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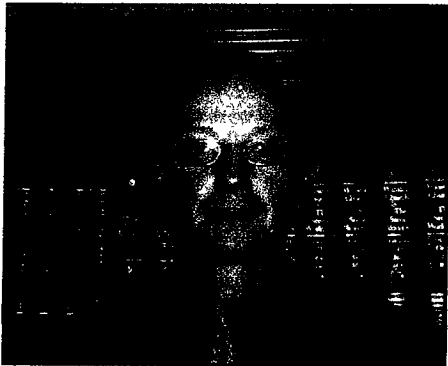
Elizabeth A. Luce

Director, Department of Licensing

Supplemental Rule G Governing Pretrial Procedures in Forfeiture In Rem Actions

John K. Rabiej

Supplemental Rule G is not a panacea, but it does offer procedural protection that civil forfeiture claimants have sought for a long time.



John K. Rabiej

is Chief of the Rules Committee Support Office of the Administrative Office of US Courts. His office staffs the Advisory Committees on Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules and the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. An earlier version of this article appeared in *The Federal Lawyer* and is used with permission. The author can be reached at John.Rabiej@AOUSCourts.gov.

THE ADVISORY COMMITTEE on Civil Rules proposed a new Rule G that became effective December 1, 2006, governing pretrial procedures in forfeiture actions as part of the Supplemental Rules for Certain Admiralty and Maritime Claims (Supplemental Rules). Forfeiture actions had been handled under various Supplemental Rules, which had caused problems. The Supplemental Rules are primarily designed to handle admiralty actions and applying them to asset forfeiture cases often has not been a good fit, presenting difficult interpretational issues. Moreover, the Supplemental Rules have not been revised to take account of many of the provisions of the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”), a major piece of legislation affecting forfeiture. 18 U.S.C. §§981-986. Nor have the Supplemental Rules been revised to take account of the constitutional jurisprudence dealing with adequate notice. The disconnect between the Supplemental Rules and in rem forfeiture procedures has become acute as the number of forfeiture actions continues to rise. The new rule addresses these problems in an integrated and coherent fashion.

Rule G consolidates the forfeiture in rem procedures located in several Supplemental Rules and sets up a uni-

fied procedural framework intended solely to address asset forfeiture cases. It adds provisions that take into account substantive and procedural forfeiture law changes made by CAFRA and constitutional jurisprudence involving the adequacy of notice. Finally, the rule fills in gaps in forfeiture procedures that have been addressed by courts on an ad hoc and inconsistent basis.

FORFEITURE ACTIONS IN GENERAL •

Forfeiture of property connected with criminal activity has been part of federal law since 1789. A civil forfeiture action typically starts with the seizure of property by a state or federal law enforcement officer. Property that is subject to forfeiture falls under one of three categories: contraband, instrumentalities of the criminal offense, and property constituting, derived from, or traceable to, any proceeds obtained from criminal activity.

Most property seized by the government is forfeited in accordance with administrative forfeiture procedures. The process is very efficient, and most forfeitures are handled by these means. Under these procedures, the government agency seizing the property usually publishes notice in a generally circulated newspaper for several weeks and sends individual notice to any known potential claimants. Any person claiming an interest in the property must respond within strict, tight deadlines and post a bond equal to 10 percent of the property's value. 19 U.S.C. §1608.

In most cases, no one files a timely claim for the seized property for obvious reasons, and the property is forfeited to the government on default. Only if someone files a claim alleging an interest in the property must the government initiate proceedings in federal court to forfeit the seized property. And in these cases, Rule G comes into play.

VOLUME OF FORFEITURE ACTIONS •

The federal government undertakes about 30,000 seizures of property each year. The vast majority

of forfeiture proceedings are handled administratively by the seizing government agencies. A significant portion of the seizures involves seizures of cars used in transporting illegal aliens into the country. Nearly 10,000 cars are forfeited annually. In about 80 percent to 85 percent of all forfeitures, no claim is made on the property, and the property is forfeited without further government action.

