States v. Monsanto,* 491 U.S. 600, 615-616 (1989):

> [I]t would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense.

Similarly, in *Graham v. Connor,* 490 U.S. 386, 394-395 (1989), the Court faced the question of what constitutional standard governed a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other "seizure" of his person. We held that the Fourth Amendment, rather than the Due Process Clause, provides the source of any specific limitations on the use of force in seizing a person:

> Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due

process," must be the guide for analyzing these claims.

Id. at 395. The "explicit textual source of constitutional protection" found in the Fourth Amendment should also guide the analysis of respondent Good's claim of a right to additional procedural measures in civil forfeitures.

B

The Court dismisses the holdings of *Gerstein* and *Graham* as inapposite because they concern "the arrest or detention of criminal suspects." *Ante* at 50. But we have never held that the Fourth Amendment is limited only to criminal proceedings. In *Soldal v. Cook County,* 506 U.S. 56, 67 (1992), **[510 U.S. 69]** we expressly stated that the Fourth Amendment "applies in the civil context as well." Our historical treatment of civil forfeiture procedures underscores the notion that the Fourth Amendment specifically governs the process afforded in the civil forfeiture context, and it is too late in the day to question its exclusive application. As we decided in *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974), there is no need to look beyond the Fourth Amendment in civil forfeitures proceedings involving the Government because *ex parte* seizures are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." *Id.* at 686 (quoting *J.W. Goldsmith, Jr.-Grant Co. v. United States,* 254 U.S. 505, 510-511 (1921) (forfeiture not a denial of procedural due process despite the absence of preseizure notice and opportunity for a hearing)).

The Court acknowledges the long history of *ex parte* seizures of real property through civil forfeiture, *see Phillips v. Commissioner,* 283 U.S. 589 (1931); *Springer v. United States,* 102 U.S. 586 (1881); *Murray's Lessee v. Hoboken Land & Improvement Co.,* 18 How. 272 (1856); *United States v. Stowell,* 133 U.S. 1 (1890); *and Dobbins's Distillery v. United States,* 96 U.S. 395 (1878), and says "[w]ithout revisiting these cases," *ante* at 59 -- whatever that means -- that they appear to depend on the need for prompt payment of taxes. The Court goes on to note that the passage of the Sixteenth Amendment alleviated the Government's reliance on liquor, customs, and tobacco taxes as sources of operating revenue. Whatever the merits of this novel distinction, it fails entirely to distinguish the leading case in the field, *Phillips v. Commissioner, supra,* a unanimous opinion authored by Justice Brandeis. That case dealt with the enforcement of income tax liability, which the Court says has replaced earlier forms of taxation as the principle source of governmental revenue. There, the Court said:

> The right of the United States to collect its internal revenue by summary administrative proceedings has **[510 U.S. 70]** long been settled . . . [w]here, as here adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.

283 U.S. at 595 (footnote omitted).

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

Id. at 596-597. Thus, today's decision does not merely discard established precedence regarding excise taxes, but deals at least a glancing blow to the authority of the Government to collect income tax delinquencies by summary proceedings.

II

The Court attempts to justify the result it reaches by expansive readings of *Fuentes v. Shevin,* 407 U.S. 67 (1972), and *Connecticut v. Doehr,* 501 U.S. 1 (1991). In *Fuentes,* the Court struck down state replevin procedures, finding that they served no important state interest that might justify the summary proceedings. 407 U.S. at 96. Specifically, the Court noted that the tension between the private buyer's use of the property pending final judgment and the private seller's interest in preventing further use and deterioration of his security tipped the balance in favor of a prior hearing in certain replevin situations. "[The provisions] allow summary seizure of a person's possessions when no more than private gain is directly at stake." *Id.* at 92. *Cf. Mitchell v. W.T. Grant Co.,* 417 U.S. 600 (1974) (Upholding Louisiana sequestration statute that provided immediate post-deprivation hearing along with the option of damages).

The Court in *Fuentes* also was careful to point out the limited situations in which seizure before hearing was constitutionally permissible, and included among them "summary [510 U.S. 71] seizure of property to collect the internal revenue of the United States." 407 U.S. at 91-91 (citing *Phillips v. Commissioner, supra*). Certainly the present seizure is analogous, and it is therefore quite inaccurate to suggest that *Fuentes* is authority for the Court's holding in the present case.

Likewise, in *Doehr,* the Court struck down a state statute authorizing prejudgment attachment of real estate without prior notice or hearing due to potential bias of the self-interested private party seeking attachment. The Court noted that the statute enables one the private parties to "make use of state procedures with the overt, significant assistance of state officials," that involve state action "substantial enough to implicate the Due Process Clause." *Connecticut v. Doehr, supra,* at 11 (quoting *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 486 (1988)). The Court concluded that, absent exigent circumstances, the private party's interest in attaching the property did not justify the burdening of the private property owner's rights without a hearing to determine the likelihood of recovery. 501 U.S. at 18. In the present case, however, it is not a private party, but the Government itself, which is seizing the property.

The Court's effort to distinguish *Calero-Toledo v. Pearson Yacht Leasing*

Co., 416 U.S. 663 (1974), is similarly unpersuasive. The Court says that

> [c]entral to our analysis in *Calero-Toledo* was the fact that a yacht was the "sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advanced warning of confiscation were given."

Ante at 52 (quoting *Calero-Toledo, supra,* at 679). But this is one of the *three* reasons given by the Court for upholding the summary forfeiture in that case: the other two -- "fostering the public interest and preventing continued illicit use of the property," and the fact that the "seizure is not initiated by self-interested private parties; rather, Commonwealth officials determine whether seizure is appropriate . . . ," 416 U.S. at 679, are both met in the present [510 U.S. 72] case. And while not capable of being moved or concealed, the real property at issue here surely could be destroyed or damaged. Several dwellings are located on the property that was seized from respondent Good, and these buildings could easily be destroyed or damaged to prevent them from falling into the hands of the Government if prior notice were required.

The government interests found decisive in *Calero-Toledo* are equally present here: the seizure of respondent Good's real property serves important governmental purposes in combatting illegal drugs; a preseizure notice might frustrate this statutory purpose by permitting respondent Good to destroy or otherwise damage the buildings on the property; and Government officials made the seizure rather than self-interested private parties seeking to gain from the seizure. Although the Court has found some owners entitled to an immediate postseizure administrative hearing, *see, e.g., Mitchell v. W.T. Grant Co., supra,* not until the majority adopted the Court of Appeals ruling have we held that the Constitution demanded notice and a *preseizure* hearing to satisfy due process requirements in civil forfeiture cases.*

III

This is not to say that the Government's use of civil forfeiture statutes to seize real property in drug cases may not cause hardship to innocent individuals. But I have grave [510 U.S. 73] doubts whether the Court's decision in this case will do much to alleviate those hardships, and I am confident that whatever social benefits might flow from the decision are more than offset by the damage to settled principles of constitutional law which are inflicted to secure these perceived social benefits. I would reverse the decision of the Court of Appeals *in toto.*

O'CONNOR, J., concurring and dissenting

JUSTICE O'CONNOR, concurring in part and dissenting in part.

Today the Court declares unconstitutional an act of the Executive Branch taken with the prior approval of a federal magistrate in full compliance with the laws enacted by Congress. On the facts of this case, however, I am unable to conclude that the seizure of Good's property did not afford him due process. I

agree with the Court's observation in an analogous case more than a century ago:

> If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government.

Springer v. United States, 102 U.S. 586, 594 (1881).

I

With respect to whether 19 U.S.C. §§ 1602-1604 impose a timeliness requirement over and above the statute of limitations, I agree with the dissenting judge below that the Ninth Circuit improperly "converted a set of housekeeping rules for the government into statutory protection for the property of malefactors." 971 F.2d 1376, 1384 (1992). I therefore join Parts I and III of the Court's opinion.

I cannot agree, however, that, under the circumstances of this case -- where the property owner was previously convicted of a drug offense involving the property, the Government obtained a warrant before seizing it, and the residents were not dispossessed -- there was a due process violation [510 U.S. 74] simply because Good did not receive preseizure notice and an opportunity to be heard. I therefore respectfully dissent from Part II of the Court's opinion; I also join Parts II and III of the opinion of The Chief Justice.

II

My first disagreement is with the Court's holding that the Government must give notice and a hearing before seizing *any* real property prior to forfeiting it. That conclusion is inconsistent with over a hundred years of our case law. We have already held that seizure for purpose of forfeiture is one of those "extraordinary situations," *Fuentes v. Shevin,* 407 U.S. 67, 82 (1972) (internal quotation marks omitted), in which the Due Process Clause does not require predeprivation notice and an opportunity to be heard. *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 676-680 (1974). As we have recognized, *Calero-Toledo* "clearly indicates that due process does not require federal [agents] to conduct a hearing before seizing items subject to forfeiture." *United States v. $8,850,* 461 U.S. 555, 562, n. 12 (1983); *see also United States v. Von Neumann,* 474 U.S. 242, 249, n. 7 (1986). Those cases reflect the common sense notion that the property owner receives all the process that is due at the forfeiture hearing itself. *See id.* at 251 ("[The claimant's] right to a [timely] forfeiture proceeding . . . satisfies any due process right with respect to the [forfeited property]"); *Windsor v. McVeigh,* 93 U.S. 274, 279 (1876).

The distinction the Court tries to draw between our precedents and this case -- the only distinction it *can* draw -- is that real property is somehow different than personal property for due process purposes. But that distinction has never been considered constitutionally relevant in our forfeiture cases.

Indeed, this Court rejected precisely the same distinction in a case in which we were presented with a due process challenge to the forfeiture of real property for back taxes: **[510 U.S. 75]**

> The power to distrain personal property for the payment of taxes is almost as old as the common law. . . . Why is it not competent for Congress to apply to realty as well as personalty the power to distrain and sell when necessary to enforce the payment of a tax? It is only the further legitimate exercise of the same power for the same purpose.

Springer, supra, at 593-594.

There is likewise no basis for distinguishing between real and personal property in the context of forfeiture of property used for criminal purposes. The required nexus between the property and the crime -- that it be used to commit, or facilitate the commission of, a drug offense -- is the same for forfeiture of real and personal property. *Compare* 21 U.S.C. § 881(a)(4) *with* § 881(a)(7); *see Austin v. United States,* 509 U.S. 602, 619-620 (1993) (construing the two provisions equivalently). Forfeiture of real property under similar circumstances has long been recognized. *Dobbins's Distillery v. United States,* 96 U.S. 395, 399 (1878) (upholding forfeiture of "the real estate used to facilitate the [illegal] operation of distilling"); *see also United States v. Stowell,* 133 U.S. 1 (1890) (upholding forfeiture of land and buildings used in connection with illegal brewery).

The Court attempts to distinguish our precedents by characterizing them as being based on "executive urgency." *Ante* at 60. But this case, like all forfeiture cases, also involves executive urgency. Indeed, the Court in *Calero-Toledo* relied on the same cases the Court disparages:

> [D]ue process is not denied when postponement of notice and hearing is necessary to protect the public from contaminated food, *North American [Cold] Storage Co. v. Chicago,* 211 U.S. 306 (1908); . . . or to aid the collection of taxes, *Phillips v. Commissioner,* 283 U.S. 589 (1931); or the war effort, *United States v. Pfitsch,* 256 U.S. 547 (1921).

416 U.S. at 679. **[510 U.S. 76]** The Court says that there is no "plausible claim of urgency today to justify the summary seizure of real property under § 881(a)(7)." *Ante* at 61. But we said precisely the opposite in *Calero-Toledo*: "The considerations that justified postponement of notice and hearing in those cases are present here." 416 U.S. at 679. The *only* distinction between this case and *Calero-Toledo* is that the property forfeited here was realty, whereas the yacht in *Calero-Toledo* was personalty.

