

Removing Interpretative Barnacles: Counterclaims and Civil Forfeiture

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Through civil forfeiture, the federal government can take ownership of property merely by proving it “guilty” by a preponderance of the evidence. The government need not formally accuse its owner of any crime. Yet the procedural mechanisms available to a property owner who wishes to contest a forfeiture are limited, complex, and strictly enforced. A creature of admiralty law, civil forfeiture draws on supplemental provisions of the Federal Rules of Civil Procedure with which many lawyers and federal judges are unfamiliar.

This Comment explores an active circuit split and identifies an undertheorized way for property owners to vindicate their rights: counterclaims against the government. Though the great majority of federal courts to address the question have summarily dismissed property owners’ counterclaims in civil forfeiture actions, those courts are mistaken. The civil forfeiture counterclaim finds strong support in the Civil Rules’ text, as well as in their historical context, purpose, and original public understanding. In the words of then-Judge Charles E. Clark, the principal drafter of the Civil Rules, courts should remove the “interpretative barnacles” that have made it unnecessarily difficult for property owners to defend themselves in civil forfeiture actions.

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INTRODUCTION

The Pueblo of Pojoaque is a Native American tribe in northern New Mexico. Its reservation has a population of 2,712, and, like many tribes, the Pueblo of Pojoaque operates multiple casinos and resorts.¹ When its gaming agreement with New Mexico expired in 2015, the tribe received federal permission to continue operating its casinos while it negotiated a new deal with the state.²

But in 2018—after the tribe and state came to an agreement—the U.S. government seized over \$10 million earned by the tribe during the negotiation, claiming the money was the proceeds of illegal gambling.³ The Pueblo of Pojoaque challenged the civil forfeiture in court, filing a counterclaim alleging that the United States had violated “two non-enforcement agreements and . . . the covenant of good faith and fair dealing with respect to both agreements.”⁴ The court dismissed the tribe’s counterclaim as

¹ *Pojoaque Pueblo*, N.M. TOURISM DEPT, <https://perma.cc/HQ5W-KUQX>.

² Andrew Oxford, *U.S. Seizes \$10.1 Million in Gambling Revenue from Pojoaque Pueblo*, SANTA FE NEW MEXICAN (Mar. 23, 2018), <https://perma.cc/88PH-HR3U>.

³ *Id.*

⁴ *United States v. Approximately \$10,128,847.42 Seized from US Bank Account No. -XXXX Held in the Name of Pueblo of Pojoaque Gaming Funds*, No. 1:18-CV-0279-SWS-MLC, 2018 WL 6381150, at *1 (D.N.M. Dec. 3, 2018).

inappropriate in an in rem proceeding, since the money—not the tribe—was the nominal defendant.⁵ The tribe, with reduced leverage, settled and ultimately gave up \$6.2 million.⁶

Civil forfeiture—the proceeding that cost the tribe so much—is commonplace. The federal government takes in billions of dollars each year through the practice,⁷ assuming ownership of everything from cars to houses, cash to bitcoins.⁸ Crucially, a civil forfeiture action is in rem, not in personam. The government brings proceedings against the property itself, rather than against its owner, under the legal fiction that the property is culpable due to its association with an alleged crime. The government can thereby take ownership without formally accusing the owner of anything.⁹ Property cannot hire a lawyer or defend itself pro se, so its owner, though not a defendant, must intercede and contest the forfeiture. Since the action is civil in form, the federal government has a low burden: it need only prove the property “guilty” by a preponderance of the evidence.¹⁰

Property owners start at a disadvantage, but it gets worse. The Federal Rules of Civil Procedure (the “Civil Rules”), which govern federal civil forfeiture actions,¹¹ provide few protections for property owners. And when states enact more procedural protections, state and local law enforcement can enlist the federal government to seize property for them in exchange for a cut, called “equitable sharing.”¹² To complicate matters further, civil forfeiture is a creature of admiralty practice. Consequently, it draws on the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the “Supplemental Civil Rules”) for additional procedural requirements. Many lawyers and federal

⁵ *Id.* at *1–2.

⁶ See Mark Oswald, *State, Pojoaque Agree to Divide Up \$10M Account*, ALBUQUERQUE J. (June 23, 2019), <https://perma.cc/ZJ26-X4MU>.

⁷ See LISA KNEPPER, JENNIFER McDONALD, KATHY SANCHEZ & ELYSE SMITH POHL, INST. FOR JUST., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 162 (3d ed. 2020) (finding “at least \$45.7 billion in total forfeiture revenue”).

⁸ For an example of a civil forfeiture proceeding against bitcoins and other cryptocurrencies, see generally Complaint, *United States v. 280 Virtual Currency Accounts*, No. 1:20-cv-02396 (D.D.C. Aug. 27, 2020), 2020 WL 5217106.

⁹ See KNEPPER ET AL., *supra* note 7, at 10.

¹⁰ See CHARLES DOYLE, CONG. RSCH. SERV., 97-139, *CRIME AND FORFEITURE* 10 (2015).

¹¹ By contrast, criminal forfeiture can occur only after the owner has been duly convicted of a crime. *Id.* at 5. There is no special reason for this distinction, and “the government regularly brings civil forfeiture actions alongside criminal prosecution in order to avoid granting defendants criminal procedural protections.” Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 83 (2008).

¹² See DOYLE, *supra* note 10, at 20–21.

judges are unfamiliar with this obscure portion of the Civil Rules.¹³

Necessity breeds innovation. In the face of these hurdles, many litigants, like the Pueblo of Pojoaque, have sought to bring counterclaims against the federal government in civil forfeiture actions. For nearly three decades, however, federal courts unanimously threw out such counterclaims.¹⁴ These courts reasoned that a counterclaim, by its nature, must literally run counter to a plaintiff's claim, and therefore can only be brought by a defendant against a plaintiff.¹⁵ Property owners, mere "claimants" rather than defendants, are out of luck. Today, however, there is an active circuit split over the question. In 2019, the Fifth Circuit expressly broke from its peers.¹⁶ The Civil Rules, it held, allow property owners to bring counterclaims in civil forfeiture cases.¹⁷

Civil forfeiture's burdensome procedures, combined with their cramped interpretation by most federal courts, are unduly harsh and demand reform. Members of Congress from across the political spectrum advocate for an overhaul.¹⁸ Yet the legislative process works slowly. Without robust congressional action on the horizon, this Comment acts practically and proposes a change that can be brought about by simply interpreting existing procedural rules correctly. This Comment argues that, as a descriptive matter, the Fifth Circuit is right and other courts are wrong. For three decades, courts decoupled the relevant rules from their texts and, in the words of the primary drafter of the Civil Rules, then-Judge Charles E. Clark, caused the rules to "become[] entirely obscured by [] interpretative barnacles."¹⁹

In 2019, the Fifth Circuit began the process of removing those interpretative barnacles by applying the Civil Rules accurately.

¹³ See Anton R. Valukas & Thomas P. Walsh, *Forfeitures: When Uncle Sam Says You Can't Take It with You*, 14 LITIG., no. 2, 1988, at 31, 35 (calling civil forfeiture procedure "strange to most lawyers," and warning that, under the Supplemental Civil Rules, even "an experienced lawyer may encounter the unexpected").

¹⁴ See *infra* notes 97, 100–01 (collecting cases).

¹⁵ See, e.g., *United States v. One Lot of U.S. Currency (\$68,000)*, 927 F.2d 30, 34 (1st Cir. 1991).

¹⁶ See *United States v. \$4,480,466.16 in Funds Seized from Bank of Am. Account Ending in 2653*, 942 F.3d 655, 656 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 112 (2020).

¹⁷ *Id.* at 663.

¹⁸ See Fifth Amendment Integrity Restoration Act of 2019, H.R. 1895, 116th Cong. (2019) (introduced by a Republican and co-sponsored by three Democrats and two Republicans); Fifth Amendment Integrity Restoration Act of 2019, S. 4074, 116th Cong. (2020) (introduced by a Republican and co-sponsored by two Republicans and an Independent).

¹⁹ Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 498 (1950).

As currently written, the Civil Rules permit claimants—not just defendants—to bring counterclaims against the United States in civil forfeiture proceedings. Such a reading finds strong support in the Civil Rules’ text, as well as in their historical context, purpose, and original public understanding. A civil forfeiture case is not *sui generis*. At its core, it is a civil action like any other²⁰ and should be treated as such. Allowing such counterclaims will help property owners vindicate individual rights, achieve greater control over the proceedings, and reduce perverse incentives for law enforcement.

This Comment proceeds in four parts. Part I begins with an overview of civil forfeiture’s history and present-day practice. It then outlines the historical evolution of counterclaims and intervention in courts of law, equity, and admiralty. Lastly, it explains the Supplemental Civil Rules relevant to the question at hand. Part II details the circuit split. Part III examines the text to argue that per the plain meaning of the Civil Rules, claimants in civil forfeiture actions are intervenors, and can therefore bring counterclaims. It then turns to extrinsic sources to buttress its claim. Part IV looks to sovereign immunity doctrine to determine which counterclaims are allowed and addresses possible questions of jurisdiction and claim preclusion. Finally, it concludes by discussing the normatively beneficial effects of counterclaims on civil forfeiture actions.

I. BACKGROUND AND RELEVANT LAW

This Part details civil forfeiture’s history and current status. It then describes the evolution of counterclaims and intervention, concluding that they have trended toward easier joinder of claims and parties, respectively. Finally, it summarizes the relevant Supplemental Civil Rules.

A. Civil Forfeiture: Past and Present

Civil forfeiture is firmly ensconced in Anglo-American law. Its theoretical roots extend back to biblical sources, and its historical trajectory runs from English admiralty law through the ongoing “war on drugs.” This Section will summarize the historical development and contemporary operation of civil forfeiture.

²⁰ Cf. FED. R. CIV. P. 2 (“There is one form of action—the civil action.”).

1. History.

Civil forfeiture's logic is of ancient vintage. The Bible allows punishment of guilty property without personal liability for the owner.²¹ Similar mechanisms existed in Anglo-Saxon, Roman, and customary African law.²² And at English common law, personal property that caused a death was considered "an accursed thing" and would be forfeited to the crown as a "deodand"²³—literally, a thing "given to God"²⁴—ostensibly "to be applied to pious uses" by the king.²⁵

Colonial America adopted the deodand, but the mechanism for giving up property without criminal conviction did not last long after independence.²⁶ The underlying legal fiction, however, proved influential in admiralty law.²⁷ Since at least the seventeenth century, the British Empire enforced its trade and customs laws through in rem forfeitures.²⁸ The government (or a qui tam relator) could bring a case against a ship and its cargo in the Court of Exchequer, and the owner could appear to contest the seizure.²⁹ The early United States adopted similar practices in admiralty actions. Chief Justice John Marshall explained that such a case "is not a proceeding against the owner; it is a proceeding against the vessel, for an offense committed by the vessel."³⁰ The deodand was over—Americans recoiled at providing revenue for

²¹ See *Exodus* 21:28 (King James) ("If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, . . . but the owner of the ox *shall be* quit."). This is a canonical citation for any discussion of civil forfeiture's origins. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 & n.17 (1974) (quoting *Exodus* 21:28). Yet some doubt whether the rule referred to in this passage is actually comparable to modern forfeiture. See, e.g., LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 7–9 (1996) (explaining that "[d]eodands did not derive from the Bible," and that the ox, rather than being forfeited, was stoned to death based on a fear of diabolical possession, because "no one in authority benefited from its value").

²² See Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 *TEMP. L.Q.* 169, 181–82 (1973).

²³ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *300–01.

²⁴ Finkelstein, *supra* note 22, at 180 n.35.

²⁵ 1 BLACKSTONE, *supra* note 23, at *300.

²⁶ See LEVY, *supra* note 21, at 13–15.

²⁷ Cf. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 24–30 (Boston, Little, Brown & Co. 1881) (linking deodands to in rem actions in admiralty).

²⁸ See Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 *YALE L.J.* 2446, 2457–58 (2016).

²⁹ *Id.* at 2459–60.

³⁰ *United States v. The Little Charles*, 26 F. Cas. 979, 982 (Marshall, Circuit Justice, C.C.D. Va. 1818) (No. 15,612); see also *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14–15 (1827).

the king.³¹ But forfeiture, justified by regulatory purposes rather than moral ones, continued.

Forfeiture actions were necessary in the maritime domain. Without immediate seizure, a foreign-owned ship connected to a crime could simply sail away, leaving authorities with no recourse. Over the next century and a half, however, civil forfeiture traveled onto dry land. A convenient way for the government to enforce regulations of property,³² the action in rem naturally expanded, from customs laws to tax laws,³³ to alcohol-prohibition laws,³⁴ to laws regulating drugs and numerous other crimes.³⁵ Despite its historical pedigree, however, courts never saw the practice as unassailable. In 1886, the Supreme Court called civil forfeiture “quasi-criminal” and held that both the Fourth and Fifth Amendments applied to its use by the federal government.³⁶

Forfeiture’s great expansion came in the 1980s, during the war on drugs. Believing existing forfeiture laws to be “underutilized,”³⁷ Congress passed two statutes³⁸ to expand federal civil forfeiture. In 1989, the attorney general said, “It’s now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation.”³⁹ This expansion begat another round of reforms: the Supreme Court addressed various constitutional aspects of civil forfeiture in the 1990s⁴⁰ and, in 2000, Congress reformed the process somewhat

³¹ See LEVY, *supra* note 21, at 14.