About 2,000 of these actions end up in federal court in civil cases each year when a claim has been filed. *Judicial Business of the United States Courts, Annual Report of the Director*, Leonidas Ralph Mecham (2003). These civil judicial forfeiture proceedings usually involve seizures of drug-related property. Rule G governs these proceedings. An approximately equal number of criminal forfeiture actions are handled as part of prosecutions in criminal cases, as discussed below.

NATURE AND THEORY OF CIVIL AND CRIMINAL FORFEITURES •

For nearly 200 years, all forfeiture statutes were civil statutes, and all forfeitures were civil forfeitures. In the last 25 years, however, Congress has enacted criminal forfeiture statutes. Both civil and criminal forfeiture statutes prescribe the substantive law, and both invoke the admiralty procedures used in forfeiting vessels under the Supplemental Rules.

A civil forfeiture is different in nature from a criminal forfeiture. Forfeiture in a criminal case serves as punishment of an individual for commission of a criminal offense. The forfeiture action is aimed at a specific individual and requires in personam jurisdiction over the defendant. Federal Rule of Criminal Procedure 32.2 sets out the procedures governing a criminal forfeiture. The rule consolidates various forfeiture procedures contained in other rules and in the Supplemental Rules. Criminal Rule 32.2 took effect on December 1, 2000. They include procedures governing a third party's claim to the seized property.

Unlike a criminal forfeiture, a civil forfeiture is based on in rem jurisdiction. The forfeited property is the defendant, and the burden of proof rests on the party alleging ownership. Under federal forfeiture law, the government need not establish that the owner of the property is a criminal, only that the property was unlawfully used by someone or was bought with money from illicit activity.

→ **CIVIL FORFEITURE PROCEDURES** • Congress has enacted about 100 civil forfeiture statutes and 10 criminal forfeiture statutes. The statutes specify the types of property that can be forfeited and the grounds for forfeiture. The overwhelming majority of civil forfeitures are carried out under one of two CAFRA statutes: 18 U.S.C. §981 and 21 U.S.C. §881. Both statutes invoke the customs law for administrative forfeiture proceedings and the Supplemental Rules for judicial forfeiture proceedings. 18 U.S.C. §981(d) and 21 U.S.C. §881(d) incorporate by reference the administrative forfeiture procedures in the customs laws set out in 19 U.S.C. §§1602 et seq.

After a government agency seizes property, it typically commences administrative forfeiture procedures, which provide for public notice published for three successive weeks and individual notice to known potential claimants. Under the relevant customs law “notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct.” 19 U.S.C. §1607(a).

Specific time deadlines are set out for a claimant to file a claim with the appropriate official of the seizing government agency. The deadlines are tight, such as “not later than 30 days after the date of final publication of notice of seizure.” 18 U.S.C. §983(a)(2)(B). Compare with the shorter response time under the customs law, which requires a claim

to be filed within 20 days from the date of the first publication of the seizure notice (19 U.S.C. §1608).

If no claim is timely filed, the property is forfeited. A court may consider a claim filed untimely, however, if the government failed to provide adequate notice in the administrative forfeiture proceeding.

If someone files a timely claim to the seized property in the administrative forfeiture proceeding, the government must decide whether to release the property or institute judicial forfeiture proceedings. If the government decides to proceed with the forfeiture action, it must file a complaint in federal court. The complaint must be filed generally no later than 90 days after the claim had been filed in the administrative forfeiture proceeding. The claimant may file a claim in federal court to the forfeited property. The claimant has the burden to prove that the property is not subject to forfeiture by a preponderance of the evidence. A claimant can make this showing either by establishing that the predicate offense was never committed or the property lacked a sufficient nexus to the crime to qualify for forfeiture under the underlying statute. This burden can be demonstrated only by admissible evidence. The pretrial procedures governing judicial forfeiture proceedings were found throughout the Supplemental Rules, particularly in Rules C and E.

CIVIL ASSET FORFEITURE REFORM ACT

OF 2000 • In 2000, Congress enacted CAFRA. The Act changed the law governing forfeiture. The Act provides citizens more protections against improper government seizures of property. Two changes made by CAFRA in particular affect the forfeiture rules under consideration.