It is entirely spurious to say, as the Court does, that executive urgency depends on the nature of the property sought to be forfeited. The Court reaches its anomalous result by mischaracterizing *Calero-Toledo,* stating that the movability of the yacht there at issue was "[c]entral to our analysis." *Ante* at 52. What we actually said in *Calero-Toledo,* however, was that

> preseizure notice and hearing might frustrate the interests served by [forfeiture] statutes, since the property seized -- as here, a yacht -- will *often be of a sort* that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.

416 U.S. at 679 (emphasis added). The fact that the yacht could be sunk or sailed away was relevant to, but hardly dispositive of, the due process analysis. In any event, land and buildings *are* subject to damage or destruction. *See ante* at 72 (REHNQUIST, C.J., concurring in part and dissenting in part). Moreover, that was just one of the three justifications on which we relied in upholding the forfeiture in *Calero-Toledo.* The other two -- the importance of the governmental purpose and the fact that the seizure was made by government officials, rather than private parties -- are, without a doubt, equally present in this case, as THE CHIEF JUSTICE's opinion demonstrates. *Ante* at 71-72.

III

My second disagreement is with the Court's holding that the Government acted unconstitutionally in seizing *this* real [510 U.S. 77] property for forfeiture without giving Good prior notice and an opportunity to be heard. I agree that the due process inquiry outlined in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976) -- which requires a consideration of the private interest affected, the risk of erroneous deprivation and the value of additional safeguards, and the Government's interest -- provides an appropriate analytical framework for evaluating whether a governmental practice violates the Due Process Clause notwithstanding its historical pedigree. *Cf. Medina v. California,* 505 U.S. 437, 453 (1992) (O'CONNOR, J., concurring in judgment). But this case is an *as applied* challenge to the seizure of Good's property; on these facts, I cannot conclude that there was a constitutional violation.

The private interest at issue here -- the owner's right to control his property -- is significant. *Cf. Connecticut v. Doehr,* 501 U.S. 1, 11 (1991) ("[T]he property interests that attachment affects are significant"). Yet the preforfeiture intrusion in this case was minimal. Good was not living on the property at the time, and there is no indication that his possessory interests were in any way infringed. Moreover, Good's tenants were allowed to remain on the property. The property interest of which Good was deprived was the value of the rent during the period between seizure and the entry of the judgment of forfeiture -- a monetary interest identical to that of the property owner in *$8,850, supra,* in which we stated that preseizure notice and hearing was not required.

The Court emphasizes that people have a strong interest in their homes. *Ante* at 53-55, 61. But that observation confuses the Fourth and the Fifth Amendments. The "sanctity of the home" recognized by this Court's cases, *e. g., Payton v. New York,* 445 U.S. 573, 601 (1980), is founded on a concern with governmental *intrusion* into the owner's possessory or privacy interests --

the domain of the Fourth Amendment. Where, as here, the Government obtains a warrant supported by probable cause, that concern is allayed. The [510 U.S. 78] Fifth Amendment, on the other hand, is concerned with *deprivations* of property interests; for due process analysis, it should not matter whether the property to be seized is real or personal, home or not. The relevant inquiry is into the governmental interference with the owner's interest in whatever property is at issue, an intrusion that is minimal here.

Moreover, it is difficult to see what advantage a preseizure adversary hearing would have had in this case. There was already an *ex parte* hearing before a magistrate to determine whether there was probable cause to believe that Good's property had been used in connection with a drug trafficking offense. That hearing ensured that the probable validity of the claim had been established. *Cf. Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring). The Court's concern with innocent owners (*see ante* at 55-56) is completely misplaced here, where the warrant affidavit indicated that the property owner had already been convicted of a drug offense involving the property. *See* App. 29-31.

At any hearing -- adversary or not -- the Government need only show probable cause that the property has been used to facilitate a drug offense in order to seize it; it will be unlikely that giving the property owner an opportunity to respond will affect the probable cause determination. *Cf. Gerstein v. Pugh*, 420 U.S. 103, 121-122 (1975). And we have already held that property owners have a due process right to a prompt postseizure hearing, which is sufficient to protect the owner's interests. *See $8,850*, 461 U.S. at 564-565; *Von Neumann*, 474 U.S. at 249.

The Government's interest in the property is substantial. Good's use of the property to commit a drug offense conveyed all right and title to the United States, although a judicial decree of forfeiture was necessary to perfect the Government's interest. *See United States v. A Parcel of Rumson, N.J., Land*, 507 U.S. 111, 125-127 (1993) (plurality opinion); *compare Doehr, supra*, at 16 (noting that the plaintiff [510 U.S. 79] "had no existing interest in Doehr's real estate when he sought the attachment"). Seizure allowed the Government to protect its inchoate interest in the property itself. *Cf. Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 608-609 (1974).

Seizure also permitted the Government

> to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions.

Calero-Toledo, 416 U.S. at 679 (footnote omitted); *see also Fuentes*, 407 U.S. at 91, n. 23, citing *Ownbey v. Morgan*, 256 U.S. 94 (1921). In another case in which the forfeited property was land and buildings, this Court stated:

> Judicial proceedings *in rem*, to enforce a forfeiture, cannot, in general, be properly

> instituted until the property inculpated is previously seized by the executive authority, as it is the preliminary seizure of the property that brings the same within the reach of such legal process.

Dobbins's Distillery, 96 U.S. at 396, citing *The Brig Ann,* 9 Cranch 289 (1815). The Government in *Dobbins's Distillery* proceeded almost exactly as it did here: the United States Attorney swore out an affidavit alleging that the premises were being used as an illegal distillery, and thus were subject to forfeiture; a federal judge issued a seizure warrant; a deputy United States Marshal seized the property by posting notices thereon admonishing anyone with an interest in it to appear before the court on a stated date; and the court, after a hearing at which Dobbins claimed his interest, ordered the property forfeited to the United States. *See* Record in *Dobbins's Distillery v. United States,* No. 145, O. T. 1877, pp. 2-8, 37-39, 46-48. The Court noted that "[d]ue executive seizure was made in this case of the distillery and of the real and personal property used in connection with the same." 96 U.S. at 396. **[510 U.S. 80]**

The Court objects that the rule has its origins in admiralty cases, and has no applicability when the object of the forfeiture is real property. But Congress has specifically made the customs laws applicable to drug forfeitures, regardless of whether the Government seeks to forfeit real or personal property. 21 U.S.C. § 881(d); *cf. Tyler v. Defrees,* 11 Wall. 331, 346 (1871) ("Unquestionably, it was within the power of Congress to provide a full code of procedure for these cases [involving the forfeiture of real property belonging to rebels], but it chose to [adopt], as a general rule, a well-established system of administering the law of capture"). Indeed, just last Term, we recognized in a case involving the seizure and forfeiture of real property that "it long has been understood that a valid seizure of the *res* is a prerequisite to the *initiation* of an *in rem* civil forfeiture proceeding." *Republic Nat. Bank of Miami v. United States,* 506 U.S. 80, 84 (1992).

Finally, the burden on the Government of the Court's decision will be substantial. The practical effect of requiring an adversary hearing before seizure will be that the Government will conduct the full forfeiture hearing on the merits before it can claim its interest in the property. In the meantime, the Government can protect the important *federal* interests at stake only through the vagaries of state laws. And while, under the current system, only a few property owners contest the forfeiture, the Court's opinion creates an incentive and an opportunity to do so, thus increasing the workload of federal prosecutors and courts.

For all these reasons, I would reverse the judgment of the Court of Appeals. I therefore respectfully dissent from Part II of the opinion of the Court.

THOMAS, J., concurring and dissenting

JUSTICE THOMAS, concurring in part and dissenting in part.

Two fundamental considerations seem to motivate the Court's due process ruling: first, a desire to protect the [510 U.S. 81] rights incident to the ownership of real property, especially residences, and second, a more implicitly expressed distrust of the Government's aggressive use of broad civil forfeiture statutes. Although I concur with both of these sentiments, I cannot agree that Good was deprived of due process of law under the facts of this case. Therefore, while I join Parts I and III of the Court's opinion, I dissent from Part II.

Like the majority, I believe that "[i]ndividual freedom finds tangible expression in property rights." *Ante* at 61. In my view, as the Court has increasingly emphasized the creation and delineation of entitlements in recent years, it has not always placed sufficient stress upon the protection of individuals' traditional rights in real property. Although I disagree with the outcome reached by the Court, I am sympathetic to its focus on the protection of property rights -- rights that are central to our heritage. *Cf. Payton v. New York,* 445 U.S. 573, 601 (1980) ("[R]espect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic"); *Entick v. Carrington,* 19 How.St.Tr. 1029, 1066 (C.P. 1765) ("The great end, for which men entered into society was to secure their property").

And like the majority, I am disturbed by the breadth of new civil forfeiture statutes such as 21 U.S.C. § 881(a)(7), which subjects to forfeiture *all* real property that is used, or intended to be used, in the commission, or even the *facilitation,* of a federal drug offense.{1} As JUSTICE O'CONNOR [510 U.S. 82] points out, *ante* at 74-76, since the Civil War we have upheld statutes allowing for the civil forfeiture of real property. A strong argument can be made, however, that § 881(a)(7) is so broad that it differs not only in degree, but in kind, from its historical antecedents. *See, e.g.,* Brief for Respondents 19-21. Indeed, it is unclear whether the central theory behind *in rem* forfeiture, the fiction "that the thing is primarily considered the offender," *J. W. Goldsmith, Jr.-Grant Co. v. United States,* 254 U.S. 505, 511 (1921), can fully justify the immense scope of § 881(a)(7). Under this provision,

> large tracts of land [and any improvements thereon] which have no connection with crime other than being the location where a drug transaction occurred,

Brief for Respondents 20, are subject to forfeiture. It is difficult to see how such real property is necessarily in any sense "guilty" of an offense, as could reasonably be argued of, for example, the distillery in *Dobbins's Distillery v. United States,* 96 U.S. 395 (1878), or the pirate vessel in *Harmony v. United States,* 2 How. 210 (1844). Given that current practice under § 881(a)(7) appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary -- in an appropriate case -- to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture.{2}

In my view, however, Good's due process claim does not present that "appropriate" case. In its haste to serve laudable goals, the majority disregards our case law and ignores [510 U.S. 83] the critical facts of the case before it. As the opinions of THE CHIEF JUSTICE, *ante* at 69-72, and JUSTICE O'CONNOR, *ante* at 74-76, persuasively demonstrate, the Court's opinion is predicated in large part upon misreadings of important civil forfeiture precedents, especially *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).{3} I will not repeat the critiques found in the other dissents, but will add that it is twice puzzling for the majority to explain cases such as *Springer v. United States*, 102 U.S. 586 (1881), and *Dobbins's Distillery, supra,* as depending on the Federal Government's urgent need for revenue in the 19th century. First, it is somewhat odd that the Court suggests that the Government's financial concerns might justifiably control the due process analysis, *see ante* at 59-60, and second, it is difficult to believe that the prompt collection of funds was more essential to the Government a century ago than it is today.