³² *Cf. id.* at 47 (“The *in rem* proceeding that leads to civil forfeiture is attractive to the nation’s lawmakers because it is swift, cheap, productive, and much more likely to be successful than a criminal forfeiture proceeding.”).

³³ See *Calero-Toledo*, 416 U.S. at 683.

³⁴ See *Van Oster v. Kansas*, 272 U.S. 465, 466 (1926).

³⁵ See, e.g., 18 U.S.C. § 981(a) (listing property subject to civil forfeiture).

³⁶ *Boyd v. United States*, 116 U.S. 616, 634–35 (1886); see also *id.* at 634 (“[P]roceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offences committed by him, though they may be civil in form, are in their nature criminal.”).

³⁷ DOYLE, *supra* note 10, at 22 n.130.

³⁸ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2040 (civil forfeiture provisions codified at 21 U.S.C. § 881); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (civil forfeiture provisions codified at 18 U.S.C. § 981).

³⁹ Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), <https://perma.cc/M2TW-2VBZ> (quoting then-Attorney General Richard Thornburgh).

⁴⁰ See, e.g., *Austin v. United States*, 509 U.S. 602, 622 (1993) (holding that the Excessive Fines Clause of the Eighth Amendment applies to civil forfeitures); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 46 (1993) (holding that due process normally requires notice and an opportunity to be heard before seizure of real property); *Bennis v. Michigan*, 516 U.S. 442, 446 (1996) (holding that due process does not require an “innocent-owner” defense); *United States v. Ursery*, 518 U.S. 267, 287 (1996) (holding that civil

through the Civil Asset Forfeiture Reform Act⁴¹ (CAFRA). As the story of the Pueblo of Pojoaque demonstrates, however, even after CAFRA, civil forfeiture continues to reach far beyond drug kingpins and high-seas pirates.

2. Civil forfeiture today.

Today, a federal civil forfeiture proceeding typically begins as an “administrative forfeiture,” which allows for seizure and only requires notice to anyone with a legal interest in the property.⁴² A claimant then has thirty-five days to file a claim and request a judicial hearing.⁴³ If a claimant contests the seizure, the government can launch a “judicial forfeiture” by filing a complaint against the property in district court.⁴⁴ The owner has thirty days to file a claim identifying her interest⁴⁵ and twenty-one more days to file an answer to the complaint.⁴⁶

Judicial forfeiture largely relies on the Supplemental Civil Rules.⁴⁷ Civil forfeiture proceedings are unforgiving. Property owners have little room for error, since courts take “a severe stance against a claimant who has not properly perfected his claim in a forfeiture proceeding in a timely manner.”⁴⁸ The harshness of federal civil forfeiture procedure has inspired state law enforcement agencies, often facing more owner-friendly state forfeiture procedures, to turn to “equitable sharing”: states can seize property and hand it over to the federal government for judicial proceedings.⁴⁹ In exchange, the federal government returns 80% of the proceeds to the state, even if that state’s laws prohibited the civil forfeiture.⁵⁰ Since “the federal government has duplicated

forfeitures do not implicate double jeopardy); *United States v. Bajakajian*, 524 U.S. 321, 324 (1998) (striking down a civil forfeiture as violating the Excessive Fines Clause).

⁴¹ Pub. L. No. 106-185, 114 Stat. 202 (2000) (codified at scattered sections of 8, 18, 21, and 28 U.S.C.).

⁴² DOYLE, *supra* note 10, at 8.

⁴³ *Id.* at 10.

⁴⁴ *Id.* at 9–10; FED. R. CIV. P. SUPP. G(2).

⁴⁵ FED. R. CIV. P. SUPP. G(5)(a)(ii)(B).

⁴⁶ FED. R. CIV. P. SUPP. G(5)(b).

⁴⁷ See 18 U.S.C. § 983(a)(4)(A).

⁴⁸ *United States v. \$10,000.00 in U.S. Funds*, 863 F. Supp. 812, 814 (S.D. Ill. 1994), *aff'd*, 52 F.3d 329 (7th Cir. 1995).

⁴⁹ KNEPPER ET AL., *supra* note 7, at 46.

⁵⁰ *Id.*

virtually every major state crime,”⁵¹ most state civil forfeiture proceedings can be turned into federal ones.

Moreover, civil forfeiture disproportionately victimizes low-income communities and people of color. This disparate impact extends far beyond the Pueblo of Pojoaque. Much of federal equitable sharing payments go to law enforcement agencies that police communities of color, indicating the money’s source.⁵² There are many potential reasons for this. Since so many civil forfeitures are of cash, “unbanked” and “underbanked” individuals who lack easy access to financial institutions are most vulnerable to asset seizure.⁵³ Many courts have held that the Sixth Amendment does not guarantee an indigent owner court-appointed counsel to contest the forfeiture, though CAFRA grants that right when a person’s “primary residence” is at risk.⁵⁴

B. Evolution of the Procedural Rules

For their first century and a half, federal district courts served three roles, adjudicating cases at law, in equity, and in admiralty. Each docket followed different rules of procedure.⁵⁵ In the 1840s, the Supreme Court adopted separate procedural rules for federal equity and admiralty actions,⁵⁶ but federal courts continued to apply the procedural rules of the states in which they sat when handling civil actions at law.⁵⁷ The Civil Rules united law and equity in 1938, while admiralty continued to be separate until 1966, when it joined in the form of the Supplemental Civil

⁵¹ Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 22 (1997); see also *id.* at 2–5 (explaining the replication of state crimes on the federal level).

⁵² See AM. C.L. UNION OF CAL., CIVIL ASSET FORFEITURE: PROFITING FROM CALIFORNIA’S MOST VULNERABLE 6 (2016) (finding that more than 85% of equitable sharing payments in California went to agencies that policed communities with over 50% people of color).

⁵³ *Id.* at 7; KNEPPER ET AL., *supra* note 7, at 20; see also Mary Murphy, Note, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 TEX. J. C.L. & C.R. 77, 94–95 (2010).

⁵⁴ See *United States v. 777 Greene Ave.*, 609 F.3d 94, 97–98 (2d Cir. 2010) (citing 18 U.S.C. § 983(b)(2)(A) and collecting cases).

⁵⁵ See William Howard Taft, *Three Needed Steps of Progress*, 8 A.B.A. J. 34, 35 (1922) (“We still retain in [federal trial] courts the distinction between suits at law, suits in equity and suits in admiralty.”).

⁵⁶ See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 953 (1987); Harold K. Watson & Ifigeneia Xanthopoulou, *Evolution and Unification of the Federal Admiralty Rules and Federal Rules of Civil Procedure*, 92 TUL. L. REV. 1123, 1125 (2018).

⁵⁷ Subrin, *supra* note 56, at 930.

Rules.⁵⁸ This Section will examine the development of counterclaims and intervention in these three practices to provide insight into the current state of the Civil Rules.

1. Counterclaims.

The story of counterclaims is one of inexorable expansion, though more so on land than at sea. Permissive counterclaims were widely available at law and in equity before the Civil Rules and are even more broadly available now. In premerger admiralty practice, however, counterclaims were limited to those that today would be deemed compulsory.⁵⁹

Early practice on land permitted combining multiple issues into one civil action through two equitable mechanisms: recoupment and set-off.⁶⁰ Recoupment allowed a defendant, harmed by a plaintiff in the incident for which the plaintiff brought suit, to reduce the judgment by the amount of his own damages.⁶¹ Set-off involved the settling of mutual independent debts: when a creditor sued a debtor, the debtor could reduce the judgment by deducting any amount that the creditor owed independent of the contract at issue.⁶² These doctrines were the precursors of the modern counterclaim.

The counterclaim emerged in 1852 as part of an early amendment to New York's pioneering Field Code.⁶³ It included any claim "existing in favor of a defendant and against a plaintiff."⁶⁴ Before the Code, the term "counter-claim" had generally been synonymous with set-off,⁶⁵ but New York courts now interpreted it broadly to include recoupment, set-off, and "all sorts of claims which a defendant may have against a plaintiff, in the nature of a cross action or demand, or for which a cross or separate action

⁵⁸ Watson & Xanthopoulos, *supra* note 56, at 1125–27. The Federal Admiralty Rules were repromulgated in 1920, albeit with only minor substantive changes. *Id.* at 1125.

⁵⁹ See *infra* note 75 and accompanying text.

⁶⁰ See Charles E. Clark & Leighton H. Surbeck, *The Pleading of Counterclaims*, 37 YALE L.J. 300, 300–02 (1928).

⁶¹ See THOMAS W. WATERMAN, A TREATISE ON THE LAW OF SET-OFF, RECOUPMENT, AND COUNTER-CLAIM §§ 414–18, at 466–68 (New York, Baker, Voorhis & Co. 1869).

⁶² See 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 1431–35, at 656–61 (Boston, Hilliard, Gray & Co. 1836).

⁶³ See Clark & Surbeck, *supra* note 60, at 302.

⁶⁴ THE CODE OF PROCEDURE, OF THE STATE OF NEW YORK, AS AMENDED APRIL 16, 1852 § 150, at 166 (New York, Voorhees 3d ed. 1853).

⁶⁵ See *Kneeder v. Sternbergh*, 10 How. Pr. 67, 71–72 (N.Y. Sup. Ct. 1854).

would lie.”⁶⁶ By 1890, half of the states had adopted the Field Code and most other state codes bore its influence.⁶⁷

The last standalone Federal Equity Rules, promulgated in 1912, included counterclaims in terms similar to the Field Code. Equity Rule 30 allowed a defendant to file “his answer,” and said that the “answer must state . . . any counter-claim arising out of the transaction which is the subject matter of the suit.”⁶⁸ It also provided for unrelated, permissive counterclaims: an answer “may . . . set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him.”⁶⁹

The modern Civil Rules, enacted in 1938, went further.⁷⁰ Critically, Rule 13 removed the “defendant” language of Equity Rule 30, thereby making counterclaims available to more parties. Today, pleadings can contain “any claim,”⁷¹ with rules on which are compulsory and which are permissive.⁷² Rule 13 clarifies that it does “not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency.”⁷³ In sum, the development of counterclaims from common law to the Civil Rules is a tale of liberalization.

Admiralty counterclaims were more limited; in this area, admiralty law had what one commentator later called “a most oppressive practice.”⁷⁴ The Federal Admiralty Rules restricted counterclaims to recoupment, allowing those that “aris[e] out of the same contract or cause of action for which the original [suit] was filed.”⁷⁵ The Supreme Court even contrasted the restrictive admiralty counterclaim procedure with “the more flexible procedure utilized in civil cases.”⁷⁶ However, when recoupment was available, in rem claimants could utilize it—recoupment was not

⁶⁶ Wolf v. H., 13 How. Pr. 84, 85 (N.Y. Sup. Ct. 1856).

⁶⁷ Subrin, *supra* note 56, at 910, 939.

⁶⁸ FED. EQUITY R. 30, 226 U.S. 649, 657 (1912) (repealed 1938).

⁶⁹ FED. EQUITY R. 30, 226 U.S. 649, 657 (1912) (repealed 1938).

⁷⁰ There have been no relevant changes to Rules 13(a), (b), or (d) since 1938. For the original, see ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PROPOSED RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 36–39 (1937) [hereinafter PROPOSED RULES], as amended by ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, FINAL REPORT 13–14 (1937) [hereinafter FINAL REPORT].

⁷¹ FED. R. CIV. P. 13(a)(1); FED. R. CIV. P. 13(b).

⁷² See FED. R. CIV. P. 13(a)(1)(A)–(B). For discussion of compulsory counterclaims in civil forfeiture cases, see *infra* Part IV.B.

⁷³ FED. R. CIV. P. 13(d).

⁷⁴ Leavenworth Colby, *Admiralty Unification*, 54 GEO. L.J. 1258, 1271 (1966).

⁷⁵ FED. ADMIRALTY R. 50, 254 U.S. 671, 702 (1920) (repealed 1966).

⁷⁶ United States v. Isthmian S.S. Co., 359 U.S. 314, 322 (1959).

limited to in personam defendants.⁷⁷ Before unification with civil cases in 1966, admiralty counterclaims were stuck in the past, deprived of a century of procedural innovation. Yet even then the Admiralty Rules provided more rights to property owners than in rem procedure does in many circuits today.

2. Intervention.

The history of intervention mirrors the history of counterclaims in important ways. Once again, by the twentieth century, law and equity were a step ahead, despite intervention's deep roots in admiralty.