CAFRA shifted the initial burden of proof to the government to show that the seized property is subject to forfeiture by a preponderance of the evidence. 18 U.S.C. §983(c). “In a suit or action brought under any civil forfeiture statute for

the civil forfeiture of any property—the burden of proof is on the Government to establish, by a preponderance of the evidence, that property is subject to forfeiture....” This change has far-reaching consequences because under CAFRA the government must now rely on admissible evidence to meet its burden of proof.

CAFRA also expressly recognized an “innocent owner” defense that could be raised by the claimant to defeat the forfeiture. 18 U.S.C. §983(d). “An innocent owner’s interest in property shall not be forfeited under any civil forfeiture statute.” Until CAFRA’s enactment, an innocent owner of the seized property could not prevail against the government in a forfeiture action. In *Bennis v. Michigan*, 516 U.S. 442, 446 (1996), the Supreme Court had held that the Due Process Clause of the Fifth Amendment did not protect an innocent owner from forfeiture. The Court found that “a long and unbroken line of cases holds that an owner’s interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.” A claimant’s only recourse was to challenge the nexus between the property and the crime, contending that the property was not connected to the criminal activity or that the crime was never committed. That changed with the enactment of CAFRA.

PRINCIPAL ISSUES: STANDING TO CONTEST FORFEITURE OF SEIZED PROPERTY AND ADEQUATE NOTICE •

The Advisory Committee on Civil Rules devoted considerable attention to two issues in in rem forfeiture actions dealing with the claimant’s standing and the adequacy of notice. The former issue was raised by CAFRA, while constitutional jurisprudence raised the latter issue.

Under the procedures in effect before CAFRA, the relative burdens of proof for the government and the claimant in forfeiture actions were one-sided in favor of the government. Although a claim-

ant could file a motion to dismiss first, requiring the government to respond, the claimant’s motion to dismiss seldom succeeded. The government would usually rebuff the motion by meeting its minimum probable cause burden of proof, often relying solely on hearsay evidence to show that the property was subject to forfeiture. The claimant would then be compelled to file an answer establishing standing. Thus, as a practical matter, the claimant had to prove its bona fides first before the government was put to its test.

After disposing of the motion of dismiss, the government would have the opportunity to scrutinize the claimant’s answer to determine whether the claimant had a real interest in the seized property. The claimant’s interest in the property had to be adequately pleaded as part of the claimant’s answer, which the government could carefully examine. Absent proof of a real interest in the seized property, sham claims were readily dismissed. In the end, the government was never put to the test because the claimant often failed to demonstrate a real interest in the seized property. The government was successful in a very high percentage of these cases.

CAFRA’s shifting of the government’s burden of proof to show that the property is subject to forfeiture by a preponderance of evidence instead of probable cause resulted in unforeseen consequences arising from the interplay between the existing Civil and Supplemental Rules. The government contends that shifting the burden of proof provides an opportunity to claimants to file sham claims to take possession of the seized property when the government fails to meet its burden, even though the claimant may possess no real interest in the property.

The government must now present admissible evidence, not hearsay evidence, to meet its burden. No longer is a claimant’s motion to dismiss, filed before the answer, easily deflected by the government. As a result, although CAFRA has effectively



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TITLE 18 > PART I > CHAPTER 46 > § 983

§ 983. General rules for civil forfeiture proceedings

(a) Notice; Claim; Complaint.—

(1)

(A)

(i) Except as provided in clauses (ii) through (v), in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.

(ii) No notice is required if, before the 60-day period expires, the Government files a civil judicial forfeiture action against the property and provides notice of that action as required by law.

(iii) If, before the 60-day period expires, the Government does not file a civil judicial forfeiture action, but does obtain a criminal indictment containing an allegation that the property is subject to forfeiture, the Government shall either—

(I) send notice within the 60 days and continue the nonjudicial civil forfeiture proceeding under this section; or

(II) terminate the nonjudicial civil forfeiture proceeding, and take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.