I agree with the other dissenters that a fair application of the relevant precedents to this case would indicate that no due process violation occurred. But my concerns regarding the legitimacy of the current scope of the Government's real property forfeiture operations lead me to consider these cases as only helpful to the analysis, not dispositive. What convinces me that Good's due process rights were not violated are the facts of this case -- facts that are disregarded by the Court in its well-intentioned effort to protect "innocent owners" from mistaken Government seizures. *Ante* at 55. The Court forgets that "this case is an *as applied* challenge to the seizure of Good's property." *Ante* at 77 (O'CONNOR, J., concurring in part and dissenting in part). In holding that the Government generally may not seize real property prior to a final judgment of forfeiture, *see ante* at 59, 62, the [510 U.S. 84] Court effectively declares that many of the customs laws are facially unconstitutional as they apply under 21 U.S.C. § 881(d) to forfeiture actions brought pursuant to § 881(a)(7). *See, e.g.*, 19 U.S.C. §§ 1602, 1605 (authorizing seizure prior to adversary proceedings). We should avoid reaching beyond the question presented in order to fashion a broad constitutional rule when doing so is unnecessary for resolution of the case before us. *Cf. Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). The Court's overreaching is particularly unfortunate in this case because the Court's solicitude is so clearly misplaced: Good is not an "innocent owner"; he is a convicted drug offender.

Like JUSTICE O'CONNOR, I cannot agree with the Court that,

> under the circumstances of this case -- where the property owner was previously convicted of a drug offense involving the property, the Government obtained a warrant before seizing it, and the residents were not dispossessed -- there was a due process violation simply because Good did not receive preseizure notice and an opportunity to be heard.

Ante at 73-74 (O'CONNOR, J., concurring in part and dissenting in part).

Wherever the due process line properly should be drawn, in circumstances such as these, a preseizure hearing is not required as a matter of constitutional law. Moreover, such a hearing would be unhelpful to the property owner. As a practical matter, it is difficult to see what purpose it would serve. Notice, of course, is provided by the conviction itself. In my view, seizure of the property without more formalized notice and an opportunity to be heard is simply one of the many unpleasant collateral consequences that follows from conviction of a serious drug offense. *Cf. Price v. Johnston,* 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights").

It might be argued that this fact-specific inquiry is too narrow. Narrow, too, however, was the first question presented **[510 U.S. 85]** to us for review.{4} Moreover, when, as here, ambitious modern statutes and prosecutorial practices have all but detached themselves from the ancient notion of civil forfeiture, I prefer to go slowly. While I sympathize with the impulses motivating the Court's decision, I disagree with the Court's due process analysis. Accordingly, I respectfully dissent.

Footnotes

KENNEDY, J., lead opinion (Footnotes)

1. Title 21 U.S.C. § 881(a)(7) provides:

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

2. The extent of the Government's financial stake in drug forfeiture is apparent from a 1990 memo in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target:

> We must significantly increase production to reach our budget target.
>
> . . . Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.

Executive Office for United States Attorneys, U.S. Dept. of Justice, 38 United

States Attorney's Bulletin 180 (1990).

3. We do not address what sort of procedures are required for preforfeiture seizures of real property in the context of criminal forfeiture. *See, e.g.*, 21 U.S.C. § 853; 18 U.S.C. § 1963 (1988 ed. and Supp. IV). We note, however, that the federal drug laws now permit seizure before entry of a criminal forfeiture judgment only where the Government persuades a district court that there is probable cause to believe that a protective order "may not be sufficient to assure the availability of the property for forfeiture." 21 U.S.C. § 853(f).

REHNQUIST, J., concurring and dissenting (Footnotes)

* Ironically, courts and commentators have debated whether even a *warrant* should be required for civil forfeiture seizures, not whether *notice* and a *preseizure hearing* should apply. *See, e.g.*, Nelson, Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture, 80 Calif.L.Rev. 1309 (1992); Ahuja, Civil Forfeiture, Warrantless Property Seizures, and the Fourth Amendment, 5 Yale L. & Policy Rev. 428 (1987); *and* Comment, Forfeiture, Seizures and the Warrant Requirement, 48 U.Chi.L.Rev. 960 (1981). Forcing the Government to notify the affected property owners and go through a preseizure hearing in civil forfeiture cases must have seemed beyond the pale to these commentators.

THOMAS, J., concurring and dissenting (Footnotes)

1. Other courts have suggested that Government agents, and the statutes under which they operate, have gone too far in the civil forfeiture context. *See, e.g., United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (CA2 1992) ("We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes"); *United States v. One Parcel of Property*, 964 F.2d 814, 818 (CA8 1992) ("[W]e are troubled by the government's view that *any* property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction"), *rev'd sub nom. Austin v. United States*, 509 U.S. 602 (1993).

2. Such a case may arise in the excessive fines context. *See Austin v. United States*, 509 U.S. at 628 (1993) (SCALIA, J., concurring in part and concurring in judgment) (suggesting that "[t]he relevant inquiry for an excessive forfeiture under [21 U.S.C.] § 881 is the relationship of the property to the offense: was it close enough to render the property, under traditional standards, 'guilty,' and hence forfeitable?").

3. With scant support, the Court also dispenses with the ancient jurisdictional rule that "a valid seizure of the *res* is a prerequisite to the

initiation of an *in rem* civil forfeiture proceeding," *Republic Nat. Bank of Miami v. United States,* 506 U.S. 80, 84 (1992), at least in the case of real property. *See ante* at 57-58.

4.

Whether the seizure of the respondent real property for forfeiture, pursuant to a warrant issued by a magistrate judge based on a finding of probable cause, violated the Due Process Clause of the Fifth Amendment because the owner (who did not reside on the premises) was not given notice and an opportunity for a hearing prior to the seizure.

Pet. for Cert. I.

Cases citing this case . . .

The following 6 case(s) in the USSC+ database cite this case:

Hudson v. United States, No. 1997-010 (1997)
Gilbert v. Homar, No. 96-651 (1997)
United States v. Ursery, No. 95-345 (1996)
Degen v. United States, No. 95-173 (1996)
Bennis v. Michigan, 516 U.S. 442 (1996)
Albright v. Oliver, 510 U.S. 266 (1994)

Republic Nat'l Bank of Miami v. United States
No. 91-767
Argued Oct. 5, 1992
Decided Dec. 14, 1992
506 U.S. 80

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Syllabus

The Government filed a civil action in the District Court alleging that a particular residence was subject to forfeiture under 21 U.S.C. § 881(a)(6) because its owner had purchased it with narcotics trafficking proceeds. After the United States Marshall seized the property, petitioner Bank, which claimed a lien under a recorded mortgage, agreed to the Government's request for a sale of the property, the proceeds of which were retained by the Marshal pending disposition of the case. A trial on the merits resulted in a judgment denying the Bank's claim with prejudice and forfeiting the sale proceeds to the United States. When the Bank filed a timely notice of appeal but failed to post a supersedeas bond or seek to stay the execution of the judgment, the Marshal, at the Government's request, transferred the sale proceeds to the United States Treasury. The Court of Appeals then granted the Government's motion to dismiss, holding, *inter alia,* that the removal of the sale proceeds from the judicial district terminated the District Court's *in rem* jurisdiction.

Held: the judgment is reversed, and the case is remanded.

JUSTICE BLACKMUN delivered the opinion of the Court with respect to Parts I, II, and IV, concluding that, in an *in rem* forfeiture action, the Court of Appeals is not divested of jurisdiction by the prevailing party's transfer of the *res* from the district. The "settled" rule on which the Government relies -- that jurisdiction over such a proceeding depends upon continued control of the *res* -- does not exist. Rather, the applicable general principle is that jurisdiction, once vested, is not divested by a discontinuance of possession, although exceptions may exist where, for example, release of the *res* would render the judgment "useless" because the *res* could neither the delivered to the complainant nor restored to the claimant. *See, e.g., United States v. The Little Charles,* 26 F.Cas. 979. *The Brig Ann,* 9 Cranch 289, 290, distinguished. The fictions if *in rem* forfeiture were developed primarily to expand the reach of the courts and to furnish remedies for aggrieved parties, not to provide a prevailing party with a means of defeating its adversary's claim for redress. Pp. 84-89, 92-93. **[506 U.S. 81]**

THE CHIEF JUSTICE delivered the opinion of the Court in part, concluding that a judgment for petitioner in the underlying forfeiture action

would not be rendered "useless" by the absence of a specific congressional appropriation authorizing the payment of funds to petitioner. Even if there exist circumstances where funds which have been deposited into the Treasury may be returned absent an appropriation, *but cf. Knote v. United States,* 95 U.S. 149, 154, it is unnecessary to plow that uncharted ground here. For together, 31 U.S.C. § 1304 -- the general appropriation for the payment of judgments against the United States -- and 28 U.S.C. § 2465 -- requiring the return of seized property upon entry of judgment for claimants in forfeiture proceedings -- would authorize the return of funds in this case in the event petitioner were to prevail below. *See OPM v. Richmond,* 496 U.S. 414, 432. Pp. 93-96.

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, in which REHNQUIST, C.J., and WHITE, STEVENS, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined, and an opinion with respect to Part III, in which STEVENS and O'CONNOR, JJ., joined. REHNQUIST, C.J., delivered the opinion of the Court in part, as to which WHITE, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined, and concurred in part and concurred in the judgment, joined by WHITE, SCALIA, KENNEDY, and SOUTER, JJ., *post,* p. 93. WHITE, J., filed a concurring opinion, *post,* p. 96. STEVENS, J., *post,* p. 99, and THOMAS, J., *post,* p. 99, filed opinions concurring in part and concurring in the judgment.

BLACKMUN, J., lead opinion

JUSTICE BLACKMUN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, and an opinion with respect to Part III in which JUSTICE STEVENS and JUSTICE O'CONNOR joined.

The issue in this case is whether the Court of Appeals may continue to exercise jurisdiction in an *in rem* civil forfeiture [506 U.S. 82] proceeding after the *res,* then in the form of cash, was removed by the United States Marshal from the judicial district and deposited in the United States Treasury.

I

In February, 1988, the Government instituted an action in the United States District Court for the Southern District of Florida seeking forfeiture of a specified single-family residence in Coral Gables. The complaint alleged that Indalecio Iglesias was the true owner of the property; that he had purchased it with proceeds of narcotics trafficking; and that the property was subject to forfeiture to the United States pursuant to § 511(a)(6) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended, 92 Stat. 3777, 21 U.S.C. § 881(a)(6).{1} A warrant for the arrest of the property was issued, and the United States Marshal seized it.

In response to the complaint, Thule Holding Corporation, a Panama corporation, filed a claim asserting that it was the owner of the *res* in question. Petitioner Republic National Bank of Miami filed a claim asserting a lien interest of $800,000 in the property under a mortgage recorded in 1987. Thule subsequently withdrew its claim. At the request of the Government, petitioner Bank agreed to a sale [506 U.S. 83] of the property. With court approval, the residence was sold for $1,050,000. The sale proceeds were retained by the Marshal pending disposition of the case. *See* App. 6, n. 2.

After a trial on the merits, the District Court entered judgment denying the Bank's claim with prejudice and forfeiting the sale proceeds to the United States pursuant to § 881(a)(6). App. 25. The court found probable cause to believe that Iglesias had purchased the property and completed the construction of the residence thereon with drug profits. It went on to reject the Bank's innocent-owner defense to forfeiture. *United States v. One Single Family Residence,* 731 F.Supp. 1563 (SD Fla.1990).{2} Petitioner Bank filed a timely notice of appeal, but did not post a supersedeas bond or seek to stay the execution of the judgment.

Thereafter, at the request of the Government, the United States Marshal transferred the proceeds of the sale to the Assets Forfeiture Fund of the United States Treasury. The Government then moved to dismiss the appeal for want of jurisdiction. App. 4.