State intervention rules in suits at common law fell into two buckets: some limited intervention to parties seeking recovery of property, while others allowed intervention by anyone with a legally cognizable interest.⁷⁸ Federal equity procedure hewed close to the second category: Equity Rule 37 permitted "[a]nyone claiming an interest in the litigation . . . to assert his right by intervention."⁷⁹ However, it specified that "the intervention shall be in subordination to . . . the main proceeding."⁸⁰ The Civil Rules disclaimed such subordination.⁸¹ Rule 24 now states that "the court must permit anyone to intervene who claims an interest relating to the property . . . and is so situated that disposing of the action

⁷⁷ See *Ebert v. The Schooner Reuben Doud*, 3 F. 520, 521 (E.D. Wis. 1880):

It is well settled, in a series of adjudicated cases, that in actions *in rem* or *in personam*, in admiralty, which are founded upon contract, the respondent may avoid an obligation which his contract, in terms, imposes upon him, by showing that the contract has not been duly performed by the other party thereto, who seeks to enforce it; and that, by way of recoupment, the damages which have been sustained by a respondent in such case may be applied in reduction of the damages which the libellant would otherwise be entitled to recover.

See also, e.g., *The Chattahoochee*, 74 F. 899, 903–04, 906 (1st Cir. 1896) (permitting a claimant to recoup from the plaintiff); *The Ciampa Emilia*, 39 F. 126, 127 (S.D.N.Y. 1889) (same).

⁷⁸ Caleb Nelson, *Intervention*, 106 VA. L. REV. 271, 308–09 (2020).

⁷⁹ FED. EQUITY R. 37, 226 U.S. 649, 659 (1912) (repealed 1938).

⁸⁰ FED. EQUITY R. 37, 226 U.S. 649, 659 (1912) (repealed 1938).

⁸¹ Changes to Rule 24(a) in the years since 1938 (most significantly in 1966) broadened the right to intervene but did not affect property owners' rights in an in rem proceeding. For the original, see PROPOSED RULES, *supra* note 70, at 61–63, as amended by FINAL REPORT, *supra* note 70, at 16. For a discussion of the 1966 amendments, see Nelson, *supra* note 78, at 329–37.

may as a practical matter impair or impede the movant's ability to protect its interest."⁸²

The Admiralty Rules, which governed actions in rem, differentiated claimants from intervenors: a "claimant" was the owner of the property at issue and sought its return, while an "intervenor," by contrast, had a lesser "interest" (such as a lien on the property) and sought monetary compensation for the seizure.⁸³ This distinction was new. Before the Admiralty Rules went into force in the 1840s, courts often used the terms interchangeably. Some federal cases soon after the Founding allowed those with minor property interests to fully involve themselves.⁸⁴ Though the distinction remained in the text of the Admiralty Rules until 1966, there are reasons to believe it was never particularly important. It was not fully accepted by courts or scholars. Decades later, a writer noted that "[a]ll such intervenors are sometimes termed claimants by the courts."⁸⁵ And the distinction did not apply to early civil forfeitures on land: when nonadmiralty civil forfeitures reached the Supreme Court in the early twentieth century, the Court often (though not exclusively) used "intervene" to refer to the property owner's action.⁸⁶

Intervention practice evolved differently in each procedural system. Law and equity adopted broad rules of intervention while admiralty adopted new, arbitrary limitations. Equity procedure and the Civil Rules found it just and efficient to join many related disputes in one lawsuit, while admiralty did not. But, at least

⁸² FED. R. CIV. P. 24(a)(2). Rule 24(b) gives the trial judge discretion to allow someone with only "a claim or defense that shares with the main action a common question of law or fact" to intervene. FED. R. CIV. P. 24(b)(1)(B).

⁸³ See Nelson, *supra* note 78, at 302–03. Compare FED. ADMIRALTY R. 25, 254 U.S. 671, 689–90 (1920) (repealed 1966) (describing the rights of "the party claiming the property"), with FED. ADMIRALTY R. 34, 254 U.S. 671, 693–94 (1920) (repealed 1966) (permitting a "third person" to "intervene").

⁸⁴ See, e.g., *The Mary Anne*, 16 F. Cas. 953, 954–55 (D. Me. 1826) (No. 9,195).

⁸⁵ RUFUS WAPLES, A TREATISE ON PROCEEDINGS IN REM § 80, at 110 (Chicago, Callaghan & Co. 1882); see also ERASTUS C. BENEDICT, THE AMERICAN ADMIRALTY § 462, at 257 (Lawbook Exchange 2009) (1850) (referring to a ship's "owners . . . intervening for their interest"). Nineteenth-century English practice, which still influenced American law, was less formal still. One treatise referred to an in rem claimant as a "defendant" who can bring a legal or equitable "counterclaim" against a plaintiff. GAINSFORD BRUCE, A TREATISE ON THE JURISDICTION AND PRACTICE OF THE ENGLISH COURTS IN ADMIRALTY ACTIONS AND APPEALS 345–47 (London, W. Maxwell & Son 2d ed. 1886).

⁸⁶ See, e.g., *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 508 (1921); *United States v. One Ford Coupe Auto.*, 272 U.S. 321, 323 (1926); *Van Oster*, 272 U.S. at 466. But see *United States v. One 1936 Model Ford V-8 De Luxe Coach, Motor No. 18-3306511*, 307 U.S. 219, 223 (1939) (neglecting to use the "intervene" terminology and referring to the claimant instead).

after the mid-nineteenth century, law and equity rules and admiralty practice trended toward liberalization, even if the text of the admiralty rules did not follow.

C. The Supplemental Civil Rules

The *in rem* action lives, for the most part, in the Supplemental Civil Rules. The first, Rule A, expressly incorporates the Civil Rules proper into forfeiture actions. It defines the Supplemental Civil Rules' scope, explaining that they apply to admiralty claims as well as "forfeiture actions *in rem* arising from a federal statute."⁸⁷ But it clarifies that the Civil Rules "also apply to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules."⁸⁸

The *in rem* forfeiture portion of the Supplemental Civil Rules outlines the rights and obligations of the property owner, called a "claimant." These provisions were in Rule C until 2006, when they moved to Rule G. That rule now "governs a forfeiture action *in rem* arising from a federal statute"⁸⁹ and, mirroring Rule A, states that, "[t]o the extent that this rule does not address an issue, Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply."⁹⁰ Under Rule G, any "person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending."⁹¹ Such a claim must, *inter alia*, "identify the claimant and state the claimant's interest in the property,"⁹² and the claimant must file an answer.⁹³

The Supplemental Civil Rules do not expressly provide for counterclaims, but they do contain an oblique reference to them. According to Rule E, "[w]hen a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action," the original plaintiff "must give security for damages

⁸⁷ FED. R. CIV. P. SUPP. A(1)(B). For the original, see FED. R. CIV. P. SUPP. A, 39 F.R.D. 69, 240 (1966) (amended 2006) (calling civil forfeiture actions "statutory condemnation proceedings analogous to maritime actions *in rem*").

⁸⁸ FED. R. CIV. P. SUPP. A(2); *cf.* FED. R. CIV. P. SUPP. A, 39 F.R.D. 69, 240 (1966) (amended 2006).

⁸⁹ FED. R. CIV. P. SUPP. G(1).

⁹⁰ FED. R. CIV. P. SUPP. G(1).

⁹¹ FED. R. CIV. P. SUPP. G(5)(a)(i).

⁹² FED. R. CIV. P. SUPP. G(5)(a)(i)(B).

⁹³ FED. R. CIV. P. SUPP. G(5)(b); *cf.* FED. R. CIV. P. SUPP. C(6), 39 F.R.D. 69, 243 (1966) (amended 2000).

demanded in the counterclaim.”⁹⁴ Notably, however, Rule E says it “supplement[s] Rules B, C, and D,” but does not mention Rule G, even while it says it governs “actions in rem.”⁹⁵

In sum, the Supplemental Civil Rules are rather sparse: They create strict procedures for certain actions and briefly mention others. In addition, by referring to other rules for anything not mentioned, they delegate significant authority to the Civil Rules proper. Therefore, courts must consider the Civil Rules to faithfully implement the Supplemental Civil Rules. Only then can they accurately determine the rights of claimants in civil forfeiture cases.

* * *

Civil forfeiture has long served an important role in law enforcement. Yet in the past few decades, the practice has expanded rapidly, while developing a complicated procedural shell that makes it difficult for property owners to assert their rights and exacerbates its racially disparate impacts. Such problems are baked into the procedural regime. Admiralty developed far more slowly than law and equity, and limited intervention and counterclaims long after the promulgation of the Civil Rules. Though admiralty cases entered the Civil Rules in the 1960s, this preexisting disconnect has not entirely vanished in civil forfeiture actions. There is a tension today between the practice of civil forfeiture, which is governed by terse and strictly enforced rules, and the historical development of U.S. civil procedure, which trends toward liberal intervention and joinder of claims.

II. THE CIRCUIT SPLIT

Given civil forfeiture’s procedural complexity, it is unsurprising that courts do not agree on some of its implications. Today, there is a circuit split over whether claimants in federal civil forfeiture actions can bring counterclaims against the United States. The First and Sixth Circuits, and many district courts, have held that they cannot, while the Fifth Circuit, standing alone, has held that they can. No other courts of appeals have weighed in.

In 1981, the Eleventh Circuit accepted a counterclaim in a civil forfeiture action in dicta.⁹⁶ But before 1991, no federal court

⁹⁴ FED. R. CIV. P. SUPP. E(7)(a); *cf.* FED. R. CIV. P. SUPP. E(7), 39 F.R.D. 69, 247 (1966) (amended 2000).

⁹⁵ FED. R. CIV. P. SUPP. E(1).

⁹⁶ See *United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372, 1377 (11th Cir. 1981) (holding “that appellant could have asserted a counterclaim,” but denying the counterclaim for unrelated reasons).

had addressed the issue head-on. After the expansion of civil forfeiture in the 1980s, the First Circuit became the first court of appeals to reach the question. In *United States v. One Lot of U.S. Currency (\$68,000)*⁹⁷ (*\$68,000*), the federal government brought a civil forfeiture action to seize Giovanni Castiello's Lincoln Town Car and cash.⁹⁸ Castiello protested as a claimant and filed a counterclaim, which the court rejected:

By definition, a counterclaim is a turn-the-tables response directed by one party ("A") at another party ("B") in circumstances where "B" has earlier lodged a claim in the same proceeding against "A." A forfeiture action is *in rem*, not *in personam*. The property is the defendant. Since no civil claim was filed by the government against Castiello—indeed, rather than being dragooned into the case as a *defendant*, he intervened as a *claimant*—there was no "claim" to "counter." Thus, Castiello's self-styled counterclaim was a nullity, and the court below appropriately ignored it.⁹⁹

Over the next three decades, numerous district courts¹⁰⁰ and the Sixth Circuit¹⁰¹ embraced *\$68,000's* approach. Often, courts dismissed civil forfeiture counterclaims by quickly repeating the

⁹⁷ 927 F.2d 30 (1st Cir. 1991).

⁹⁸ *Id.* at 31–32.

⁹⁹ *Id.* at 34 (emphasis in original).

¹⁰⁰ *See United States v. \$10,000.00 in U.S. Funds*, 863 F. Supp. 812, 816 (S.D. Ill. 1994), *aff'd*, 52 F.3d 329 (7th Cir. 1995); *United States v. All Right, Tit. & Int. in Contents of Following Accounts at Morgan Guar. Tr. Co. of N.Y.*: (1) Account No. 00-650-04-405 in the Name of Andes Intl. SA; (2) Account No. 00-650-04-416 in the Name of Lansing Ent. LTD; and (3) Account No. 00-600-01-187 in the Name of Coco Ltd., No. 95 CIV. 10929 HB THK, 1996 WL 695671, at *9 (S.D.N.Y. Dec. 5, 1996), *aff'd*, No. 95 CIV. 10929 HB, 1997 WL 220309 (S.D.N.Y. May 1, 1997); *United States v. Assorted Comput. Equip.*, No. 03-2356V, 2004 WL 784493, at *2 (W.D. Tenn. Jan. 9, 2004); *United States v. 1866.75 Bd. Feet, 11 Doors and Casings, More or Less of Dipteryx Panamensis Imported from Nicaragua*, No. 1:07CV1100 (GBL), 2008 WL 839792, at *3 (E.D. Va. Mar. 25, 2008); *United States v. \$43,725.00 in U.S. Currency*, No. CIV.A. 4:08-1373-TLW, 2009 WL 347475, at *1 (D.S.C. Feb. 3, 2009); *United States v. \$22,832.00 in U.S. Currency*, No. 1:12 CV 01987, 2013 WL 4012712, at *4 (N.D. Ohio Aug. 6, 2013); *United States v. 8 Luxury Vehicles*, 88 F. Supp. 3d 1332, 1337 (M.D. Fla. 2015); *United States v. Various Rest. Furniture & Goods of Iranian Origin*, No. CV 15-259-GW (MRWx), 2015 WL 12867375, at *3 (C.D. Cal. Dec. 10, 2015), *aff'd sub nom. United States v. Elahinejad*, 693 F. App'x 715 (9th Cir. 2017); *United States v. Various Rest. Furniture & Goods of Iranian Origin*, No. CV 15-259-GW(MRWx), 2016 WL 7496130, at *2 (C.D. Cal. Feb. 8, 2016); *United States v. Certain Real Prop.*, 381 F. Supp. 3d 1007, 1009 (E.D. Wis. 2018); *United States v. Approximately \$10,128,847.42 Seized from US Bank Account No. -XXXX Held in the Name of Pueblo of Pojoaque Gaming Funds*, No. 1:18-CV-0279-SWS-MLC, 2018 WL 6381150, at *2 (D.N.M. Dec. 3, 2018).