(iv) In a case in which the property is seized by a State or local law enforcement agency and turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law, notice shall be sent not more than 90 days after the date of seizure by the State or local law enforcement agency.

(v) If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

(B) A supervisory official in the headquarters office of the seizing agency may extend the period for sending notice under subparagraph (A) for a period not to exceed 30 days (which period may not be further extended except by a court), if the official determines that the conditions in subparagraph (D) are present.

(C) Upon motion by the Government, a court may extend the period for sending notice under subparagraph (A) for a period not to exceed 60 days, which period may be further extended by the court for 60-day periods, as necessary, if the court determines, based on a written certification of a supervisory official in the headquarters office of the seizing agency, that the conditions in subparagraph (D)

are present.

~~(D) The period for sending notice under this paragraph may be extended only if there is reason to believe that notice may have an adverse result, including—~~

- ~~(i) endangering the life or physical safety of an individual;~~
- ~~(ii) flight from prosecution;~~
- ~~(iii) destruction of or tampering with evidence;~~
- ~~(iv) intimidation of potential witnesses; or~~
- ~~(v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.~~

(E) Each of the Federal seizing agencies conducting nonjudicial forfeitures under this section shall report periodically to the Committees on the Judiciary of the House of Representatives and the Senate the number of occasions when an extension of time is granted under subparagraph (B).

~~(F) If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.~~

(2)

~~(A) Any person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may file a claim with the appropriate official after the seizure.~~

(B) A claim under subparagraph (A) may be filed not later than the deadline set forth in a personal notice letter (which deadline may be not earlier than 35 days after the date the letter is mailed), except that if that letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure.

(C) A claim shall—

- (i) identify the specific property being claimed;
- (ii) state the claimant's interest in such property; and
- (iii) be made under oath, subject to penalty of perjury.

(D) A claim need not be made in any particular form. Each Federal agency conducting nonjudicial forfeitures under this section shall make claim forms generally available on request, which forms shall be written in easily understandable language.

(E) Any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

(3)

(A) ~~Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.~~

- (B) If the Government does not—
- (I) file a complaint for forfeiture or return the property, in accordance with subparagraph (A); or
 - (II) before the time for filing a complaint has expired—
 - (I) obtain a criminal indictment containing an allegation that the property is subject to forfeiture; and
 - (II) take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute,
- the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense.
- (C) In lieu of, or in addition to, filing a civil forfeiture complaint, the Government may include a forfeiture allegation in a criminal indictment. If criminal forfeiture is the only forfeiture proceeding commenced by the Government, the Government's right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.
- (D) No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

(4)

- (A) In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint.
- (B) A person asserting an interest in seized property, in accordance with subparagraph (A), shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim.

(b) Representation.—

(1)

- (A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under section 3006A of this title in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.
- (B) In determining whether to authorize counsel to represent a person under subparagraph (A), the court shall take into account such factors as—
- (i) the person's standing to contest the forfeiture; and
 - (ii) whether the claim appears to be made in good faith.

(2)

- (A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the property subject to forfeiture is real property

that is being used by the person as a primary residence, the court, at the request of the person, shall insure that the person is represented by an attorney for the Legal Services Corporation with respect to the claim.

(B)

(i) At appropriate times during a representation under subparagraph (A), the Legal Services Corporation shall submit a statement of reasonable attorney fees and costs to the court.

(ii) The court shall enter a judgment in favor of the Legal Services Corporation for reasonable attorney fees and costs submitted pursuant to clause (i) and treat such judgment as payable under section 2465 of title 28, United States Code, regardless of the outcome of the case.

(3) The court shall set the compensation for representation under this subsection, which shall be equivalent to that provided for court-appointed representation under section 3006A of this title.

(c) Burden of Proof.— In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property—

(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;

(2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and

(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

(d) Innocent Owner Defense.—

(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.

(2)

(A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who—

(i) did not know of the conduct giving rise to forfeiture; or

(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

(B)

(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law—

(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law

enforcement agency to discourage or prevent the illegal use of the property.