The Court of Appeals granted the motion. 932 F.2d 1433 (CA11 1991). Relying on its 6-to-5 en banc decision in *United States v. One Lear Jet Aircraft,* 836 F.2d 1571, *cert. denied,* 487 U.S. 1204 (1988), the court held that the removal of the proceeds of the sale of the residence terminated the District Court's *in rem* jurisdiction. 932 F.2d at 1435-1436. The court also rejected petitioner Bank's argument that the District Court had personal jurisdiction because the Government had served petitioner with the complaint of forfeiture. *Id.* at 1436-1437. Finally, the court ruled that the Government [506 U.S. 84] was not estopped from contesting the jurisdiction of the Court of Appeals because of its agreement that the United States Marshal would retain the sale proceeds pending order of the District Court. *Id.* at 1437.

In view of inconsistency and apparent uncertainty among the Courts of Appeals,{3} we granted certiorari. 502 U.S. 1090 (1992).

II

A civil forfeiture proceeding under § 881 is an action *in rem,* "which shall conform as near as may be to proceedings in admiralty." 28 U.S.C. § 2461(b). In arguing that the transfer of the *res* from the judicial district deprived the Court of Appeals of jurisdiction, the Government relies on what it describes as a settled admiralty principle: that jurisdiction over an *in rem* forfeiture proceeding depends upon continued control of the *res.* We, however, find no such established rule in our cases. Certainly, it long has been understood that a

valid seizure of the *res* is a prerequisite to the *initiation* of an *in rem* civil forfeiture proceeding. *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 363 (1984); *Taylor v. Carryl,* 20 How. 583, 599 (1858); 1 S. Friedell, Benedict on Admiralty § 222, p. 14-39 (7th ed.1992); H. Hawes, The Law Relating to the Subject of Jurisdiction of Courts § 92 (1886). *See also* Supplemental Rules for Certain Admiralty and Maritime Claims C(2) and C(3). **[506 U.S. 85]** The bulk of the Government's cases stands merely for this unexceptionable proposition, which comports with the fact that, in admiralty, the

> seizure of the RES, and the publication of the monition or invitation to appear, is regarded as equivalent to the particular service of process in law and equity.

Taylor v. Carryl, 20 How. at 599.

To the extent that there actually is a discernible rule on the need for continued presence of the *res,* we find it expressed in cases such as *The Rio Grande,* 23 Wall. 458 (1875), and *United States v. The Little Charles,* 26 F.Cas. 979 (CC Va.1818). In the latter case, Chief Justice Marshall, sitting as Circuit Justice, explained that "continuance of possession" was not necessary to maintain jurisdiction over an *in rem* forfeiture action, citing the

> general principle that jurisdiction, once vested, is not divested, although a state of things should arrive in which original jurisdiction could not be exercised.

Id. at 982. The Chief Justice noted that, in some cases, there might be an exception to the rule where the release of the property would render the judgment "useless" because "the thing could neither be delivered to the libellants, nor restored to the claimants." *Ibid.* He explained, however, that this exception "will not apply to any case where the judgment will have any effect whatever." *Ibid.* Similarly, in *The Rio Grande,* this Court held that improper release of a ship by a marshal did not divest the Circuit Court of jurisdiction.

> We do not understand the law to be that an actual and continuous possession of the *res* is required to sustain the jurisdiction of the court. When the vessel was seized by the order of the court and brought within its control, the jurisdiction was complete. 23 Wall. at 463. The Court there emphasized the impropriety of the ship's release. The Government now suggests that the case merely announced an "injustice" exception to the requirement of continuous control. But the question is **[506 U.S. 86]** one of jurisdiction, and we do not see why the means of the *res'* removal should make a difference.{4}

Only once, in *The Brig Ann,* 9 Cranch 289, 290 (1815), has this Court found that events subsequent to the initial seizure destroyed jurisdiction in an *in rem* forfeiture action. In that case, a brig was seized in Long Island Sound and brought into the port of New Haven, where the collector took possession of it as forfeited to the United States. Several days later, the collector gave written orders for the release of the brig and its cargo from the seizure. Before the ship could leave, however, the District Court issued an information, and the

brig and cargo were taken by the Marshal into his possession. This Court held that, because the attachment was voluntarily released before the libel was filed and allowed, the District Court had no jurisdiction. Writing for the Court, Justice Story explained that judicial cognizance of a forfeiture *in rem* requires

> a good subsisting seizure *at the time when the libel or information is filed and allowed.* If a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who has made **[506 U.S. 87]** the seizure, all rights under it are gone. Although judicial jurisdiction once attached, it is divested by the subsequent proceedings, and it can be revived only by a new seizure. It is, in this respect, like a case of capture, which, although well made, gives no authority to the prize Court to proceed to adjudication, if it be voluntarily abandoned *before judicial proceedings are instituted.*

Id. at 291 (emphasis added).

Fairly read, *The Brig Ann* simply restates the rule that the court must have actual or constructive control of the *res* when an *in rem* forfeiture suit is initiated. If the seizing party abandons the attachment prior to filing an action, it, in effect, has renounced its claim. The result is "to purge away all the prior rights acquired by the seizure," *ibid.*, and, unless a new seizure is made, the case may not commence. *The Brig Ann* stands for nothing more than this.

The rule invoked by the Government thus does not exist, and we see no reason why it should. The fiction of *in rem* forfeiture were developed primarily to expand the reach of the courts and to furnish remedies for aggrieved parties, *see Continental Grain Co. v. Barge FBL 585,* 364 U.S. 19, 23 (1960); *United States v. Brig Malek Adhel,* 2 How. 210, 233 (1844), not to provide a prevailing party with a means of defeating its adversary's claim for redress. Of course, if a "defendant ship stealthily absconds from port and leaves the plaintiff with no *res* from which to collect," *One Lear Jet,* 836 F.2d at 1579 (Vance, J., dissenting), a court might determine that a judgment would be "useless." *Cf. The Little Charles,* 26 F.Cas. at 982. So, too, if the plaintiff abandons a seizure, a court will not proceed to adjudicate the case. These exceptions, however, are closely related to the traditional, theoretical concerns of jurisdiction: enforceability of judgments and fairness of notice to parties. *See* R. Casad, Jurisdiction in Civil Actions § 1.02, pp. 1-13 to 1-14 (2d ed.1991); *cf. Miller v. United States,* 11 Wall. 268, 294-295 (1870) ("Confessedly, **[506 U.S. 88]** the object of the writ was to bring the property under the control of the court and keep it there, as well as to give notice to the world. These objects would have been fully accomplished if its direction had been nothing more than to hold the property subject to the order of the court, and to give notice."). Neither interest depends absolutely upon the continuous presence of the *res* in the district.

Stasis is not a general prerequisite to the maintenance of jurisdiction. Jurisdiction over the person survives a change in circumstances, *Leman v. Krentler-Arnold Co.,* 284 U.S. 448, 454 (1932) ("[A]fter a final decree, a party cannot defeat the jurisdiction of the appellate tribunal by removing from the

jurisdiction, as the proceedings on appeal are part of the cause," citing *Nations v. Johnson,* 24 How. 195 (1860)), as does jurisdiction over the subject matter, *Louisville, N.A. & C.R. Co. v. Louisville Trust Co.,* 174 U.S. 552, 566 (1899) (mid-suit change in the citizenship of a party does not destroy diversity jurisdiction); *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 289-290 (1938) (jurisdiction survives reduction of amount in controversy). Nothing in the nature of *in rem* jurisdiction suggests a reason to treat it differently.

If the conjured rule were genuine, we would have to decide whether it had outlived its usefulness, and whether, in any event, it could ever be used by a plaintiff -- the instigator of the *in rem* action -- to contest the appellate court's jurisdiction. The rule's illusory nature obviates the need for such inquiries, however, and a lack of justification undermines any argument for its creation. We agree with the late Judge Vance's remark in *One Lear Jet,* 836 F.2d at 1577:

> although in some circumstances the law may require courts to depart from what seems to be fairness and common sense, such a departure in this case is unjustified and unsupported by the law of forfeiture and admiralty.

We have no cause to override common sense and fairness here. We hold that, in an *in rem* forfeiture action, the Court of Appeals is not **[506 U.S. 89]** divested of jurisdiction by the prevail ing party's transfer of the *res* from the District.{5}

III

The Government contends, however, that this *res* no longer can be reached, because, having been deposited in the United States Treasury, it may be released only by congressional appropriation. If so, the case is moot, or, viewed another way, it falls into the "useless judgment" exception noted above, to appellate *in rem* jurisdiction.

The Appropriations Clause, U.S.Const., Art. I, § 9, cl. 7, provides: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." In *Knote v. United States,* 95 U.S. 149 (1877), this Court held that the President could not order the Treasury to repay the proceeds from the sale of property forfeited by a convicted traitor who had been pardoned. But the Government -- implicitly in its brief and explicitly at oral argument, *see* Tr. of Oral Arg. 37-39 -- now goes further, maintaining that, absent an appropriation, *any* funds that find their way into a Treasury account must remain there, regardless of their origin or ownership. Such a rule would lead to seemingly bizarre results. The Ninth Circuit recently observed:

> If, for example, an **[506 U.S. 90]** agent of the United States had scooped up the cash in dispute and, without waiting for a judicial order, had run to the nearest outpost of the Treasury and deposited the money . . . it would be absurd to say that only an act of Congress could restore the purloined cash to the court.

United States v. Ten Thousand Dollars ($10,000.00) in United States

Currency, 860 F.2d 1511, 1514 (1988). Yet that absurdity appears to be the logical consequence of the Government's position.

Perhaps it is not so absurd. In some instances where a private party pays money to a federal agency and is later deemed entitled to a refund, an appropriation has been assumed to be necessary to obtain the money. *See* 55 Comp.Gen. 625 (1976); United States General Accounting Office, Principles of Federal Appropriations Law, 5-80 to 5-81 (1982). Congress, therefore, has passed a permanent indefinite appropriation for

> "Refund of Moneys Erroneously Received and Covered" and other collections erroneously deposited that are not properly chargeable to another appropriation.

31 U.S.C. § 1322(b)(2). This appropriation has been interpreted to authorize, for example, the refund of charges assessed to investment advisers by the Securities and Exchange Commission and deposited in the Treasury, after those charges were held to be erroneous in light of decisions of this Court. *See* 55 Comp.Gen. 243 (1975); *see also National Presto Industries, Inc. v. United States,* 219 Ct.Cl. 626, 630 (1979) (suggesting that prior version of § 1322(b)(2) authorized refund of sum deposited in Treasury during litigation). Section 1322(b)(2) arguably applies here.

Petitioner offers a different suggestion. It identifies 28 U.S.C. § 2465 as an appropriation. That statute states:

> Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent.

That is hardly standard language of appropriation. *Cf.* 31 U.S.C. § 1301(d). Yet I have difficulty [506 U.S. 91] imagining how an "appropriation" of funds determined on appeal not to belong to the United States could ever be more specific.{6}

In part for that reason, however, I believe that a formal appropriation is not required in these circumstances. The Appropriations Clause governs only the disposition of money that belongs to the United States. The Clause "assure[s] that *public funds* will be spent according to the letter of the difficult judgments reached by Congress." *OPM v. Richmond,* 496 U.S. 414, 428 (1990) (emphasis added); *see also* Stith, Congress' Power of the Purse, 97 Yale L.J. 1343, 1358, and n. 67 (1988) (Clause encompasses only funds that belong to the United States); 2 Story, Commentaries on the Constitution of the United States § 1348 (3d ed 1858) (object of the Clause "is to secure regularity, punctuality, and fidelity, in the disbursements of the *public money*" (emphasis added)). I do not believe that funds held [506 U.S. 92] in the Treasury during the course of an ongoing *in rem* forfeiture proceeding -- the purpose of which, after all, is to determine the ownership of the *res, see, e.g., The Propeller Commerce,* 1 Black 575, 580-581 (1861); *The Maggie Hammond,* 9 Wall. 435, 456 (1869); *Jennings v. Carson,* 4 Cranch 2, 23 (1807) -- can properly be

considered public money. The Court in *Tyler v. Defrees,* 11 Wall. 331, 349 (1870), explained that once a valid seizure of forfeitable property has occurred and the court has notice of the fact, "[n]o change of the title or possession [can] be made, pending the judicial proceedings, which would defeat the final decree."