¹⁰¹ *See Zappone v. United States*, 870 F.3d 551, 561 (6th Cir. 2017).

(pre-1938) notion that a “counterclaim” may only be filed by a defendant against a plaintiff.¹⁰²

One district court did defend *\$68,000*'s holding with independent analysis. In *United States v. 8 Luxury Vehicles*,¹⁰³ the U.S. District Court for the Middle District of Florida looked to the Civil Rules' text for guidance. The court ultimately concluded that, since Rule 13 promises that the Federal Rules “do not expand the right to assert a counterclaim . . . against the United States,”¹⁰⁴ and Rule G does not expressly authorize counterclaims, the best interpretation is that *\$68,000*'s “general rule” is correct.¹⁰⁵

In 2019, for the first time, a federal court split from its peers. In *United States v. \$4,480,466.16 in Funds Seized from Bank of America Account Ending in 2653*¹⁰⁶ (*Funds Seized*), the Fifth Circuit rejected what it called the “dubious reasoning” of the First Circuit on four grounds.¹⁰⁷ First, the court looked to the text of the Civil Rules and forfeiture statutes themselves. Rule 24 grants broad powers to “intervenor” in civil suits, while Rule G and federal statutes similarly allow claimants to intercede in forfeiture actions.¹⁰⁸ Second, the court found that “claimant” and “intervenor” are generally synonymous in the case law.¹⁰⁹ Third, admiralty law, where in rem forfeiture originated, is replete with courts allowing claimants to bring counterclaims or their equivalents.¹¹⁰ Fourth, the court noted that Rule E considers the possibility of counterclaims.¹¹¹ The court concluded that, “[g]iven those textual cues in the Supplemental Rules, it would seem anomalous

¹⁰² See, e.g., *Certain Real Prop.*, 381 F. Supp. 3d at 1009 (“Only a defendant may assert a counterclaim.”); *\$22,832.00 in U.S. Currency*, 2013 WL 4012712, at *4 (“[B]ecause the government has not filed a complaint against the claimants, they are not in the position to file a counterclaim.”); *Assorted Comput. Equip.*, 2004 WL 784493, at *2 (“Because the government has not asserted a claim against [the claimant], there can be no counterclaim.”); *\$10,000.00 in U.S. Funds*, 863 F. Supp. at 816 (“A counterclaim is an action brought by a defendant against the plaintiff. Whatever the claimants’ pleading is, it is not properly a counterclaim.”).

¹⁰³ 88 F. Supp. 3d 1332 (M.D. Fla. 2015).

¹⁰⁴ *Id.* at 1335 (quoting FED. R. CIV. P. 13(d)); see also *infra* Part III.A.2.

¹⁰⁵ *8 Luxury Vehicles*, 88 F. Supp. 3d at 1337.

¹⁰⁶ 942 F.3d 655 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 112 (2020).

¹⁰⁷ *Id.* at 659.

¹⁰⁸ *Id.* at 660.

¹⁰⁹ *Id.* at 660–61.

¹¹⁰ *Id.* at 661–62.

¹¹¹ *Funds Seized*, 942 F.3d at 662.

to say that counterclaims are always out-of-bounds in *in rem* proceedings.”¹¹² In June 2020, the Supreme Court denied certiorari.¹¹³

All of the Fifth Circuit’s reasons are individually compelling, but the court could have gone further. Instead of merely “declin[ing] to endorse”¹¹⁴ the First Circuit’s flawed reasoning with references to snippets of the Civil Rules and admiralty history, the court could have looked further into the Civil Rules’ history and purposes. Had it done so, it would likely have concluded, as this Comment does, that civil forfeiture actions are civil actions like any other, and civil forfeiture claimants are parties with the full procedural rights that come with that position.

III. CLAIMANTS IN CIVIL FORFEITURE ACTIONS CAN BRING COUNTERCLAIMS AGAINST THE UNITED STATES

This Part argues that claimants in civil forfeiture actions can bring counterclaims against the United States under the Civil Rules as currently written. This thesis relies on a two-part argument. First, under the best reading of the Civil Rules as written in the 1930s, Rule 24 intervenors can bring counterclaims under Rule 13. Second, under the best reading of the Supplemental Civil Rules as written in the 1960s and subsequently amended, Rule G claimants have the full powers of intervenors, including the right to bring counterclaims. Part III.A examines the text of the most relevant rules to argue that the language unambiguously permits property owners to file counterclaims. The rest of the Part reinforces this interpretation by reviewing the history, purposes, and public understanding of those rules and their development. Part III.B shows that the Civil Rules’ drafters intended and understood them to allow mandatory intervenors to file permissive counterclaims. Part III.C.1 explains that the Supplemental Civil Rules’ drafters intended and understood them to fully apply the Civil Rules to admiralty actions unless expressly exempted. Part III.C.2 argues that they specifically wanted Rule 13 to govern counterclaims in admiralty. Finally, Part III.C.3 demonstrates that later amendments to the Supplemental Civil Rules only clarify that civil forfeiture claimants are equivalent to intervenors.

¹¹² *Id.* at 662–63.

¹¹³ *Retail Ready Career Ctr., Inc. v. United States*, 141 S. Ct. 112, 112 (2020).

¹¹⁴ *Funds Seized*, 942 F.3d at 663.

A. The Text of the Civil Rules

This Section looks to the plain text of the Civil Rules to argue that property owners in federal civil forfeiture actions can file counterclaims. Next, it addresses potential textual counterarguments. Finally, it discusses why extratextual sources are valuable as additional evidence to clarify the text's meaning.

1. The plain text supports this reading.

As with statutes, the plain text of a procedural rule controls if unambiguous.¹¹⁵ This Comment's simplest argument relies on the plain text of the Civil Rules. Under Rule 24, intervention "must . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought."¹¹⁶ And under Rule 13, a "pleading must state . . . [compulsory] counterclaim[s],"¹¹⁷ and a "pleading may state . . . [permissive] counterclaim[s]."¹¹⁸ The text is clear. Intervenors file pleadings, and pleadings may contain counterclaims. Therefore, intervenors, especially those permitted to join as of right by Rule 24(a), can file counterclaims.

Despite civil forfeiture's complexities, it fits into this procedural scheme. Rule 24 provides that, "[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action."¹¹⁹ Rule G uses the same "interest" language: that rule allows "[a] person who asserts an interest in the defendant property [to] contest the forfeiture by filing a claim."¹²⁰ A potential textual problem is that Rule G calls the property owner a "claimant" and does not refer to "intervention." But Rule 24 refers to an intervenor bringing a "claim"¹²¹—once again, Rule 24 and Rule G mirror one another. This similarity is unsurprising, since the two rules serve the same function of governing the entrance of third parties into the litigation. Rule 24 intervenors and Rule G claimants are ultimately the same people: parties with unrepresented interests who wish to assert claims. The similarities between Rule 24 and Rule G, visible on the face of those rules' text, underline their

¹¹⁵ See *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123 (1989) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

¹¹⁶ FED. R. CIV. P. 24(c).

¹¹⁷ FED. R. CIV. P. 13(a)(1).

¹¹⁸ FED. R. CIV. P. 13(b).

¹¹⁹ FED. R. CIV. P. 24(a)(2).

¹²⁰ FED. R. CIV. P. SUPP. G(5)(a)(i).

¹²¹ See FED. R. CIV. P. 24(b)(1)(B); FED. R. CIV. P. 24(c).

shared subject matter and warrant a cooperative reading.¹²² Such a cooperative reading leads to the conclusion that claimants under Rule G are necessarily also intervenors under Rule 24. Rule G merely provides additional, more specific requirements for intervenors in civil forfeiture proceedings. Accordingly, claimants in civil forfeiture actions are mandatory intervenors.

When Rule G is silent on an issue affecting intervenors, then, the Civil Rules govern. Rule G is silent on counterclaims, but Rule 24, as previously discussed, permits mandatory intervenors to file pleadings.¹²³ And under Rule 13, counterclaims are one type of pleading. Consequently, claimants in civil forfeiture actions can file counterclaims.

2. Textual counterarguments do not withstand scrutiny.

There is no textual support for a counterargument that the use of the word “claimant” in the Supplemental Civil Rules limits that provision to claimants as defined by the old Admiralty Rules and thereby excludes intervenors with lesser property rights. Rule G (originally Rule C) linked the word “claimant”—previously used to refer to owners—to the word “interest”—previously used to include the minor property interests of intervenors.¹²⁴ That the language of Rule G borrows from both sides of the Admiralty Rules’ provisions for claimants and intervenors is strong textual evidence that this distinction is no longer significant.

Another counterargument, adopted by the Middle District of Florida, is also inapposite.¹²⁵ Rule 13’s statement that the “rules do not expand the right to assert a counterclaim . . . against the United States,”¹²⁶ to which the *8 Luxury Vehicles* court gave so much weight, merely reaffirms that the Civil Rules are not an independent waiver of sovereign immunity.¹²⁷ It does not further limit the ability to bring counterclaims against the United States.

¹²² A statute should be considered as a whole, and provisions in *pari materia*—addressing cognate subject matter—should be construed harmoniously. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 167, 252 (2012).

¹²³ An additional piece of textual evidence comes from Rule G itself: a section is entitled “Responsive Pleadings,” implying that Rule G claimants can file pleadings. FED. R. CIV. P. SUPP. G(5).

¹²⁴ See Nelson, *supra* note 78, at 303 (contending that “interest” included “a legally recognized interest such as a lien”).

¹²⁵ See *supra* note 104.

¹²⁶ FED. R. CIV. P. 13(d).

¹²⁷ 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1427, at 230 (2010 ed.).

Put another way, Rule 13 creates a procedural mechanism to file counterclaims against any plaintiff, including the federal government, but does not expand any substantive legal right that might otherwise be proscribed by sovereign immunity doctrine. And even if this reading is not the only plausible way to read Rule 13(d), it has long been settled law. The Fifth Circuit explained this clearly, writing that, despite Rule 13(d), “a defendant is either compelled by 13(a), or permitted by 13(b), to counterclaim against the sovereign *within the limits to which the sovereign immunity has been given up* by the United States by other provisions of law.”¹²⁸ The *8 Luxury Vehicles* court’s reliance on 13(d) in this context is therefore inapt.¹²⁹

3. Extratextual sources provide additional evidence in support.

But the textual reading discussed in Part III.A.1 was available to the First and Sixth Circuits and the district courts, and they were not convinced. They instead asserted that counterclaims can only be filed by a defendant, which the Civil Rules’ text does not support. The Fifth Circuit, by contrast, recognized the textual connections between Rule 24 and Rule G, and the history of intervenors filing counterclaims in admiralty actions.¹³⁰

Some circuits consider the existence of a circuit split over the meaning of a statute to be *prima facie* evidence of ambiguity.¹³¹ Outside sources, then, have a potential role to play: courts often rely on extratextual evidence to disambiguate unclear language.

The legitimacy of such an approach has support in existing legal scholarship. Multiple scholars have argued that Civil Rules

¹²⁸ *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967) (emphasis added); see also *Waylyn Corp. v. United States*, 231 F.2d 544, 547 (1st Cir. 1956) (stating that Rule 13(d) reaffirms sovereign immunity doctrine “maybe out of an excess of caution”). Given that the Federal Tort Claims Act, enacted in 1946—soon after Rule 13(d)—addresses counterclaims against the federal government, see *infra* note 217 and accompanying text, it is likely that Congress understood Rule 13 to provide a procedure to bring such counterclaims.

¹²⁹ See *Funds Seized*, 942 F.3d at 661 n.10 (disagreeing with the reliance on Rule 13(d) in *8 Luxury Vehicles*). The Middle District of Florida’s mistake is especially problematic given that Fifth Circuit opinions delivered before close of business on September 30, 1981, including *Frederick*, are binding on district courts in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

¹³⁰ See *Funds Seized*, 942 F.3d at 661–62.