(II) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

(3)

(A) ~~With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term "innocent owner" means a person who, at the time that person acquired the interest in the property—~~

(i) ~~was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and~~

(ii) ~~did not know and was reasonably without cause to believe that the property was subject to forfeiture.~~

(B) ~~An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if—~~

(i) ~~the property is the primary residence of the claimant;~~

(ii) ~~depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;~~

(iii) ~~the property is not, and is not traceable to, the proceeds of any criminal offense; and~~

(iv) ~~the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate,~~

except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.

(4) Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.

(5) ~~If the court determines, in accordance with this section, that an innocent owner has a partial interest in property otherwise subject to forfeiture, or a joint tenancy or tenancy by the entirety in such property, the court may enter an appropriate order—~~

(A) ~~severing the property;~~

(B) ~~transferring the property to the Government with a provision that the Government compensate the innocent owner to the extent of his or her ownership interest once a final order of forfeiture has been entered and the property has been reduced to liquid assets; or~~

(C) ~~permitting the innocent owner to retain the property subject to a lien in favor of the Government to the extent of the forfeitable interest in the property.~~

(6) In this subsection, the term "owner"—

(A) ~~means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest; and~~

(B) does not include—

- (i) a person with only a general unsecured interest in, or claim against, the property or estate of another;**
- (ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or**
- (iii) a nominee who exercises no dominion or control over the property.**

(e) Motion To Set Aside Forfeiture.—

(1) Any person entitled to written notice in any nonjudicial civil forfeiture proceeding, under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person's interest in the property, which motion shall be granted if—

- (A) the Government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice; and**
- (B) the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim.**

(2)

(A) Notwithstanding the expiration of any applicable statute of limitations, if the court grants a motion under paragraph (1), the court shall set aside the declaration of forfeiture as to the interest of the moving party without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party.

- (B) Any proceeding described in subparagraph (A) shall be commenced—**
 - (i) if nonjudicial, within 60 days of the entry of the order granting the motion; or**
 - (ii) if judicial, within 6 months of the entry of the order granting the motion.**

(3) A motion under paragraph (1) may be filed not later than 5 years after the date of final publication of notice of seizure of the property.

(4) If, at the time a motion made under paragraph (1) is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government may institute proceedings against a substitute sum of money equal to the value of the moving party's interest in the property at the time the property was disposed of.

(5) A motion filed under this subsection shall be the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statute.

(f) Release Of Seized Property.—

(1) A claimant under subsection (a) is entitled to immediate release of seized property if—

- (A) the claimant has a possessory interest in the property;**
- (B) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of the trial;**
- (C) the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as**

preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless;

~~(D) the claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and~~

(E) none of the conditions set forth in paragraph (8) applies.

~~(2) A claimant seeking release of property under this subsection must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.~~

~~(3)~~

~~(A) If not later than 15 days after the date of a request under paragraph (2) the property has not been released, the claimant may file a petition in the district court in which the complaint has been filed or, if no complaint has been filed, in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.~~

~~(B) The petition described in subparagraph (A) shall set forth—~~

~~(i) the basis on which the requirements of paragraph (1) are met; and~~

~~(ii) the steps the claimant has taken to secure release of the property from the appropriate official.~~

~~(4) If the Government establishes that the claimant's claim is frivolous, the court shall deny the petition. In responding to a petition under this subsection on other grounds, the Government may in appropriate cases submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.~~

~~(5) The court shall render a decision on a petition filed under paragraph (3) not later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown.~~

~~(6) If—~~

~~(A) a petition is filed under paragraph (3); and~~

~~(B) the claimant demonstrates that the requirements of paragraph (1) have been met,~~

the district court shall order that the property be returned to the claimant, pending completion of proceedings by the Government to obtain forfeiture of the property.

(7) If the court grants a petition under paragraph (3)—

(A) the court may enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including—

(i) permitting the inspection, photographing, and inventory of the property;

(ii) fixing a bond in accordance with rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims; and

(iii) requiring the claimant to obtain or maintain insurance on the subject property; and

(B) the Government may place a lien against the property or file a lis pendens to ensure that the property is not transferred to another person.