Contrary to the Government's broad submission here, the Comptroller General long has assumed that, in certain situations, an erroneous deposit of funds into a Treasury account can be corrected without a specific appropriation. *See* 53 Comp.Gen. 580 (1974); 45 Comp.Gen. 724 (1966); 3 Comp.Gen. 762 (1924); 12 Comp.Dec. 733, 735 (1906); Principles of Federal Appropriations Law, at 5-79 to 5-81. Most of these cases have arisen where money intended for one account was accidentally deposited in another. It would be unrealistic, for example, to require congressional authorization before a data processor who misplaces a decimal point can "undo" an inaccurate transfer of Treasury funds. The Government's absolutist view of the scope of the Appropriations Clause is inconsistent with these common sense understandings.

I would hold that the Constitution does not forbid the return without an appropriation of funds held in the Treasury during the course of an *in rem* forfeiture proceeding to the party determined to be their owner. Because the funds therefore could be disgorged if petitioner is adjudged to be their rightful owner, a judgment in petitioner's favor would not be "useless."

IV

In a civil forfeiture proceeding, where the Government has the power to confiscate private property on a showing of mere probable cause, the right to appeal is a crucial safeguard [506 U.S. 93] against abuse. No settled rule requires continuous control of the *res* for appellate jurisdiction in an *in rem* forfeiture proceeding. Nor does the Appropriations Clause place the money out of reach. Accordingly, we hold that the Court of Appeals did not lose jurisdiction when the funds were transferred from the Southern District of Florida to the Assets Forfeiture Fund of the United States Treasury. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

REHNQUIST, J., concurring

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court in part and, joined by JUSTICE WHITE, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE THOMAS,* concurred in part and concurred in the judgment.

I join the Court's judgment and Parts I, II, and IV of its opinion. I write

separately, however, because I do not agree with the Appropriations Clause analysis set forth in Part III. JUSTICE BLACKMUN

> would hold that the Constitution does not forbid the return without an appropriation of funds held in the Treasury during the course of an *in rem* forfeiture proceeding to the party determined to be their owner.

Ante at 92. JUSTICE BLACKMUN reaches this result because he concludes that funds deposited in the Treasury in the course of a proceeding to determine their ownership are not "public money." I have difficulty accepting the proposition that funds which have been deposited into the Treasury are not public money, regardless of whether the Government's ownership of those funds is disputed. Part of my difficulty stems from the lack of any support in our cases for this theory. **[506 U.S. 94]**

In *Knote v. United States,* 95 U.S. 149, 154 (1877), we stated:

> [I]f the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law.

Knote is distinguishable in that the forfeiture proceeding in that case was final at the time the appropriations question arose. But the principle that, once funds are deposited into the Treasury, they become public money -- and thus may only be paid out pursuant to a statutory appropriation -- would seem to transcend the facts of *Knote.* That there exists a specific appropriation for

> "Refund of Moneys Erroneously Received and Covered" and other collections erroneously deposited that are not properly chargeable to another appropriation,

31 U.S.C. § 1322(b)(2), supports this understanding.**

JUSTICE BLACKMUN relies principally on language from *Tyler v. Defrees,* 11 Wall. 331, 349 (1871), to the effect that, once a seizure of forfeitable property has occurred, "[n]o change of the title or possession [can] be made, pending the judicial proceedings, which would defeat the final decree." *See ante* at 92. This language is dictum rendered in the course of deciding a dispute over the sufficiency of the Marshal's seizure of the property subject to forfeiture. But even if it were the holding of the case, it would have no application to the present case, because here there *was* a **[506 U.S. 95]** final decree entered by the District Court in favor of the Government. It is petitioner's failure to post a bond or obtain a stay of that judgment which has brought the present controversy to this Court.

In any event, even if there are circumstances in which funds which have been deposited into the Treasury may be returned absent an appropriation, I believe it unnecessary to plow that uncharted ground here. The general appropriation for payment of judgments against the United States provides in part:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when --
>
> (1) payment is not otherwise provided for;
>
> (2) payment is certified by the Comptroller General; and
>
> (3) the judgment, award, or settlement is payable --
>
> (A) under section 2414, 2517, 2672, or 2677 of title 28. . . .

31 U.S.C. § 1304. Title 28 U.S.C. § 2414, in turn, authorizes the payment of "final judgments rendered by a district court . . . against the United States." Together, § 1304 and § 2414 would seem to authorize the return of funds in this case in the event petitioner were to prevail in the underlying forfeiture action.

But further inquiry is required, for we have said that § 1304

> does not create an all-purpose fund for judicial disbursement. . . . Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute.

OPM v. Richmond, 496 U.S. 414, 432 (1990). The question, then, is whether petitioner would have a "substantive right to compensation" if it were to prevail in this forfeiture proceeding. I believe 28 U.S.C. § 2465 provides such a right here. That section provides:

> Upon **[506 U.S. 96]** the entry of judgment for the claimant in any proceeding to . . . forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent.

Although § 2465 speaks of forfeitable "property," and not public money, the property subject to forfeiture in this case has been converted to proceeds now resting in the Assets Forfeiture Fund of the Treasury. I see no reason why § 2465 should not be construed as authorizing the return of proceeds in such a case. Therefore, I would hold that 31 U.S.C. § 1304, together with 28 U.S.C. § 2465, provide the requisite appropriation.

Because I believe there exists a specific appropriation authorizing the payment of funds in the event petitioner were to prevail in the underlying forfeiture action, I agree with JUSTICE BLACKMUN that a judgment for petitioner below would not be "useless." Accordingly, I concur in the judgment of the Court.

WHITE, J., concurring

JUSTICE WHITE, concurring.

I agree with Parts I, II, and IV of the Court's opinion but would prefer not to address the Appropriations Clause issue.

As JUSTICE BLACKMUN indicates, *ante* at 89, the Government argues that, because the Appropriations Clause bars reaching the funds transferred to the Treasury's Assets Forfeiture Fund, the case is either moot or falls into the useless judgment exception to appellate *in rem* jurisdiction. I am surprised that the Government would take such a transparently fallacious position. The case is not moot, and a ruling by the Court of Appeals would not be a useless judgment. Had the funds not been transferred to Washington, the Court of Appeals, if it thought the District Court had erred in rejecting the Bank's innocent owner defense, would have been free to reverse the lower court, direct that the Bank be paid out of the *res,* and, to that extent, rule against the United States' forfeiture claim. The United States does not question **[506 U.S. 97]** this, for when the property was sold, the Government agreed to hold the proceeds pending resolution of the claims against the *res.*

The funds are, of course, no longer in Florida, but that fact, as the Court now holds, did not deprive the Court of Appeals of jurisdiction to reverse the District Court and direct entry of judgment against the United States for the amount of the Bank's lien, nor did it prevent the Court of Appeals from declaring that the Bank was entitled to have its lien satisfied from the *res* and, therefore, that the Government had no legal entitlement to the proceeds from the sale of the house. The case is obviously not moot. Nor should the Government suggest that a final judgment against the United States by a court with jurisdiction to enter such a judgment is useless because the United States may refuse to pay it. Rather, it would be reasonable to assume that the United States obeys the law and pays its debts, and that, in most people's minds, a valid judgment against the Government for a certain sum of money would be worth that very amount. This is such a reasonable expectation that there is no need in this case to attempt to extract the transferred *res* from whatever fund in which it now is held.

There is nothing new about expecting governments to satisfy their obligations. Thus, in *Steffel v. Thompson,* 415 U.S. 452, 468-471 (1974), the Court discussed the comparative propriety of entering a declaratory judgment, as opposed to an injunction. Describing the cases of *Roe* and *Bolton,* the Court explained:

> In those two cases, we declined to decide whether the District Courts had properly denied to the federal plaintiffs, against whom no prosecutions were pending, injunctive relief restraining enforcement of the Texas and Georgia criminal abortion statutes; instead, we affirmed the issuance of declaratory judgments of unconstitutionality, **[506 U.S. 98]** anticipating that these would be given effect by state authorities.

415 U.S. at 469. *See also Roe v. Wade,* 410 U.S. 113, 166 (1973):

> [w]e find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional;

Doe v. Bolton, 410 U.S. 179, 201 (1973) (same). More generally, it goes without saying that a creditor must first have judgment before he is entitled to collect from one who has disputed the debt, and it frequently happens that the losing debtor pays up without more. Perhaps, however, the judgment creditor will have collection problems, but that does not render his judgment a meaningless event.

For the same reasons, it is unnecessary for the Court at this point to construe the Appropriations Clause, either narrowly or broadly. Normally, we avoid deciding constitutional questions when it is reasonable to avoid or postpone them. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.,* 467 U.S. 138, 157 (1984); *Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 39 (1885). It is apparent, moreover, that the Court has struggled to reach a satisfactory resolution of the Appropriations Clause issue. I would not anticipate that the United States would default, and that the Bank would require the help of the judiciary to collect the debt. I would leave it to the Executive Branch to determine, in the first instance, when and if it suffers an adverse judgment, whether it would have authority under existing statutes to liquidate the judgment that might be rendered against it. It will be time enough to rule on the Appropriations Clause when and if the position taken by the Government requires it.

I bow, however, to the will of the Court to rule prematurely on the Appropriations Clause, and on that issue I agree with THE CHIEF JUSTICE and join his opinion. **[506 U.S. 99]**

STEVENS, J., concurring

JUSTICE STEVENS, concurring in part and concurring in the judgment.

While I agree with JUSTICE BLACKMUN's analysis of the Government's Appropriations Clause argument, and join his opinion in its entirety, I also agree with THE CHIEF JUSTICE that 31 U.S.C. § 1304, together with 28 U.S.C. § 2465, provide a satisfactory alternative response. Moreover, like JUSTICE WHITE, and for the reasons stated in his separate opinion, I am surprised that the Government would make "such a transparently fallacious" argument in support of its unconscionable position in this case. *See ante* at 96.

THOMAS, J., concurring

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I cannot join the Court's discussion of jurisdiction, because that discussion is unnecessary, and may very well constitute an advisory opinion. In my view, we should determine the applicability of § 1521 of the Housing and Community Development Act of 1992, 106 Stat. 3672. Effective October 28, 1992, §

1521 amended 28 U.S.C. § 1355 to provide that,

> [i]n any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction.

106 Stat. 4062-4063. The clear import of the new law is to preserve the jurisdiction of a court of appeals in a civil forfeiture action where the *res* has been removed by the prevailing party -- the very issue involved in this case. This law would appear, by its plain terms, to be dispositive of this case, thus rendering academic the discussion in Part II of the Court's opinion.*

The Court mentions § 1521 in a single footnote, stating simply that "we do not now interpret that statute or determine [506 U.S. 100] the issue of its retroactive application to the present case." *Ante* at 89, n. 5. As a general rule, of course, statutes affecting substantive rights or obligations are presumed to operate prospectively only. *Bennett v. New Jersey,* 470 U.S. 632, 639 (1985). "Thus, congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 208 (1988). But not every application of a new statute to a pending case will produce a "retroactive effect." "[W]hether a particular application *is* retroactive" will "depen[d] upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 857, and n. 3 (1990) (SCALIA, J., concurring) (emphasis in original).