¹³¹ See, e.g., *In re S. Star Foods, Inc.*, 144 F.3d 712, 715 (10th Cir. 1998); see also *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996) (stating that a conflict between courts makes it difficult to conclude that a statutory term is unambiguous).

interpretation permits more room for consideration of drafters' purpose. Professor David Marcus argued that, since rules committees are normally small—with little more than a dozen members—determining an objective shared intent is possible.¹³² Additionally, Marcus defended the interpretative value of “postpromulgation statements by committee members,” since their reliability “can often be determined fairly well by comparing them with statements made at the time of drafting.”¹³³ He noted that “courts have taken seriously postpromulgation statements made by committee reporters.”¹³⁴ And Professors Lumen N. Mulligan and Glen Staszewski posited that, when interpreting rules, a court need not act as the “faithful agent” of Congress,¹³⁵ but instead may “follow the identifiable policy choices of the rulemakers.”¹³⁶ They embrace “traditional tools of purposive construction,” including “non-textualist tools of interpretation,” to construe the Civil Rules.¹³⁷

For these reasons, the rest of Part III looks to the drafters' publicly available statements to shed light on the purposes of the Civil Rules' drafters. Part III.B examines the statements of the Civil Rules' drafters to show that mandatory intervenors can file counterclaims. Then, Part III.C scrutinizes the creation of the Supplemental Civil Rules to show that claimants in civil forfeiture actions are mandatory intervenors.

B. Mandatory Intervenors Can File Counterclaims

This Section will show that, like the plain text, original intent and postpromulgation debate support the argument proposition that the Civil Rules permit mandatory intervenors to file counterclaims.

1. Charles E. Clark on counterclaims.

Charles E. Clark, then the Dean of Yale Law School and a professor of civil procedure, was the reporter of the Advisory Committee that drafted the Civil Rules, and he is generally considered

¹³² See David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 962.

¹³³ *Id.* at 967.

¹³⁴ *Id.*

¹³⁵ Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2180–86 (2017).

¹³⁶ *Id.* at 2193.

¹³⁷ *Id.* at 2225.

their principal architect.¹³⁸ Clark's overarching purpose was to eliminate the procedural technicalities that stood in the way of adjudicating a suit's merits and applying substantive law,¹³⁹ and he specifically intended to expand counterclaims to include issues not directly related to the original action.

Clark had long condemned procedural technicalities, such as the traditional division of law and equity, as "vestiges [] of no benefit whatsoever," which "merely cause unnecessary expense, delay, and at times failure of justice."¹⁴⁰ After the Civil Rules' completion, he praised their "due subordination of civil procedure to the ends of substantive justice,"¹⁴¹ and decried "[t]he trend of procedural rules towards undue rigidity . . . at variance with a developing substantive law."¹⁴² Clark's worry reappeared in his later writings. He warned that "the bad, or harsh, procedural decisions drive out the good, so that in time a rule becomes entirely obscured by its interpretative barnacles."¹⁴³ As a consequence, he supported a purposive method of rule interpretation, under which "the rules should be stated in the terms of the functions they are to perform, or the results they are to achieve, rather than as arbitrary mandates."¹⁴⁴

In particular, Clark intended the Civil Rules to liberalize counterclaim procedure. Years earlier, Clark praised English procedural provisions, which, "under liberal constructions motivated by the policy of encouraging the settlement of all disputes between the parties in one litigation, have been held to allow many counterclaims which are beyond the scope of those provided for in the usual American codes."¹⁴⁵ He "hoped" other states would "adopt provisions as broad as the English rules."¹⁴⁶ During the drafting of the Civil Rules, Clark wrote that "free joinder of parties, of claims, and of counterclaims" were "among the most important features of the new draft."¹⁴⁷ The text of Rule 13 appears

¹³⁸ Subrin, *supra* note 56, at 961.

¹³⁹ *Id.* at 962.

¹⁴⁰ Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 453 (1935).

¹⁴¹ Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938).

¹⁴² *Id.* at 300.

¹⁴³ Clark, *supra* note 19, at 498.

¹⁴⁴ *Id.* at 499.

¹⁴⁵ Clark & Surbeck, *supra* note 60, at 303.

¹⁴⁶ *Id.*

¹⁴⁷ Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 448 (1936).

to bear out Clark's liberal purpose: counterclaims are no longer limited to defendants and may consist of "any claim."¹⁴⁸

At first blush, the Advisory Committee Notes on Rule 13 do not necessarily support this interpretation. The Notes call it "substantially [former] Equity Rule 30 . . . broadened to include legal as well as equitable counterclaims," without commenting on extending counterclaims to nondefendants.¹⁴⁹ But they also observe "the modern tendency" of states to "adopt[] almost unrestricted provisions concerning both the subject matter of *and the parties to a counterclaim.*"¹⁵⁰ The mention of parties, along with the new text, supports Clark's intent that counterclaims should encompass "all disputes."

2. Edward Levi and James Moore on intervention.

While Clark wrote little on intervention, two of his assistants, Edward Levi and James Moore, focused on the subject. Moore was Clark's research assistant during the drafting of the Civil Rules and worked closely with Levi to research the history of intervention.¹⁵¹ According to them, the Civil Rules' drafters intended those rules to allow intervenors to bring counterclaims against original plaintiffs. The drafters specifically sought to supersede a recent Supreme Court decision, *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*,¹⁵² which had interpreted the Equity Rules narrowly to prohibit counterclaims by intervenors.¹⁵³ In their second article on intervention, they wrote:

With the subordination requirement of Equity Rule 37 omitted, it was superfluous to add that the intervener could litigate on the merits the claim or defense for which the intervention was permitted. Further, Rule 13 on Counterclaim . . . was expanded to include all parties to an action, and was not delimited to the defendant as was Equity Rule 30 It was, therefore, unnecessary to provide expressly that an intervener could counterclaim and bring in third parties. He may do so if the pleading which he proposes to file when he seeks intervention shows that he desires to press a counterclaim. . . . A strict interpretation of Rule 13 might limit that

¹⁴⁸ FED. R. CIV. P. 13(a)(1); FED. R. CIV. P. 13(b).

¹⁴⁹ FED. R. CIV. P. 13 advisory committee's note.

¹⁵⁰ FED. R. CIV. P. 13 advisory committee's note (emphasis added).

¹⁵¹ Nelson, *supra* note 78, at 312-13.

¹⁵² 296 U.S. 53 (1935).

¹⁵³ *Id.* at 59.

rule to original defendants, and thus preserve the doctrine of [*Chandler*], but such an interpretation would not do justice to the plain language of the rule.¹⁵⁴

Levi and Moore's explanation makes clear that the drafters intended and expected the Civil Rules to allow an intervenor to file a counterclaim against the plaintiff. And it makes sense given that Rule 13 removed the old limitations on counterclaims to defendants, and Rule 24 removed the previous language subordinating the intervenor to the original action. Later in 1938, Clark, while discussing the new Civil Rules, declined to go into Rule 24 in detail, but told the audience that "Mr. Moore has worked up the subject in 45 *Yale Law Journal* 565, and again in 47 *Yale Law Journal* 898."¹⁵⁵ Though Levi and Moore were not themselves the official drafters of the Civil Rules, Clark's statement indicates that he endorsed their description of the Civil Rules' intended effects.

Since admiralty was not included in the Civil Rules, the drafters did not discuss claimants in actions in rem. But in an earlier article on intervention, Levi and Moore expressly linked Rule 24 intervention to claimants in forfeiture proceedings: they noted that "[i]ntervention in *in rem* proceedings in admiralty was early developed."¹⁵⁶

A brief discussion of *Chandler* at a meeting of the Advisory Committee in February, 1936, complicates matters a bit. Levi and Moore, as Clark's assistants rather than Committee members, did not participate in the conversation. At that meeting, Committee member Edmund M. Morgan advocated changing *Chandler*,¹⁵⁷ believing it "pretty foolish to put a limitation here on our general notion . . . that we should settle up everything that the judge thinks ought to be settled in one lawsuit."¹⁵⁸ Clark endorsed the discretion of the trial judge to permit or deny an intervenor's counterclaims: "We have provided that the intervener shall have the right to litigate his claim or defense on such terms and conditions as the court may think proper to impose. We have not given

¹⁵⁴ Edward H. Levi & James Wm. Moore, *Federal Intervention: II. The Procedure, Status, and Federal Jurisdictional Requirements*, 47 *YALE L.J.* 898, 909 (1938).

¹⁵⁵ *Proceedings of the Institute on Federal Rules of Civil Procedure Held at Washington, D.C.*, in *FEDERAL RULES OF CIVIL PROCEDURE* 17, 67 (Edward H. Hammond ed., 1939) (quoting Clark).

¹⁵⁶ James Wm. Moore & Edward H. Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 *YALE L.J.* 565, 569 (1936).

¹⁵⁷ *ADVISORY COMM. ON RULES FOR CIV. PROC.*, PROCEEDINGS 606-07 (1936).

¹⁵⁸ *Id.* at 618.

him free right of intervention.”¹⁵⁹ He suggested a potential “limitation on the *Chandler* decision” when the judge “permit[s]” an intervenor to bring an independent counterclaim.¹⁶⁰

While this statement supports Levi and Moore’s general claim that *Chandler* is no longer good law, it at first seems to provide district judges carte blanche to limit the authority of intervenors. But Clark’s focus on judicial discretion points to this discussion actually being about permissive intervention. Clark appears to object only to a suggestion that the new rule would require judges to allow anyone to intervene and counterclaim.¹⁶¹ This was a core concern of the drafters: as Advisory Committee member William Olney, Jr., put it, they feared that “a man . . . who simply claims an interest in the subject matter of the action” might intervene and “seriously [] delay and impede the trial of the original cause.”¹⁶²

That concern lines up with the language adopted over a year later. By contrast, Rule 24(b) provides for discretionary intervention for intervenors with de minimis or no legal interest in the lawsuit, which would not apply to property owners in civil forfeiture proceedings.¹⁶³ Clark’s words point only to a hesitancy about requiring judges to allow anyone to intervene, rather than opposition to counterclaims by intervenors with strong interests. This transcript suggests that Clark and his fellow drafters were not worried about intervention by persons with strong interests closely related to the original action, who would be covered by Rule 24(a).

Levi and Moore’s writing, endorsed by Clark, is clear: mandatory intervenors can file counterclaims. This directly contradicts the First Circuit’s assertion that a counterclaim can only be a defendant’s “turn-the-tables response” to a plaintiff.¹⁶⁴

¹⁵⁹ *Id.* at 607.

¹⁶⁰ *Id.* at 608.

¹⁶¹ The discussion of counterclaims and *Chandler* is immediately preceded by reassurances that potential parties alleging merely that they are not “adequately represented”—a minor interest in the litigation—would be permissive intervenors, only permitted to intervene at the judge’s discretion. *See id.* at 606.

¹⁶² ADVISORY COMM. ON RULES FOR CIV. PROC., *supra* note 157, at 619.

¹⁶³ *See supra* note 82.

¹⁶⁴ §68,000, 927 F.2d at 34.

3. The postpromulgation debate supports Levi and Moore's position.

Levi and Moore's articles did not fully settle the question of whether intervenors can bring counterclaims. In 1961, the eminent Judge Henry Friendly, sitting by designation on the Southern District of New York, concluded that pre-1938 equity practice, under which an intervenor could not "assert a claim which was [] wholly beyond the issues framed by the pleadings," was still good law.¹⁶⁵ Rule 24, he wrote, "did not so alter historic concepts as to permit an intervenor to assert a [brand-new] claim."¹⁶⁶ Judge Friendly argued that *Chandler* was predicated on the "interest" language in Equity Rule 37 (which was not changed by Rule 24) rather than the "subordination" language excluded by the Civil Rules.¹⁶⁷

Judge Friendly, however, did not take account of two important aspects of the Civil Rules. First, Judge Friendly did not engage with the new language of Rule 13 which, unlike Equity Rule 30, does not limit counterclaims—even permissive counterclaims—to the "defendant." This provides textual support for a broader reading. Second, Judge Friendly also did not engage with the purposes of the drafters—like Clark, whose views were reflected in Levi and Moore's article—who intended to combine all claims in one case whenever possible. When the issue reached the Second Circuit in another case two years later, Chief Judge J. Edward Lumbard, over Judge Friendly's dissent, made this precise point:

The whole tenor and framework of the Rules of Civil Procedure preclude application of a standard which strictly limits the intervenor to those defenses and counterclaims which the original defendant could himself have interposed. Where there exists a sufficiently close relationship between the claims and defenses of the intervenor and those of the original defendant to permit adjudication of all claims in one forum and in one suit without unnecessary delay—and to avoid as well the delay and waste of judicial resources attendant

¹⁶⁵ N.Y. Cent. R.R. Co. v. United States, 200 F. Supp. 944, 948 (S.D.N.Y. 1961) (Friendly, J., sitting by designation).

¹⁶⁶ *Id.* at 949. Though not the law, Judge Friendly's claim does carry some potential weight: at least one leading treatise still cites it when discussing the issue. See 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1921, at 494 n.8 (1986 ed.).