(8) This subsection shall not apply if the seized property—

(A) is contraband, currency, or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;

(B) is to be used as evidence of a violation of the law;

(C) by reason of design or other characteristic, is particularly suited for use in illegal activities; or

(D) is likely to be used to commit additional criminal acts if returned to the claimant.

(g) Proportionality.—

(1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.

(2) In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture.

(3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.

(4) If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

(h) Civil Fine.—

(1) In any civil forfeiture proceeding under a civil forfeiture statute in which the Government prevails, if the court finds that the claimant's assertion of an interest in the property was frivolous, the court may impose a civil fine on the claimant of an amount equal to 10 percent of the value of the forfeited property, but in no event shall the fine be less than \$250 or greater than \$5,000.

(2) Any civil fine imposed under this subsection shall not preclude the court from imposing sanctions under rule 11 of the Federal Rules of Civil Procedure.

(3) In addition to the limitations of section 1915 of title 28, United States Code, in no event shall a prisoner file a claim under a civil forfeiture statute or appeal a judgment in a civil action or proceeding based on a civil forfeiture statute if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious, unless the prisoner shows extraordinary and exceptional circumstances.

(i) Civil Forfeiture Statute Defined.— In this section, the term "civil forfeiture statute"—

(1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; and

(2) does not include—

(A) the Tariff Act of 1930 or any other provision of law codified in title 19;

(B) the Internal Revenue Code of 1986;

(C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);

(D) the Trading with the Enemy Act (50 App. U.S.C. 1 et seq.) or the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. 1701 et seq.); or

(E) section 1 of title VI of the Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. 401).

(j) Restraining Orders; Protective Orders.—

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture—

(A) upon the filing of a civil forfeiture complaint alleging that the property with respect to which the order is sought is subject to civil forfeiture; or

(B) prior to the filing of such a complaint, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

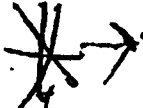
(2) An order entered pursuant to paragraph (1)(B) shall be effective for not more than 90 days, unless extended by the court for good cause shown, or unless a complaint described in paragraph (1)(A) has been filed.

(3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(4) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

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jurisdiction has the burden of showing that it exists on the record. Once the court has knowledge that subject matter is lacking, the court (meaning the judge) has no discretion but to dismiss the action. Failure to dismiss means that the court is proceeding in clear absence of all jurisdiction and subjects the judge to suit. Contemplation of subject matter jurisdiction harkens to the memory of Vince Lombardi, who when asked if winning was everything replied, "winning is the only thing." Personal jurisdiction is not usually an issue, but subject matter jurisdiction is always, always an issue! Subject matter jurisdiction is not everything, it's the only thing! Incidentally, *in rem* is the power of a court over a thing so that its jurisdiction is valid against the rights of every person having an interest in the thing; *quasi in rem* gives the court jurisdiction over a property interest but only to the limit of the interest in the property and not the property entirely.



Attorneys can't testify. Statements of counsel in brief or in oral argument are not facts before the court.

This finding of a continuing investigation, which forms the foundation of the majority opinion, comes from *statements of counsel* made during the appellate process. As we have said of other un-sworn statements which were not part of the record and therefore could not have been considered by the trial court: "Manifestly, [such statements] cannot be properly considered by us in the disposition of [a] case." *UNITED STATES v. LOVASCO* (06/09/77) 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752, Under no possible view, however, of the findings we are considering can they be held to constitute a compliance with the statute, since they merely embody conflicting *statements of counsel* concerning the facts as they suppose them to be and their appreciation of the law which they deem applicable, there being, therefore, no attempt whatever to state the ultimate facts by a consideration of which we would be able to conclude whether or not the judgment was warranted. *GONZALES v. BUIST*. (04/01/12) 224 U.S. 126, 56 L. Ed. 693, 32 S. Ct. 463. No instruction was asked, but, as we have said, the judge told the jury that they were to regard only the evidence admitted by him, not statements of counsel. *HOLT v. UNITED STATES*. (10/31/10) 218 U.S. 245, 54 L. Ed. 1021, 31 S. Ct. 2, Care has been taken, however, in summoning witnesses to testify, to call no man whose character or whose word could be successfully impeached by any methods known to the law. And it is remarkable, we submit, that in a case of this magnitude, with every means and resource at their command, the complainants, after years of effort and search in near and in the most remote paths, and in every collateral by-way, now rest the charges of conspiracy and of gullibility against these witnesses, only upon the bare *statements of counsel*. The lives of all the witnesses are clean, their characters for truth and veracity un-assailed, and the evidence of any attempt to influence the memory or the impressions of any