In the case of newly enacted laws restricting or enlarging jurisdiction, one would think that the "determinative event" for retroactivity purposes would be the final termination of the litigation, since statutes affecting jurisdiction speak to the power of the court, rather than to the rights or obligations of the parties. That conclusion is supported by longstanding precedent. We have always recognized that, when jurisdiction is conferred by an Act of Congress and that Act is repealed,

> the power to exercise such jurisdiction [is] withdrawn, and . . . all pending actions f[a]ll, as the jurisdiction depend[s] entirely upon the act of Congress.

The Assessors v. Osbornes, 9 Wall. 567, 575 (1870).

> This rule -- that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law -- has been adhered to consistently by this Court.

Bruner v. United States, 343 U.S. 112, 116-117 (1952). *See id.* at 117, n. 8 (citing cases). Moreover, we have specifically noted that

> [t]his jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication.

Ibid. [506 U.S. 101]

The same rule ordinarily mandates the application to pending cases of new laws enlarging jurisdiction. We so held in *United States v. Alabama,* 362 U.S. 602 (1960) (per curiam). There, the District Court had concluded that it was without jurisdiction to entertain a civil rights action brought by the United States against a State, and the Court of Appeals had affirmed. *Id.* at 603. While the case was pending before this Court, the President signed the Civil Rights Act of 1960, which authorized such actions. Relying on "familiar principles," we held that "the case *must* be decided on the basis of law now controlling, and the provisions of [the new statute] are applicable to this litigation." *Id.* at 604 (emphasis added) (citing cases). We therefore held that "the District Court has jurisdiction to entertain this action against the State," and we remanded for further proceedings. *Ibid.* Similarly, in *Andrus v. Charlestone Stone Products Co.,* 436 U.S. 604 (1978), we held that, because the general federal question statute had been amended in 1976 to eliminate the amount-in-controversy requirement for suits against the United States, "the fact that in 1973 respondent in its complaint did not allege $10,000 in controversy *is now of no moment.*" *Id.* at 608, n. 6 (emphasis added).

It could be argued that the language of § 1521 implies an earlier determinative event for retroactivity purposes -- such as the removal of the *res* or the point when the final order disposing of the property "is appealed." 106 Stat. 4062. I do not find these terms sufficiently clear to overcome the general rule that statutes altering jurisdiction are to be applied to pending cases; I would therefore decide this case on the basis of the new law. If the Court is plagued with doubts about the "retroactive application" of § 1521, *ante* at 89, n. 5, the Court should, at a minimum, seek further briefing from the parties on this question before embarking on what appears to me to be an unnecessary excursion through the law of admiralty. There is no legitimate reason not to take the time to do so, for if the Government were to concede the [506 U.S. 102] new law's applicability, the Court's opinion would be advisory. I can, therefore, concur only in the Court's judgment on the issue of jurisdiction.

I do, however, join the opinion of THE CHIEF JUSTICE regarding the Appropriations Clause. Because the Court of Appeals retains continuing jurisdiction over this proceeding pursuant to § 1521, we cannot avoid addressing the Government's arguments on this issue.

Footnotes

BLACKMUN, J., lead opinion (Footnotes)

1. Title 21 U.S.C. § 881(a) reads in pertinent part:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * * *
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled

> substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

2. The Government also had argued that the "relation-back" doctrine precluded the Bank from raising an innocent-owner defense. *See* 731 F.Supp. at 1567. That issue is pending before this Court in No. 91-781, *United States v. A Parcel of Land,* argued October 13, 1992.

3. *Compare United States v. One Lot of $25,721.00 in Currency,* 938 F.2d 1417 (CA1 1991); *United States v. Aiello,* 912 F.2d 4 (CA2 1990), *cert. denied,* 498 U.S. 1048 (1991); *United States v. $95,945.18 United States Currency,* 913 F.2d 1106 (CA4 1990), *with United States v. Cadillac Sedan Deville, 1983, appeal dism'd,* 933 F.2d 1010 (CA6 1991); *United States v. Tit's Cocktail Lounge,* 873 F.2d 141 (CA7 1989); *United States v. $29,959.00 U.S. Currency,* 931 F.2d 549 (CA9 1991); and the Court of Appeals' opinion in the present case. *Compare also United States v. $57,480.05 United States Currency and Other Coins,* 722 F.2d 1457 (CA9 1984), *with United States v. Aiello,* 912 F.2d at 7, *and United States v. $95,945.18 in United States Currency,* 913 F.2d at 1110, n. 4.

4. *See also The Bolina,* 3 F.Cas. 811, 813-814 (CC Mass.1812) (Story, J., as Circuit Justice) ("[O]nce a vessel is libelled, then she is considered as in the custody of the law, and at the disposal of the court, and monitions may be issued to persons having the actual custody to obey the injunctions of the court. . . . The district court of the United States derives its jurisdiction not from any supposed possession of its officers, but from the act and place of seizure for the forfeiture. . . . And when once it has acquired a regular jurisdiction, I do not perceive how any subsequent irregularity would avoid it. It may render the ultimate decree ineffectual in certain events, but the regular results of the adjudication must remain."); 1 J. Wells, A Treatise on the Jurisdiction of Courts 275 (1880) (actual or constructive seizure provides jurisdiction in admiralty forfeiture action. "And, having once acquired regular jurisdiction, no subsequent irregularity can defeat it; or accident, as, for example, an accidental fire.").

5. We note that, on October 28, 1992, the President signed the Housing and Community Development Act of 1992, 106 Stat. 3672. Section 1521 of that Act (part of Title XV, entitled the Annunzio-Wylie Anti-Money Laundering Act) significantly amended 28 U.S.C. § 1355 to provide, among other things:

> In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction. Upon motion of the appealing party, the district court or the court of appeals shall issue any order necessary to preserve the

> right of the appealing party to the full value of the property at issue, including a stay of the judgment of the district court pending appeal or requiring the prevailing party to post an appeal bond.

106 Stat. at 4062-4063.

Needless to say, we do not now interpret that statute or determine the issue of its retroactive application to the present case.

6. THE CHIEF JUSTICE, writing for the Court on this question, *post,* would find an appropriation in the judgment fund, 31 U.S.C. § 1304. While plausible, his analysis is nevertheless problematic. The judgment fund is understood to apply to money judgments only. *See, e.g.,* 58 Comp.Gen. 311 (1979). A final judgment in petitioner's favor, however, would be in the nature of a financial "acquittal" -- a simple ruling that the *res* is not forfeitable. Unless we were to require the bank to sue on its judgment of nonforfeitability for return of a sum equivalent to the retained *res,* THE CHIEF JUSTICE's approach would seem to open the judgment fund to payment on nonmoney judgments. Moreover, as THE CHIEF JUSTICE acknowledges, *see post* at 96, "the property subject to forfeiture has been converted to proceeds now resting in the Assets Forfeiture Fund of the Treasury." Title 28 U.S.C. § 2465 can "be construed as authorizing the return of proceeds in such a case." *Post* at 96. But a payment from the judgment fund would not achieve that purpose. The *res* is not in the judgment fund. A payment from that account, while no doubt entirely acceptable to petitioner, would not be a return of the forfeited property, and at the end of the episode (although I have no doubt that the Comptroller would manage to balance the books) the Assets Forfeiture Fund would be some $800,000 richer, and the judgment fund correspondingly diminished.

REHNQUIST, J., concurring (Footnotes)

* JUSTICE THOMAS joins THE CHIEF JUSTICE's opinion only insofar as it disposes of the Appropriations Clause issue.

** As JUSTICE BLACKMUN points out, where funds have been accidently deposited into the wrong account, the Comptroller General has assumed that a deposit may be corrected without an express appropriation. *Ante* at 92. So, too, reasons JUSTICE BLACKMUN, would it be

> unrealistic . . . to require congressional authorization before a data processor who misplaces a decimal point can "undo" an inaccurate transfer of Treasury funds.

Ibid. This may be so, but this is not our case. For the funds at issue were not accidently deposited into the Treasury, but rather intentionally transferred there once a valid judgment of forfeiture had been entered by the District Court.

THOMAS, J., concurring (Footnotes)

* By letter dated October 30, 1992, the Government advised the Court of

the enactment of the new law without taking a position on its applicability. On November 3, petitioner informed us by letter that, in its view, § 1521 applies and is controlling.

Cases citing this case . . .

The following 6 case(s) in the USSC+ database cite this case:

Lindh v. Murphy, No. 96-6298 (1997)
Bennis v. Michigan, 516 U.S. 442 (1996)
Stone v. INS, 514 U.S. 386 (1995)
Landgraf v. USI Film Products, 511 U.S. 244 (1994)
United States v. James Daniel Good Real Property, 510 U.S. 43 (1993)
Austin v. United States, 509 U.S. 602 (1993)

the adjoining district, shall have the same force, effect, and validity as if done and transacted by and before a judge appointed for such district.

APPROVED, August 6, 1861.

CHAP. LX. — *An Act to confiscate Property used for Insurrectionary Purposes.* August 6, 1861.

When property used in aiding insurrection may be confiscated.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if, during the present or any future insurrection against the Government of the United States, after the President of the United States shall have declared, by proclamation, that the laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person or persons, his, her, or their agent, attorney, or employé, shall purchase or acquire, sell or give, any property of whatsoever kind or description, with intent to use or employ the same, or suffer the same to be used or employed, in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person or persons engaged therein; or if any person or persons, being the owner or owners of any such property, shall knowingly use or employ, or consent to the use or employment of the same as aforesaid, all such property is hereby declared to be lawful subject of prize and capture wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, confiscated, and condemned.

In what courts to be condemned.

SEC. 2. *And be it further enacted*, That such prizes and capture shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same may be seized, or into which they may be taken and proceedings first instituted.

Who to institute proceedings for condemnation, and for whose use.

SEC. 3. *And be it further enacted*, That the Attorney-General, or any district attorney of the United States in which said property may at the time be, may institute the proceedings of condemnation, and in such case they shall be wholly for the benefit of the United States; or any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts.

When claims to persons held to service and labor to be forfeited.

SEC. 4. *And be it further enacted*, That whenever hereafter, during the present insurrection against the Government of the United States, any person claimed to be held to labor or service under the law of any State, shall be required or permitted by the person to whom such labor or service is claimed to be due, or by the lawful agent of such person, to take up arms against the United States, or shall be required or permitted by the person to whom such labor or service is claimed to be due, or his lawful agent, to work or to be employed in or upon any fort, navy yard, dock, armory, ship, entrenchment, or in any military or naval service whatsoever, against the Government and lawful authority of the United States, then, and in every such case, the person to whom such labor or service is claimed to be due shall forfeit his claim to such labor, any law of the State or of the United States to the contrary notwithstanding. And whenever thereafter the person claiming such labor or service shall seek to enforce his claim, it shall be a full and sufficient answer to such claim that the person whose service or labor is claimed had been employed in hostile service against the Government of the United States, contrary to the provisions of this act.

APPROVED, August 6, 1861.

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§ 275. Libel of Review.