¹⁶⁷ N.Y. Cent. R.R. Co., 200 F. Supp. at 949.

upon requiring separate trials—the district court is without discretion to deny the intervenor the opportunity to advance such claims.¹⁶⁸

Chief Judge Lumbard's holistic reading of the Civil Rules' "tenor and framework" unsurprisingly led him to the conclusion that intervenors can file counterclaims.

The legal academy of the time debated the issue as well.¹⁶⁹ Moore—by then, the author of *Moore's Federal Practice*—was involved with the discussion, siding, unsurprisingly, with Chief Judge Lumbard's purposive reading.¹⁷⁰ Ultimately, Chief Judge Lumbard's view is the law of the Second Circuit, and was expressly adopted by the Ninth Circuit.¹⁷¹ Moreover, given that Judge Friendly did not engage with the history of the Civil Rules or the text of Rule 13, his opinion ought not trump the history and purpose of counterclaims and intervention. Judicial discussion and eventual consensus in the 1960s provide additional support for the conclusion that the strongest reading of the Civil Rules would allow intervenors to file counterclaims.

C. Claimants Are Mandatory Intervenors and Can File Counterclaims

The Supplemental Civil Rules supply additional restrictions for claimants, but admiralty cases generally fit the Civil Rules' paradigm for intervenors and counterclaims. This Part examines the history and purposes of admiralty's incorporation into the Civil Rules, as well as later amendments after the increased use of civil forfeiture in the 1980s. It shows that, per the Supplemental Civil Rules, claimants in civil forfeiture actions are mandatory intervenors under the Civil Rules. Drafters of the Supplemental Civil Rules specifically intended Rule 13 to apply to admiralty cases

¹⁶⁸ *Stewart-Warner Corp. v. Westinghouse Elec. Corp.*, 325 F.2d 822, 827 (2d Cir. 1963).

¹⁶⁹ Compare David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 754 (1968) ("[I]t should not follow from the right to intervene on a given issue that the intervenor obtains all the rights of a party with respect to every issue."), with John E. Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329, 358 (1968) ("Where intervention is of right the court literally should have no authority to strike out any counterclaims the intervenor might set up.")

¹⁷⁰ See Shapiro, *supra* note 169, at 754 ("Professor Moore urges that if intervention is a matter of right the intervenor cannot be prevented from asserting counterclaims or cross-claims."); Kennedy, *supra* note 169, at 329 n.* ("This article is based in part on the author's co-revision with Professor James W. Moore of Chapter 24 of Moore's Federal Practice.")

¹⁷¹ See *Spangler v. United States*, 415 F.2d 1242, 1245 (9th Cir. 1969).

and allow even permissive counterclaims, and therefore, as Part III.B indicated, in rem claimants can file counterclaims.

1. The Civil Rules fully apply to admiralty cases except where expressly limited.

In 1966, the Standing Committee, guided by Professor Brainerd Currie, the reporter of the Advisory Committee on Admiralty Rules,¹⁷² eliminated the freestanding Admiralty Rules and promulgated the Supplemental Civil Rules within the existing Civil Rules.¹⁷³ The merger of admiralty into the existing Civil Rules, as opposed to the writing of new rules to encompass both, is highly significant. Law and equity (before and after the enactment of the Civil Rules) widely permitted counterclaims and intervention, while admiralty limited both.¹⁷⁴ In 1966, civil procedure, by embracing the admiralty domain, continued its historical trajectory toward both transsubstantivity and liberalization. After unification, the previous century of evolution toward free joinder of claims and parties became part of admiralty procedure's historical context.

Currie played a central role in the consolidation of the civil and admiralty rules,¹⁷⁵ and Currie's publicly stated purposes are therefore useful when interpreting the Supplemental Civil Rules as they existed in 1966. It appears that Currie endorsed Clark's commitment to substance over form—what scholars call the Civil Rules' "liberal ethos."¹⁷⁶ Currie wrote glowingly of the 1938 merger of law and equity, praising the Civil Rules' "remarkable success" that he felt ought to be extended to admiralty.¹⁷⁷ And during Currie's time on the Advisory Committee, Clark, by then a federal judge, "remarked that he felt Professor Currie's work was remarkably good and that it was a splendid job."¹⁷⁸ The shared purposes of the Civil Rules' promulgation in the 1930s and the

¹⁷² Brainerd Currie, *Unification of the Civil and Admiralty Rules: Why and How*, 17 ME. L. REV. 1, 1 n.* (1965).

¹⁷³ Watson & Xanthopoulou, *supra* note 56, at 1127.

¹⁷⁴ See *supra* Part I.

¹⁷⁵ See Watson & Xanthopoulou, *supra* note 56, at 1131 (describing Currie as "one of the architects of unification").

¹⁷⁶ Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986).

¹⁷⁷ Currie, *supra* note 172, at 14.

¹⁷⁸ Comm. on Rules of Prac. & Proc., Minutes of the August 1960 Meeting 9 (Aug. 31, 1960). Clark likely regretted the exclusion of admiralty from the Civil Rules in 1938. See Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 920 (1976) (citing letters written by Clark to this effect).

Supplemental Civil Rules' creation in the 1960s point to reading the two sets of procedures as a coherent whole. And their drafters' shared purposes underscore the public understanding, in both the 1930s and 1960s, that the rules should be interpreted, not mechanically, but with an eye to resolving the underlying dispute.

Currie specifically sought to supersede a 1960 Supreme Court decision, *Miner v. Atlass*,¹⁷⁹ which prohibited lower courts from applying the Civil Rules' useful discovery-deposition procedure to admiralty cases still governed by the less-detailed Admiralty Rules.¹⁸⁰ *Miner* cast doubt on numerous practices in important admiralty jurisdictions, and Currie called the result "an emergency that . . . demonstrate[d] graphically the need for a closer correspondence between the civil and admiralty practices."¹⁸¹ In 1961, the Supreme Court amended the Admiralty Rules to solve the problem caused by *Miner*.¹⁸²

But Currie's disagreement with admiralty practice did not end with *Miner*. He had a loftier goal: even before *Miner*, Currie supported the full unification of rules governing civil litigation, whether on land or at sea.¹⁸³ Now he argued that "the admiralty practice needs to be modernized . . . [and] the modern rules that are needed are to be found in the Federal Rules of Civil Procedure."¹⁸⁴ He concluded, "There can be no justification for non-functional procedural differences."¹⁸⁵ Considering the enormous changes in the world economy, support for eventual unification was unsurprising. The ubiquity of railroads, automobiles, and airplanes had made shipping far less important to U.S. business.¹⁸⁶ Maritime transportation, once unique, engendered the same types of disputes as other sectors of the economy. Practical justifications for substance specificity no longer held the weight they once did.¹⁸⁷

¹⁷⁹ 363 U.S. 641 (1960).

¹⁸⁰ *Id.* at 644.

¹⁸¹ Currie, *supra* note 172, at 6.

¹⁸² *See id.* at 6–7.

¹⁸³ *See* Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 65 (1959) (criticizing the "divi[sion of] a single district court into two separate courts"—law and admiralty—and calling for the "long overdue unification of all heads of federal jurisdiction under a single set of rules of procedure").

¹⁸⁴ Currie, *supra* note 172, at 13–14.

¹⁸⁵ *Id.* at 14.

¹⁸⁶ *See* Ramon Feldbrin, *Procedural Categories*, 52 LOY. U. CHI. L.J. 707, 755 (2021).

¹⁸⁷ *Id.* at 756. Outside of a few enumerated exceptions, *see infra* note 190, a substance-specific procedural regime for admiralty is no longer needed to "provide a more perfect fit between the value of the right to be vindicated and the procedural law," Feldbrin, *supra*

Currie's writings evince such practical concerns. Currie acknowledged that distinct rules remained necessary to preserve certain "maritime remedies . . . that are not envisioned at all by the Civil Rules," including "[t]he action in rem."¹⁸⁸ He recognized that "[u]nification does not mean complete uniformity," and suggested that the Supplemental Civil Rules should be "so constructed as not to have any impact on the civil practice."¹⁸⁹ But this does not imply the reverse—that the Civil Rules should not apply transsubstantively and inform admiralty practice. Currie proposed that the Civil Rules should govern admiralty cases unless they are expressly contradicted by narrow, enumerated exceptions, which he listed with specificity.¹⁹⁰ This purpose is explicitly reflected in Rule 1¹⁹¹ and in Rule A's and Rule G's statements that the Civil Rules generally apply.¹⁹² The 1966 Advisory Committee Notes accompanying Rule 1 are yet more explicit: "Just as the 1938 rules abolished the distinction between actions at law and suits in equity, this change would abolish the distinction between civil actions and suits in admiralty."¹⁹³

2. A specific purpose of unification was to expand counterclaims in admiralty cases.

Currie and other supporters of unification expressly intended to permit legal and equitable counterclaims in admiralty cases governed by the Supplemental Civil Rules. Before 1966, the Civil Rules allowed "the assertion by counterclaim of almost any claim between the parties involved," while historically in admiralty practice "a counterclaim or setoff may generally be asserted only

note 186, at 717 (quoting Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 886 (2018)).

¹⁸⁸ Currie, *supra* note 172, at 8.

¹⁸⁹ ADVISORY COMM. ON ADMIRALTY RULES, REPORT BY ADVISORY COMMITTEE ON ADMIRALTY RULES TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 3–4 (1962).

¹⁹⁰ See Currie, *supra* note 172, at 11–13 (stating that "[i]n addition to the Supplemental Rules, the five instances of special treatment for 'admiralty and maritime claims' are" third-party practice under Rule 14(c), depositions pending action under Rule 26(a), jury trial under Rule 38(e), appeal under Rule 73(h), and venue under Rule 82).

¹⁹¹ See FED. R. CIV. P. 1, 39 F.R.D. 69, 73 (1966) (amended 2007) ("These rules govern . . . all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty." (emphasis in original)).

¹⁹² See FED. R. CIV. P. SUPP. A(2); FED. R. CIV. P. SUPP. G(1).

¹⁹³ FED. R. CIV. P. 1 advisory committee's note to 1966 amendment.

if it arises out of the same contract or episode.”¹⁹⁴ One early advocate of full merger wrote that “[n]o reason, except history, can explain the limited scope of counterclaim and setoff in admiralty.”¹⁹⁵ Currie himself echoed this idea. To him, one element of the “necessary modernization” was eliminating “the inability to join admiralty with non-admiralty claims, or to maintain counterclaims, cross-claims, and third-party claims.”¹⁹⁶ These advocates were successful. According to the American Bar Association, the new rules would “permit the permissive joinder of related claims and compulsory counterclaims whether admiralty or civil, allowing the parties to resolve all their differences in a single proceeding.”¹⁹⁷

There were practical reasons, too, for expanding counterclaims in admiralty cases. One member of the Advisory Committee on Admiralty Rules, Leavenworth Colby, criticized the existing limit on counterclaims as effecting “real injustices.”¹⁹⁸ A skillful plaintiff, he wrote, who simply framed a “single transaction” as “two separate transactions,” could thereby “prevent the defendant from filing a cross-libel” and force the defendant to prosecute her claim separately in a foreign court.¹⁹⁹ Colby concluded that such result was an “unjust and irrational example of admiralty refusing to look through form to substance.”²⁰⁰ “[R]ule 13,” by contrast, “has freely permitted counterclaims of every character.”²⁰¹

Contemporaneous discussion of counterclaims also provides support for the proposition that the 1966 merger fully applied the Civil Rules to admiralty-type cases, except where specifically limited. Commentators in the 1960s explicitly acknowledged that Rule 13 would govern all counterclaims in admiralty actions. Another member of the Advisory Committee wrote that “[b]efore unification cross-libels (now counterclaims) had to be maritime and arise out of the same transaction or occurrence in order to be allowed,” but now, per “Rule 13(b) a permissive counterclaim need not pertain to the subject matter of the opposing party’s claim.”²⁰²

¹⁹⁴ Philip K. Verleger, *On the Need for Procedural Reform in Admiralty*, 35 TUL. L. REV. 61, 67 (1960). For a discussion of preunification counterclaims, see *supra* notes 75, 77 and accompanying text.

¹⁹⁵ Verleger, *supra* note 194, at 67.

¹⁹⁶ Currie, *supra* note 172, at 14.

¹⁹⁷ Am. Bar Ass’n, *Report of American Bar Association*, 38 F.R.D. 95, 100 (1965).

¹⁹⁸ Colby, *supra* note 74, at 1271.

¹⁹⁹ *Id.* at 1271–72. “The older admiralty term ‘cross-libel’ is equivalent to ‘counterclaim.’” *Funds Seized*, 942 F.3d at 662 n.12.

²⁰⁰ Colby, *supra* note 74, at 1272.

²⁰¹ *Id.*

²⁰² Stuart B. Bradley, *Admiralty Aspects of the Civil Rules*, 41 F.R.D. 257, 264 (1967).