man called, cannot be successfully pointed out in this record. *TELEPHONE CASES. DOLBEAR v. AMERICAN BELL TELEPHONE COMPANY. MOLECULAR TELEPHONE COMPANY V. AMERICAN BELL TELEPHONE COMPANY. AMERICAN BELL TELEPHONE COMPANY V. MOLECULAR TELEPHONE COMPANY. CLAY COMMERCIAL TELEPHONE COMPANY V. AMERICAN BELL TELEPHONE COMPANY. PEOPLE'S TELEPHONE COMPANY V. AMERICAN BELL TELEPHONE COMPANY. OVERLAND TELEPHONE COMPANY V. AMERICAN BELL TELEPHONE COMPANY.* (PART TWO THREE) (03/19/88) 126 U.S. 1, 31 L. Ed. 863, 8 S. Ct. 778. Statements of counsel in brief or in argument are not sufficient for motion to dismiss or for summary judgment, *Trinsey v. Pagliaro*, D. C. Pa. 1964, 229 F. Supp. 647. Factual statements or documents appearing only in briefs shall not be deemed to be a part of the record in the case, unless specifically permitted by the Court - Oklahoma Court Rules and Procedure, Federal local rule 7.1(b).

SUPREME CT CASE

SECTION TWO: The law of voids

EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT VOID JUDGMENTS BUT WERE AFRAID TO ASK!

Void judgments are those rendered by a court which lacked jurisdiction, either of the subject matter or the parties. *Wahl v. Round Valley Bank* 38 Ariz. 411, 300 P. 955 (1931); *Tube City Mining & Milling Co. v. Otterson*, 16 Ariz. 305, 146 P. 203 (1914); and *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 2d 278 (1940). A void judgment which includes judgment entered by a court which lacks jurisdiction over the parties or the subject matter, or lacks inherent power to enter the particular judgment, or an order procured by fraud, can be attacked at any time, in any court, either directly or collaterally, provided that the party is properly before the court. *Long v. Shorebank Development Corp.*, 182 F.3d 548 (C.A. 7 Ill. 1999). A void judgment is one which, from its inception, was a complete nullity and without legal effect. *Lubben v. Selective Service System Local Bd. No. 27*, 453 F.2d 645, 14 A.L.R. Fed. 298 (C.A. 1 Mass. 1972). A void judgment is one which from the beginning was complete nullity and without any legal effect. *Hobbs v. U.S. Office of Personnel Management*, 485 F.Supp. 456 (M.D. Fla. 1980). Void judgment is one that, from its inception, is complete nullity and without legal effect. *Holstein v. City of Chicago*, 803 F.Supp. 205, reconsideration denied 149 F.R.D. 147, affirmed 29 F.3d 1145 (N.D. Ill 1992). Void judgment is one where court lacked personal or subject matter jurisdiction or entry of order violated due process. U.S.C.A. Const. Amend. 5 - *Triad Energy Corp. v. McNell* 110 F.R.D. 382 (S.D.N.Y. 1986). Judgment is a void judgment if court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or acted in a manner

Section 1951. Interference with commerce by threats or violence

(a) ~~Whoever in any way or degree obstructs, delays, or impedes or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of such purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years,~~

(b) As used in this section -

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "~~extortion~~" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

~~(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.~~

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.