In general, a court of admiralty has no power to alter its final decree after the term at which that decree was entered.[11] But where a party discovers that the decree has been inadvertently and improperly entered; or that a decree has been made although he has had no proper notice of the suit and has thereby been deprived of property; or where there has been fraud of any kind in the suit; and the time to appeal has gone by and the term has closed, so that no regular remedy is left him, he may obtain redress by filing a libel of review.[12] This is a libel or petition, setting forth the facts whereby the party deems himself entitled to redress, and the procedure on filing it is the same as on an ordinary libel. Process *in personam* against the parties to the original suit, or either of them, will issue, but when property has been duly sold in the original suit, it is doubtful if process

Hayward, (1815) 2 Gall. 485, 497, Fed. Cas. No. 15336 (C.C.D. Mass.).

[11] The Martha, (1830) Blatchf. & H. 151, Fed. Cas. No. 9144 (S.D.N.Y.); Snow v. Edwards, (1873) 2 Low. 273, Fed. Cas. No. 13145 (D.Mass.); Pettit v. One Steel Lighter, (1900) 104 F. 1002 (E.D.N.Y.). See § 420, *post*. Although an interlocutory decree may be vacated at another term: The Bella, (1920) 270 F. 287 (D.N.J.).

[12] The New England, (1839) 3 Sumn. 495, Fed. Cas. No. 10151 (C.C.D.N.H.); Janvrin v. Smith, 1 Sprague 13, Fed. Cas. No. 7220; Snow v. Edwards, (1873) 2 Low. 273, Fed. Cas. No. 13145 (D.Mass.); Northwestern Car Co. v. Hopkins, (1865) 4 Biss. 51, Fed. Cas. No. 10334 (C.C.N.D. Ill.); The Sparkle, (1874) 7 Ben. 528, Fed. Cas. No. 13207 (E.D. N.Y.); Jackson v. Munks, (1893) 58 F. 596 (C.C.D.Wash.N.D.), aff'd (1895) 66 F. 571 (C.C.A., 9th); The Columbia, (1900) 100 F. 890 (E.D.N.Y.); Hall v. Chisholm, (1902) 117 F. 807 (C.C.A., 6th); The Madgie, (1887) 31 F. 926 (S.D.Ala.); The Hewitt, 1926 A.M.C. 1463, 15 F.(2d) 857 (S.D. N.Y.); The Astorian, 1932 A.M.C. 660, 57 F.(2d) 85 (C.C.A.,9th); The Friederich der Grosse and The Texas, 1930 A.M.C. 62, 37 F.(2d) 354 (S.D.N.Y.); The Thomas E. Moran, 1932 A.M.C. 1535, 2 F.Supp. 40 (S.D.N.Y.); The Bern and The Exbrook, 1935 A.M.C. 15, 74 F.(2d) 235 (C.C.A., 2d); U. S. v. Stanley & Patterson, 1935 A.M.C. 1216, 12 F.Supp. 731 (S.D.N.Y.).

in rem will be issued without indemnity. It should never issue without special order of the court. The subsequent proceedings will be the same as in any suit and the decree of the court will be such as equity demands. There is no corresponding provision in the Civil Rules.

See Form 129-A.

The libel being prepared, let it be signed and sworn to by the libelant, or, in case of his absence by his agent, attorney, or proctor before the Judge, or the Clerk, or a United States Commissioner, or a Notary Public, and signed also by the Proctor.

Prepare the stipulation for costs and have it executed, acknowledged and justified.

If the libel be in personam and pray for an attachment (in districts whose rules require an order in cases over $500), *or for an arrest, apply to the Judge for an order that a warrant of arrest or an order of attachment may issue. File the libel and stipulation for costs and direct the Clerk to issue the process (or warrant of arrest, and, if bail can be taken, to mark it for bail.)*

See to it that the process is placed in the Marshal's possession and give him information as to where the property may be found, or where the respondent resides, or has his place of business.

liens,[8] (9) Non-lien maritime claims.[9] However, the fact is that such liens rarely arise contemporaneously. In such cases

Supp. 510 (S.D. Fla. 1942) (state lien for master's wages ranks below federal maritime liens).

State lien for unpaid insurance premiums must be postponed to other maritime liens: The Daisy Day, 40 F. 538 (W.D. Mich), *aff'd*, 40 F. 603 (C.C. 1889); The Woodward, 32 F. 639 (W.D. Pa. 1887).

[7] Except for a couple of early decisions (The Melissa Trask, 285 F. 781 (D. Mass. 1923); Colonna's Shipyard, Inc. v. Rowe, 14 F.2d 267, 1926 A.M.C. 941 (4th Cir. [Va.] 1926)), it is now generally held that government tax lien claims under 26 U.S.C. § 6321 "upon all property and rights of property whether real or personal" rank below all other maritime liens: The River Queen, 8 F.2d 426, 1926 A.M.C. 79 (E.D. Va. 1925); The Ermis, 33 F.2d 763, 1929 A.M.C. 1588 (S.D. Fla. 1929); United States v. The Pomare, 92 F. Supp. 185 (D. Haw. 1950); Gulf Coast Marine Ways, Inc. v. The J.R. Hardee, 107 F. Supp. 379, 1952 A.M.C. 1124 (S.D. Tex. 1952) (does not matter if notice of tax lien is filed according to the state statute); United States v. Flood, 247 F.2d 209 (1st Cir. [Mass.] 1957) (The case of Colonna's Shipyard v. Rowe, *supra*, is "entirely unpersuasive"; The Melissa Trask, *supra*, "has been much criticized."); United States v. Jane B. Corp., 167 F. Supp. 352 (D. Mass. 1958) (irrelevant that tax lien previously perfected and maritime lienor had notice thereof; rejects The Melissa Trask, *supra*.); P.C. Pfeiffer Co., Inc. v. The Pac. Star, 183 F. Supp. 932 (E.D. Va. 1960) (Although amount due government by shipowner for tax funds already withheld from paid wages does not entitle government to maritime lien, when wages are due and owing, the seamen may demand that instead of receiving gross wages, they be paid only the net with the government directly receiving withholding taxes. In such a case the United States stands in the shoes of the seamen.); Marine Midland Trust Co. of N.Y. v. United States, 299 F.2d 724 (4th Cir. [Va.] 1962) (it is proper to pay required deductions to the United States when wages are paid to the seamen even though the government is not a lienor); United States v. O/S Ken, Jr., etc., N.1 *supra*; Nat'l Bank of No. Amer. v. S.S. Oceanic Ondine, 335 F. Supp. 71 (S.D. Tex. 1971), *aff'd*, 452 F.2d 1014 (5th Cir. 1972) (it is only right to deduct withholding and F.I.C.A. taxes when wages paid from the registry, not when unpaid wage claims voluntarily dismissed); United States v. Barge Cape Flattery I, 1972 A.M.C. 345 (W.D. Wash. 1972).

[8] The J.E. Rumbell, N.6 *supra;* The Maicaway, 22 F. Supp. 805 (D. Mass. 1938) (balance remaining after payment of all maritime claims and unclaimed by the shipowner can be paid to a judgment creditor); Tivoli Radio & Marine Co. v. Vessel Ral, 215 F. Supp. 643 (E.D. N.Y. 1963) (non-maritime lienor cannot get priority by filing retail installment contract pursuant to state law).

[9] Veverica v. Drill Barge Buccaneer No. 7, 488 F.2d 880, 1974 A.M.C.

Soc Sec LP § 70:65.

RIA Coordinators:
Federal Tax Coordinator 2d, P S-7166.

§ 6317. Payments of federal unemployment tax for calendar quarter.

Payment of Federal unemployment tax for a calendar quarter or other period within a calendar year pursuant to section 6157 shall be considered payment on account of the tax imposed by chapter 23 of such calendar year.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

In 1988, P.L. 100-647, Sec. 7106(c)(3)(A), deleted "or tax imposed by section 3321" after "unemployment tax" . . . Sec. 7106(c)(3)(B), deleted "and 23A, as the case may be," after "chapter 23" effective for remuneration paid after 12/31/88.

In 1983, P.L. 98-76, Sec. 231(b)(2)(B), substituted "Federal unemployment tax or tax imposed by section 3321" for "Federal unemployment tax" and substituted "chapter 23 and 23A, as the case may be," for "chapter 23" in Code Sec. 6317, effective for remuneration paid after 6/30/86.

In 1969, P.L. 91-53, Sec. 2(c), added Code Sec. 6317, effective for calendar years begin 12/31/69.

CODE OF FEDERAL REGULATIONS

Collection--receipt of payment, 26 CFR §§ 301.6311-1 et seq.

CROSS REFERENCES

USCS Administrative Rules, IRS, 26 CFR § 601.104.

§§ 6318–6320. [Reserved for future use.]

SUBCHAPTER C. Lien for Taxes

Sec.
6321. Lien for taxes.
6322. Period of lien.
6323. Validity and priority against certain persons.
6324. Special liens for estate and gift taxes.
6324A. Special lien for estate tax deferred under section 6166.
6324B. Special lien for additional estate tax attributable to farm, etc., valuation.
6325. Release of lien or discharge of property.
6326. Administrative appeal of liens.
6327. Cross references.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

In 1988, P.L. 100-647, Sec. 6238(c), redesignated item 6326 as item 6327 and added new item 6326.

In 1981, P.L. 97-34, Sec. 442(e)(6)(D), deleted "or 6166A" following "section 6166" in item 6324A.

In 1976, P.L. 94-455, Sec. 2003(d)(2), added the item for Code Sec. 6324B.

—P.L. 94-455, Sec. 2004(f)(1), added the item for Code Sec. 6324A.

In 1966, P.L. 89-719, amended item 6323 from "Validity against mortgagees, pledgees, purchasers, and judgment creditors" . . . deleted "partial" before "discharge" in item 6325.

§ 6321. Lien for taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

CODE OF FEDERAL REGULATIONS

Estate taxes--procedure and administration, 26 CFR §§ 20.6018-1 et seq.
Gift tax--procedure and administration, 26 CFR §§ 25.6001-1 et seq.
Collection--lien for taxes, 26 CFR §§ 301.6321-1 et seq.
Temporary regulations under Federal Tax Lien Act of 1966, 26 CFR §§ 400.1-1 et seq.
Procedure and administration, 27 CFR Part 70.

§ 7323. Judicial action to enforce forfeiture.

(a) Nature and venue. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made.

(b) Service of process when property has been returned under bond. In case bond as provided in section 7324(3) shall have been executed and the property returned before seizure thereof by virtue of process in the proceedings in rem authorized in subsection (a) of this section, the marshal shall give notice of pendency of proceedings in court to the parties executing said bond, by personal service or publication, and in such manner and form as the court may direct, and the court shall thereupon have jurisdiction of said matter and parties in the same manner as if such property had been seized by virtue of the process aforesaid.

(c) Cost of seizure taxable. The cost of seizure made before process issues shall be taxable by the court.

CODE OF FEDERAL REGULATIONS

Provisions common to forfeitures, 26 CFR §§ 301.723-1 et seq.
Disposition of seized personal property, 26 CFR §§ 403.1 et seq.
Disposition of personal property seized by Bureau of Alcohol, Tobacco and Firearms, 27 CFR §§ 72.1 et seq.

CROSS REFERENCES

Authority of Secretary to commence civil action for collection or recovery of fines, penalties, or forfeitures, 26 USCS § 7401.
Jurisdiction of United States District Court of action for penalty, 28 USCS § 1355.

RESEARCH GUIDE

Federal Procedure L Ed:
20 Fed Proc, L Ed, Internal Revenue §§ 48:1419 et seq.

RIA Coordinators:
Federal Tax Coordinator 2d, P V-4006.