And one critic of unification bemoaned the loss of admiralty's "restrict[ion of] set-offs and counterclaims" since "Rule 13 . . . would supersede that practice."²⁰³ In 1966, the relevant public understood that unification and the creation of the Supplemental Rules would expand nonadmiralty counterclaims in admiralty-type actions. This supports both the idea that claimants in actions in rem should be able to bring counterclaims, and, more generally, that the Civil Rules fully apply to actions governed by the Supplemental Civil Rules.

3. There is no distinction between claimants and intervenors.

After the 1980s, when civil forfeiture commonly utilized the in rem procedures of the Supplemental Civil Rules, courts sometimes discussed the rights of in rem "claimants" without referencing Rule 24 "intervenors." Arguably, the use of the word "claimant" could mean that property owners in civil forfeiture cases are not Rule 24 intervenors. But as discussed in Part III.A, the Supplemental Civil Rules, as enacted in 1966, finally eliminated the distinction by adopting language from both sides of the divide in its discussion of Rule C claimants. And that distinction, of reduced significance in admiralty over time, has never been significant in forfeiture.

Changes to the Supplemental Civil Rules since the start of the war on drugs should dispel any lingering doubt. In 2000, Rule C was amended to isolate the forfeiture and admiralty portions from one another and delete what the Advisory Committee called "the confusing 'claim' terminology."²⁰⁴ The Advisory Committee's meeting minutes make this explicit: In forfeiture actions, "categories of persons who may" intercede as claimants "include *everyone who can identify an interest in the property*."²⁰⁵ In admiralty, by contrast, the category of "persons who may participate directly is narrower than in forfeiture, being restricted to those who assert a right of possession or an ownership interest."²⁰⁶ Today, the Advisory Committee makes clear, a "claimant" in a civil

²⁰³ Charles N. Fiddler, *The Admiralty Practice in Montana and All That: A Critique of the Proposal to Abolish the General Admiralty Rules by Amendments to the Federal Rules of Civil Procedure, and a Counterproposal*, 17 ME. L. REV. 15, 50 (1965).

²⁰⁴ Civ. Rules Advisory Comm., Minutes 17 (Oct. 6–7, 1997).

²⁰⁵ *Id.* at 18 (emphasis added).

²⁰⁶ *Id.*

forfeiture action is defined as broadly as an “intervenor” in traditional admiralty practice.

In 2006, the Supplemental Civil Rules changed again to further acknowledge the differing trajectories of civil forfeiture and admiralty. Rules governing civil forfeiture now moved to a new location, Rule G. Under the new rule, “[a] claim filed by a person asserting an interest as a bailee must identify the bailor,”²⁰⁷ acknowledging that a claimant can be someone with as minor a property interest as a bailee’s. Again, contemporaneous public statements help reveal intent. Robert J. Zapf, the Maritime Law Association’s liaison to the Advisory Committee on Civil Rules, recognized that “[i]n some forfeiture cases, the term ‘claim’ was given a broader meaning than that applying to the context of traditional admiralty practice. In these cases, persons asserting any interest in the property seized were permitted to file ‘claims’ to the property.”²⁰⁸ This was the public understanding of the word “claimant” in proposed Rule G in the years leading up to the 2006 amendments.

Both before and after the 1966 merger, federal courts reflected this usage: they often used the terms “claimant” and “intervenor” interchangeably, even in cases that summarily dismissed claimants’ counterclaims.²⁰⁹ Reading “claimant” to include Rule 24’s rights for intervenors is the only interpretation that makes sense after taking the context of full unification into account. Any other reading would create an atextual exception to Rule A’s and Rule G’s statements that the rest of the Civil Rules apply unless specifically limited. Additionally, as the discussion of claimants and intervenors leading up to the 2000 and 2006 amendments reveals, reading Rule G narrowly to not include the rights of intervenors would contradict the public understanding when those amendments were enacted. And since a claimant in a civil forfeiture action would “claim[] an interest relating to the property . . . that is the subject of the action,”²¹⁰ she would be a mandatory intervenor with the right to file permissive counterclaims.

²⁰⁷ FED. R. CIV. P. SUPP. G(5)(a)(iii).

²⁰⁸ Robert J. Zapf, *In Rem Procedures: A Sea Change Underway—Recent and Proposed Changes to the Admiralty Rules*, 15 U.S.F. MAR. L.J. 77, 92 (2003) (emphasis in original).

²⁰⁹ See *Funds Seized*, 942 F.3d at 660–61, 661 n.9 (collecting cases).

²¹⁰ FED. R. CIV. P. 24(a)(2).

IV. CIVIL FORFEITURE COUNTERCLAIMS IN PRACTICE

Part III established that the text, history, and purposes of the Civil Rules and Supplemental Civil Rules permit claimants in civil forfeiture cases to file counterclaims. This Part now examines some collateral questions. Since such counterclaims would be filed against the federal government, Part IV.A examines current sovereign immunity doctrine and related statutory law and posits that they leave room for many potential counterclaims and third-party complaints. Part IV.B considers the claim-preclusive element of compulsory counterclaims and discusses which counterclaims relevant to this Comment might be compulsory and which might be permissive. Finally, Part IV.C looks to the likely consequences of permitting counterclaims in civil forfeiture actions and concludes that they will be able to serve as a check on an abusive system while vindicating some claimants' rights.

A. Sovereign Immunity and Possible Causes of Action

A bedrock principle of U.S. law is that “[t]he United States, as sovereign, is immune from suit save as it consents to be sued.”²¹¹ Such consent must be “unequivocally expressed in statutory text.”²¹² Consequently, though claimants in civil forfeiture actions brought by the federal government can bring counterclaims against it under the Civil Rules, courts do not have jurisdiction to entertain counterclaims that violate the United States' sovereign immunity. For instance, damages for “constitutional torts”²¹³ and “tortious interference”²¹⁴ against the United States, which some claimants have brought, are barred even though the procedural framework may permit them.

The United States has expressly waived its sovereign immunity in some situations. For instance, the Federal Tort Claims Act²¹⁵ (FTCA) allows individuals to sue the United States for “money damages” for “injury or loss of property.”²¹⁶ The FTCA does not require counterclaims to proceed through the relevant federal agency before reaching court.²¹⁷ And though it contains multiple

²¹¹ *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (collecting cases).

²¹² *Lane v. Pena*, 518 U.S. 187, 192 (1996).

²¹³ *Funds Seized*, 942 F.3d at 664.

²¹⁴ *8 Luxury Vehicles*, 88 F. Supp. 3d at 1333; accord 28 U.S.C. § 2680(h) (excluding claims for “interference with contract rights” from the Federal Tort Claims Act).

²¹⁵ Ch. 753, 60 Stat. 812 (1946) (codified in scattered sections of 28 U.S.C.).

²¹⁶ 28 U.S.C. § 1346(b)(1).

²¹⁷ 28 U.S.C. § 2675(a).

exceptions, the FTCA expressly permits claims for civil forfeiture actions gone awry²¹⁸—part of CAFRA’s response to “the overly enthusiastic pursuit of civil and criminal forfeiture.”²¹⁹ Victims of civil forfeitures have used this carveout before. In 2007, federal agents seized 81,000 cans of infant formula from a grocery distributor; the formula quickly spoiled.²²⁰ The owners sued under the FTCA.²²¹ The judge rejected the United States’ motion to dismiss, writing, “I cannot say that plaintiff fails to plausibly allege that its claim is not within the CAFRA exception to the detention of goods exception.”²²² In the claimants’ appeal of the underlying civil forfeiture case, Judge Richard Posner speculated that the claimant “might have a remedy in damages under the Federal Tort Claims Act if the government’s action in holding on to the baby formula until it became unsalable was negligent . . . , or a possible *Bivens* action for the deprivation of property without due process of law.”²²³

Claimants could bring FTCA actions as counterclaims, too, thereby consolidating their demands for relief into a single action. For example, in one such case, the federal government seized an individual’s computer equipment.²²⁴ The owner sought return of his property, and also counterclaimed for the “diminution in value of the computer equipment resulting from its seizure.”²²⁵ Relying on \$68,000, the district court dismissed the counterclaim.²²⁶ But if the district court had permitted the counterclaim, as it should have, the diminution in value claim would likely have been cognizable under the FTCA. If the claimant had successfully contested the seizure, he could have won the return of his property plus damages for any loss.

²¹⁸ 28 U.S.C. § 2680(c).

²¹⁹ *Diaz v. United States*, 517 F.3d 608, 613 (2d Cir. 2008).

²²⁰ *Kaloti Wholesale Inc. v. United States*, 748 F. Supp. 2d 955, 956 (E.D. Wis. 2010).

²²¹ *Id.*

²²² *Id.* at 957. The judge also denied the United States’ motion to dismiss *Bivens* claims brought against the unknown agents who seized the formula. *Id.* at 956.

²²³ *United States v. Approximately 81,454 Cans of Baby Formula*, 560 F.3d 638, 640 (7th Cir. 2009). In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court “established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.” *Carlson v. Green*, 446 U.S. 14, 18 (1980). For more discussion of *Bivens* actions in civil forfeiture, see *infra* note 235.

²²⁴ *United States v. Assorted Comput. Equip.*, No. 03-2356V, 2004 WL 784493, at *1 (W.D. Tenn. Jan. 9, 2004).

²²⁵ *Id.* at *2.

²²⁶ *Id.*

The government has also waived its sovereign immunity through the Tucker Act²²⁷ for contract-related claims. However, this waiver is more limited, since breach of contract claims against the United States for more than \$10,000 can only be brought in the Court of Federal Claims.²²⁸ Therefore, a Tucker Act counterclaim can only be brought in district court against the United States if it is for less than \$10,000.²²⁹ For instance, the Tucker Act would permit the Pueblo of Pojoaque to bring breach of contract and breach of implied covenant claims, as long as it sought less than \$10,000 for those counts (in addition to seeking the return of the \$10.1 million seized).²³⁰ Admittedly, this scenario may not happen very often.

Like the counterclaim, a third-party complaint allows a defendant to seek restitution. If Levi and Moore are correct, intervenors in forfeiture actions can freely bring in third parties under the Civil Rules,²³¹ and the Civil Rules specifically allow third-party practice in actions in rem.²³² In some cases, claimants in a federal civil forfeiture action could bring third-party complaints against state officials under 42 U.S.C. § 1983. When state officials undertake an initial, illegal investigation or seizure, but the federal government files the action—in a common process called equitable sharing²³³—property owners may be able to bring

²²⁷ Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified at 28 U.S.C. §§ 1346(a), 1491).

²²⁸ Compare 28 U.S.C. § 1346(a)(2) (permitting civil actions not exceeding \$10,000 “upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort”), with 28 U.S.C. § 1491(a)(1) (permitting similar claims in the Court of Federal Claims without a monetary cap).

²²⁹ See *Thompson v. United States*, 250 F.2d 43, 44 (4th Cir. 1957) (per curiam) (“[T]he counterclaims here involved may be asserted. . . . They arise out of contract and involve less than the sum of \$10,000. Congress has given its consent in the Tucker Act, 28 U.S.C. § 1346(a)(2), that the United States be sued on such claims in the District Courts.”).

²³⁰ Outside of the class-action context, a plaintiff may cap her possible damages by stipulation to stay under a jurisdictional maximum. See *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592 (2013). Of course, the Pueblo of Pojoaque could bring a separate action in the Court of Federal Claims, but it would lose the benefits of filing the claim in the same action. See *infra* Part IV.C.

²³¹ See Levi & Moore, *supra* note 154, at 909 (arguing that under the Civil Rules “an intervenor could counterclaim and bring in third parties”).

²³² See FED. R. CIV. P. 14(c)(1) (permitting “the defendant or a person who asserts a right under Supplemental Rule C(6)(a)(i),” i.e., a claimant in an action in rem, to “bring in a third-party defendant”). Rule 14(c) allows broader third-party practice in admiralty-type cases than Rule 14(a) allows in other civil actions. See Watson & Xanthopoulos, *supra* note 56, at 1134 (“[R]ule 14(c) preserved the liberal preunification approach, permitting a defendant in an admiralty action to implead a third party that is or may be liable to either the plaintiff or the defendant.” (emphasis in original)).

²³³ See KNEPPER ET AL., *supra* note 7, at 46–47.

similar claims for violations of legal rights against the state law-enforcement officials. Section 1983 actions would serve as an end run around sovereign immunity, since such claims are formally brought against the agents themselves, even if the government indemnifies them. Many provisions of the Bill of Rights apply to civil forfeiture, and property owners have successfully alleged Section 1983 claims against state officials for state civil forfeitures.²³⁴ Unfortunately, an analogous statutory cause of action against federal officials does not currently exist.²³⁵

Modern sovereign immunity doctrine guarantees that “there will be many instances in which individuals will be injured without having any judicial forum available.”²³⁶ Yet in at least some cases, the federal government has waived its immunity in ways that could benefit property owners in civil forfeiture cases who bring counterclaims. The FTCA, the Tucker Act, and § 1983 provide plausible pathways for at least some individuals to vindicate their rights when the federal government tries to wrongfully seize their property.