INTERPRETIVE NOTES AND DECISIONS

1. Nature of proceedings
2. —Contesting seizure
3. Jurisdiction
4. Timeliness
5. Notice
6. Right to jury trial
7. Procedural rules
8. Pleadings
9. Defenses
10. Cross claim for damages
11. Evidence
12. —Discovery
13. Costs of seizure

1. Nature of proceedings

Action for forfeiture of firearms seized under 26 USCS § 5872 is civil action in rem against seized firearms and not criminal action in personam against possessor of firearms, in accordance with 26 USCS § 7323. McKeehan v United States (1971, CA6 Tenn) 438 F2d 739.

Libel proceeding under internal revenue laws is not admiralty suit in rem nor ordinary civil action, but statutory proceeding which is strictly sui generis. United States v One 1941 Chrysler Sedan (1942, DC Ky) 46 F Supp 897.

2. —Contesting seizure

Forfeiture proceedings are appropriate vehicles for determining merits of seizure; legality of seized property (e.g., automobile containing sawed-off shotgun) cannot be summarily determined at hearing for return of seized property instituted before forfeiture proceedings. Castleberry v Alcohol, Tobacco & Firearms Div. of Treasury Dept. (1976, CA5 Tex) 530 F2d 672.

3. Jurisdiction

Original jurisdiction of Federal circuit courts "of all causes arising under any law providing internal revenue" extends to suits in rem for forfeitures for violation of internal revenue laws. Coffey v United States (1886) 116 US 427, 29 L Ed 681, 6 S Ct 432, reh den 117 US 233, 29 L Ed 890, 6 S Ct 717; Coffey v United States (1886) 116 US 436, 29 L Ed 684, 6 S Ct 437 (ovrld on other grounds United States v One Assortment of 89 Firearms, 465 US 354, 79 L Ed 2d 361, 104 S Ct 1099).

4. Timeliness

Delay in prosecuting forfeiture after seizure of goods by internal revenue collector is abuse of power, and any resulting expenses will be charged against collector. Standard Carpet Co. v Bowers (1922, DC NY) 284 F 284.

Seizure must be followed immediately by forfeiture proceedings or property must be returned. Church v Goodnough (1926, DC RI) 14 F2d 432.

Where, after seizure of truck, claimant petitioned for release of truck, and government did not ask for forfeiture, court will grant government right to institute forfeiture proceedings within 15 days. United States v One Mack Truck (1930, DC Pa) 41 F2d 849.

Appropriate test for determining whether delay in initiating judicial forfeiture proceedings violated due process requires weighing of 4 factors: (1) length of delay, (2) reason for delay, (3) taxpayer's

CHAPTER 76. JUDICIAL PROCEEDINGS

Subchapter
A. Civil actions by the United States.
B. Proceedings by taxpayers and third parties.
C. The Tax Court.
D. Court review of Tax Court decisions.

SUBCHAPTER A. Civil Actions by the United States

Sec.
7401. Authorization.
7402. Jurisdiction of district courts.
7403. Action to enforce lien or to subject property to payment of tax.
7404. Authority to bring civil action for estate taxes.
7405. Action for recovery of erroneous refunds.
7406. Disposition of judgments and moneys recovered.
7407. Action to enjoin income tax return preparers.
7408. Action to enjoin promoters of abusive tax shelters, etc.
7409. Action to enjoin flagrant political expenditures of section 501(c)(3) organizations.
7410. Cross references.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

In 1987, P.L. 100-203, Sec. 10713(a)(2), amended item 7409 and added new item 7410.

Prior to amendment, item 7409 read as follows:

"7409. Cross references."

In 1982, P.L. 97-248, Sec. 321(b), redesignated item 7408 as 7409 and added a new item 7408.

In 1976, P.L. 94-455, Sec. 1203(i)(4), redesignated the item for Code Sec. 7407 as the item for Code Sec. 7408 . . . added a new item for Code Sec. 7407.

§ 7401. Authorization.

No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

In 1976, P.L. 94-455, Sec. 1906(b)(13)(A), substituted "Secretary" for "Secretary or his delegate" in Code Sec. 7401, effective 2/1/77.

CODE OF FEDERAL REGULATIONS

Civil actions by United States, 26 CFR §§ 301.7401-1 et seq.
Procedure and administration, 27 CFR Part 70.

CROSS REFERENCES

USCS Administrative Rules, IRS, 26 CFR § 601.103.

RESEARCH GUIDE

Federal Procedure L Ed:

20 Fed Proc, L Ed, Internal Revenue §§ 48:1285 et seq.

Forms:

11A Am Jur Pl & Pr Forms (Rev), Federal Tax Enforcement, Forms 1 et seq.
11 Fed Proc Forms, L Ed, Internal Revenue §§ 43:321 et seq.

Immigration Law Service:

2 Immigration Law Service, Taxation § 26:25.
2 Immigration Law Service, Other Rights, Privileges, Duties, and Obligations § 28:55.

RIA Coordinators:

Federal Tax Coordinator 2d, P V-5503.

INTERPRETIVE NOTES AND DECISIONS

I. IN GENERAL
1. Jurisdictional nature of authorization
2. Presumption of authorization
3. Time of authorization

States v Hawk Contracting, Inc. (1985, WD Pa) 649 F Supp 1, 59 AFTR 2d 87-1299.

28. Surplus property

Action under 40 USCS § 489(b)(1), pertaining to surplus property, which requires every person engaging in fraud for purpose of obtaining surplus property to pay to United States sum of $2,000 for each act, is not suit for civil penalty and hence is not subject to 5-year limitation provided in 28 USCS § 2462. Koller v United States (1959) 359 US 309, 3 L Ed 2d 828, 79 S Ct 755.

Action by United States to recover sum of $2,000 for each of 5 fraudulent acts, allegedly committed by defendants in obtaining surplus property of United States, was not barred by 5-year statute of limitations provided in 28 USCS § 2462, as provision imposing arbitrary sum did not constitute penalty. United States v Weaver (1953, CA5 Ala) 207 F2d 796.

Action under provisions of 40 USCS § 489, pertaining to surplus property, is action for penalties within meaning of 28 USCS § 2642. United States v Witherspoon (1954, CA6 Tenn) 211 F2d 858.

Recovery provided for by 40 USCS § 489(b)(1), pertaining to surplus property, is not in nature of civil fine or penalty and, hence, not subject to 5-year limitation provided by 28 USCS § 2462. United States v Barish (1958, CA3 Pa) 256 F2d 571.

Limitations of 28 USCS § 2462 do not bar action by United States to recover payment under 40 USCS § 489, pertaining to surplus property, from one who obtained equipment from war assets administration by fraud and trickery, since his liability was not penal in nature. United States v Glaser (1955, DC NJ) 134 F Supp 457.

Action to recover $2,000 per violation provided for in 40 USCS § 489(b)(1), pertaining to surplus property, is action for penalty and is governed by 5-year statute of limitation under 28 USCS § 2462. United States v Covollo (1955, DC Pa) 136 F Supp 107.

§ 2463. Property taken under revenue law not repleviable

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

(June 25, 1948, ch. 646, § 1, 62 Stat. 974.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on title 28, U.S.C., 1940 ed., § 747 (R.S. § 934). Changes were made in phraseology.

CROSS REFERENCES

Levy and distraint on property by Secretary of Treasury, 26 USCS § 6331.
Property exempt from levy by Secretary of Treasury, 26 USCS § 6334.

RESEARCH GUIDE

Federal Procedure L Ed:

20 Fed Proc L Ed, Internal Revenue §§ 48:1274, 1434.
26 Fed Proc L Ed, Parties § 59:169.

Am Jur:

21A Am Jur 2d, Customs Duties and Import Regulations § 119.
35 Am Jur 2d, Federal Tax Enforcement § 25.
66 Am Jur 2d, Replevin § 35.

Forms:

1A Am Jur Pl & Pr Forms (Rev), Admiralty, Forms 81 et seq., 231 et seq.

No. 87480

United States

vs.

Notice of Tax Lien

Filed this _____ day of

_____, 19____, at _____ m.

_____

Clerk (or Registrar).

Form 668(Y) (Rev. 1-69)

Excerpts From Internal Revenue Code

Sec. 6321. Lien For Taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Sec. 6322. Period Of Lien.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

Sec. 6323. Validity and Priority Against Certain Persons.

(a) **Purchaser's, Holders Of Security Interests, Mechanic's Lienors, And Judgment Lien Creditors.** — The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

(f) **Place For Filing Notice; Form.—**

(1) Place For Filing - The notice referred to in subsection (a) shall be filed -

(A) Under State Laws

(i) Real Property - In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and

(ii) Personal Property - In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated, or

(B) With Clerk Of District Court - In the office of the clerk of the United States district court for the judicial district in which the property subject to lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A), or

(C) With Recorder Of Deeds Of The District Of Columbia - In the office of the Recorder of Deeds of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(2) Situs Of Property Subject To Lien - For purposes of paragraphs (1) and (4), property shall be deemed to be situated -

(A) Real Property - In the case of real property, at its physical location; or

(B) Personal Property - In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed.

For purposes of paragraph (2) (B), the residence of a corporation or partnership shall be deemed to be the place at which the principal executive office of the business is located, and the residence of a taxpayer whose residence is without the United States shall be deemed to be in the District of Columbia.

(3) Form - The form and content of the notice referred to in subsection (a) shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien.

Note: See section 6323(b) for protection for certain interests even though notice of lien imposed by section 6321 is filed with respect to:

1. Securities
2. Motor vehicles
3. Personal property purchased at retail
4. Personal property purchased in casual sale
5. Personal property subjected to possessory lien
6. Real property tax and special assessment liens
7. Residential property subject to a mechanic's lien for certain repairs and improvements
8. Attorney's liens
9. Certain insurance contracts
10. Passbook loans

(g) **Refiling Of Notice.** — For purposes of this section -

(1) **General Rule.** — Unless notice of lien is refiled in the manner prescribed in paragraph (2) during the required refiling period, such notice of lien shall be treated as filed on the date on which it is filed (in accordance with subsection (f)) after the expiration of such refiling period.

(2) **Place For Filing.** — A notice of lien refiled during the required refiling period shall be effective only -

(A) If -

(i) such notice of lien is refiled in the office in which the prior notice of lien was filed, and

(ii) in the case of real property, the fact of refiling is entered and recorded in an index to the extent required by subsection (f) (4), and

(B) in any case in which, 30 days or more prior to the date of a refiling of notice of lien under subparagraph (A), the Secretary received written information (in the manner prescribed in regulations issued by the Secretary) concerning a change in the taxpayer's residence, if a notice of such lien is also filed in accordance with subsection (f) in the State in which such residence is located.

(3) **Required Refiling Period.** — In the case of any notice of lien, the term "required refiling period" means -

(A) the one-year period ending 30 days after the expiration of 6 years after the date of the assessment of the tax, and

(B) the one-year period ending with the expiration of 6 years after the close of the preceding required refiling period for such notice of lien.

Sec. 6325. Release Of Lien or Discharge Of Property.

(a) **Release Of Lien.** — Subject to such regulations as the Secretary may prescribe, the Secretary shall issue a certificate of release of any lien imposed with respect to any internal revenue tax not later than 30 days after the day on which -

(1) Liability Satisfied or Unenforceable - The Secretary finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable; or

(2) Bond Accepted - There is furnished to the Secretary and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by such regulations.

Sec. 6103. Confidentiality and Disclosure of Returns and Return Information.

(a) **Disclosure of Certain Returns and Return Information For Tax Administration Purposes.** —

(2) Disclosure of amount of outstanding lien. - If a notice of lien has been filed pursuant to section 6323(f), the amount of the outstanding obligation secured by such lien may be disclosed to any person who furnishes satisfactory written evidence that he has a right in the property subject to such lien or intends to obtain a right in such property.