B. Jurisdiction and Claim Preclusion

Federal subject matter jurisdiction should be no bar to the claims discussed in Part IV.A. FTCA and Tucker Act counterclaims are “Controversies to which the United States shall be a Party,”²³⁷ and each law contains a statutory grant of jurisdiction

²³⁴ See, e.g., *Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d 694, 702–04 (E.D. Pa. 2015) (holding that plaintiffs plausibly alleged that city’s civil forfeiture policy violated their due process rights); *Hill v. Tennessee*, 868 F. Supp. 221, 224 (M.D. Tenn. 1994) (holding that plaintiff adequately alleged that civil forfeiture violated his Fourth, Fifth, and Eighth Amendment rights).

²³⁵ Some commentators have suggested a potential *Bivens* remedy. See, e.g., G. Richard Strafer, *Civil Forfeitures: Protecting the Innocent Owner*, 37 U. FLA. L. REV. 841, 858–60 (1985) (advocating for *Bivens* actions in the civil forfeiture context). While *Bivens* and its progeny offer claimants a possible cause of action, courts are loath to apply them. However, while expansion and application of the judge-made *Bivens* remedy is “a ‘disfavored’ judicial activity” today, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)), codification of *Bivens* is gaining in support and is a plausible reform in the future, see Justin Vail & Roy L. Austin, Jr., *Police Reforms Should Include Federal Cops Too*, THE HILL (June 14, 2020), <https://perma.cc/6B82-Z2LE>; Joanna Schwartz, James Pfander & Alexander Reinert, *The Simple Way Congress Can Stop Federal Officials from Abusing Protesters*, POLITICO (June 10, 2020), <https://perma.cc/9JKP-7N8K>; Megan Gephart, Note, *Iqbal Signals Bivens’ Peril: A Call for Congressional Action*, 37 FORDHAM URB. L.J. 1057, 1067–71 (2010); see also *Bivens Act of 2020*, H.R. 7213, 116th Cong. (2020).

²³⁶ Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1215 (2001).

²³⁷ U.S. CONST. art. III, § 2, cl. 1.

to the district courts.²³⁸ And *Bivens* and § 1983 claims arise under the U.S. Constitution and federal law, respectively, and therefore present a federal question.²³⁹

A related issue is whether such counterclaims are compulsory or permissive. The question has great practical importance, since claim preclusion can limit a claimant's future legal options. If they are compulsory, an intervenor must bring the counterclaims now; if they are permissive, she can wait. This Comment argues that both compulsory and permissive counterclaims ought to be permitted in civil forfeiture cases. At minimum, however, courts must admit compulsory counterclaims. They find textual support in Rule E's mention of counterclaims originating in "the transaction or occurrence that is the subject of the original action"²⁴⁰—similar language, of course, to Rule 13(a)—and additional support in the historical practice of recoupment in admiralty actions in rem.²⁴¹

Section 1983 or *Bivens* actions against third-party government agents are not mandatory, of course. FTCA and Tucker Act counterclaims are more complicated. A civil forfeiture action concerns an alleged crime committed with property, while a counterclaim by an intervenor would concern the seizure of that property by government agents. Are these independent events or part of the same occurrence? On one hand, there are arguably distinct issues of fact that will require different evidence.²⁴² But on the other hand, there is a "logical relationship between the principal claim and the counterclaims."²⁴³ The issue is complex²⁴⁴ and a full answer is beyond the ambit of this Comment, but claimants and their attorneys should be aware of the question.

C. Counterclaims' Effect on Civil Forfeiture

Civil forfeiture's impact falls disproportionately on low-income communities and people of color, which is unsurprising considering its connection to the war on drugs. The judiciary has taken notice: Justice John Paul Stevens condemned "the hoary fiction

²³⁸ See 28 U.S.C. § 1346(a), (b)(1).

²³⁹ See U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1331.

²⁴⁰ FED. R. CIV. P. SUPP. E(7)(a); cf. FED. R. CIV. P. 13(a)(1)(A).

²⁴¹ See *supra* note 77 (collecting cases).

²⁴² Cf. *FDIC v. Hulsey*, 22 F.3d 1472, 1487 (10th Cir. 1994) (discussing the factors for determining whether a counterclaim is compulsory).

²⁴³ *Id.*

²⁴⁴ Cf. Michael D. Conway, Comment, *Narrowing the Scope of Rule 13(a)*, 60 U. CHI. L. REV. 141, 149 (1993) ("In interpreting Rule 13(a), courts have struggled to determine when claims arise from the same 'transaction or occurrence.'").

that property [is] forfeitable because of its own guilt,”²⁴⁵ while Justice Clarence Thomas has recognized the “egregious and well-chronicled abuses” of a regime that so often targets the very groups “most burdened by forfeiture.”²⁴⁶ Given these problems, allowing claimants to bring counterclaims against the United States would have two normatively beneficial effects, one systemic and one individual.

First, counterclaims would have the systemic advantage of reducing the profitability of civil forfeiture.²⁴⁷ Civil forfeiture is extraordinarily lucrative for the federal government. Agencies can keep seized money and have broad leeway to use it as they see fit: they can spend it not just on forfeiture-related expenses, but also, for instance, to equip new vehicles and pay overtime.²⁴⁸ This creates a perverse incentive for police departments “to stray from legitimate law enforcement goals in order to maximize funding for their operations.”²⁴⁹ Permitting counterclaims would reduce this motivation. When a potential counterclaim has a positive expected value, it often “reduces the expected value of [the plaintiff’s] suit and so reduces [the plaintiff’s] incentive to sue.”²⁵⁰ Restricting the profitability of civil forfeiture through counterclaims would help move the government away from the practice except where it is socially beneficial. Doing so through federal civil procedure will diminish the appeal of equitable sharing, thereby reducing state-level civil forfeiture too.

Second, allowing counterclaims would provide an additional layer of protection for some individuals whose property the government seizes. Counterclaims offer significant benefits: since “[t]he assertion of a valid counterclaim may result in a favorable tactical reaction from an opponent,” it is “advantageous for a

²⁴⁵ *Bennis v. Michigan*, 516 U.S. 442, 466 (1996) (Stevens, J., dissenting).

²⁴⁶ *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari).

²⁴⁷ Other authors have also proposed reforms that reduce police profits. See, e.g., David Pimentel, *Civil Asset Forfeiture Abuses: Can State Legislation Solve the Problem?*, 25 *GEO. MASON L. REV.* 173, 194–98 (2017); Michael van den Berg, Comment, *Proposing a Transactional Approach to Civil Forfeiture Reform*, 163 *U. PA. L. REV.* 867, 919–23 (2015).

²⁴⁸ See DOYLE, *supra* note 10, at 23–27.

²⁴⁹ Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 *U. CHI. L. REV.* 35, 56 (1998); accord KNEPPER ET AL., *supra* note 7, at 34 (“This arrangement risks biasing law enforcement priorities toward the pursuit of property over justice. . . . Despite widespread concern over agencies’ financial stake in forfeiture efforts, recent years have seen little genuine reform.”).

²⁵⁰ William M. Landes, *Counterclaims: An Economic Analysis*, 14 *INT’L REV. L. & ECON.* 235, 244 (1994).

defendant [or intervenor] to assert any valid counterclaims.”²⁵¹ By filing a counterclaim, a party obtains greater bargaining power to induce a favorable settlement, greater control over discovery, and a better image in front of the trier of fact. And, of course, bringing a counterclaim is often simpler and cheaper than initiating a separate action. Due to the expansiveness of sovereign immunity and qualified immunity doctrines and the current limits on *Bivens* actions, it is the unfortunate reality that many claimants will not be able to find a permissible cause of action. But, in at least some cases, counterclaims can vindicate individual rights in the government-friendly realm of civil forfeiture. And, as previously discussed, the threat of facing successful counterclaims from property owners should reduce law enforcement agencies’ profit margin, and therefore their incentive to bring civil forfeiture actions in the first place.

CONCLUSION

Two courts of appeals and many district courts have held that, when the government files a civil forfeiture action against property, the Civil Rules prohibit the property’s owner from bringing a counterclaim against the government. As this Comment has shown, the relevant Civil Rules and Supplemental Civil Rules do not support this holding. The strongest reading of the Civil Rules as currently written—construed with an eye to all legitimate interpretative factors—indicates that claimants in civil forfeiture cases are intervenors who can file counterclaims.

Proponents of civil forfeiture reform have had some success in recent years through policy proposals in Congress²⁵² and constitutional arguments in the courts.²⁵³ This Comment proposes another reform—permitting property owners to file counterclaims—which is supported by both a descriptively consistent interpretation of existing federal civil procedure and a normatively preferable policy outcome. Many of the courts to address this issue did not take the Civil Rules’ language seriously. Luckily,

²⁵¹ ROGER S. HAYDOCK, DAVID F. HERR & JEFFREY W. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* 132 (4th ed. 2000); *accord* CHARLES H. ROSE III & JAMES M. UNDERWOOD, *FUNDAMENTAL PRETRIAL ADVOCACY: A STRATEGIC GUIDE TO EFFECTIVE LITIGATION* 193 (2d ed. 2012) (calling the assertion of permissive counterclaims a potentially “wise litigation strategy”).

²⁵² *See, e.g.*, Nick Sibilla, *Trump Signs New Law to Protect Innocent Small Business Owners from IRS Seizures*, *FORBES* (July 10, 2019), <https://perma.cc/8YJK-8MRC>.

²⁵³ *See generally, e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (holding, in a civil forfeiture action, that the Excessive Fines Clause applies to the states).

however, only three courts of appeals have weighed in, and one of them got it right.

Aside from the inequities in the actual use of civil forfeiture by states and the federal government, the very complexity of civil forfeiture procedure is a problem in and of itself. Confused property owners, without access to counsel, are likely to not contest the seizure of their property. Hence procedural changes, like the one suggested here, should be a central part of civil forfeiture reform. Yet there is more to do on the road to matching civil forfeiture procedure to the substantive law. I will suggest a few areas of future study that could simplify and demystify the procedural hurdles facing claimants.

First, as this Comment suggests, judges should consider reading the Supplemental Civil Rules in tandem with the Civil Rules. Litigants and lawyers who are familiar with the Civil Rules proper may reasonably expect that the Supplemental Civil Rules permit actions like counterclaims and third-party joinder. Aside from the textual and historical reasons presented in this Comment, judges should allow claimants access to procedural mechanisms like counterclaims for simplicity's sake. It is normatively beneficial for litigants and their attorneys to not have to worry about atextual limits on poorly known rules, and get right to the merits of the government's claims against their property and their claims against the government or its agents.

Second, the Advisory Committees, the Supreme Court, and Congress should embrace transsubstantivity more generally. As previously discussed,²⁵⁴ there is little practical reason for admiralty in general, and civil forfeiture in particular, to have its own set of procedural rules. Eventually, the Supplemental Civil Rules should be eliminated, and admiralty cases and civil forfeiture cases should be fully governed by the Civil Rules. Again, this would demystify the maze property owners must navigate. By allowing generalist lawyers to more easily handle currently specialized types of cases,²⁵⁵ transsubstantive procedural doctrine can increase the number of lawyers able to represent each prospective client, and therefore lower the cost of obtaining legal counsel.

²⁵⁴ See *supra* notes 186–87 and accompanying text.

²⁵⁵ See David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1221 (2014) (“[T]rans-substantive doctrine can lower the barriers to entry for areas of practice. . . . Trans-substantivity thus helps to enable generalist lawyers to practice in a wider array of contexts.”).

Third, Congress should consider helping property owners navigate the maze by creating a statutory right to counsel for all indigent property owners in civil forfeiture actions. CAFRA guarantees counsel when a person's primary residence is at risk of civil forfeiture,²⁵⁶ and federal law permits, but does not require, district courts to appoint counsel for civil litigants who file in forma pauperis.²⁵⁷ Today, Congress could finish the job.²⁵⁸ In 1988, the U.S. attorney for the Northern District of Illinois wrote that "[p]rocedural ghosts and substantive goblins lurk in the shadows of forfeiture law."²⁵⁹ Forcing indigent property owners to avoid those "procedural ghosts" alone, without the assistance of counsel, magnifies this problem.

All this would help. But while we wait, it is time for other district courts, courts of appeals, or even the Supreme Court to join in the Fifth Circuit's embrace of counterclaims in civil forfeiture actions. In doing so, they would rein in numerous "bad, or harsh, procedural decisions," remove the "interpretative barnacles,"²⁶⁰ and return to the correct understanding of the Civil Rules.

²⁵⁶ See 18 U.S.C. § 983(b)(2)(A).

²⁵⁷ See 28 U.S.C. § 1915(e)(1).

²⁵⁸ Bills proposed in recent Congresses would do just this. See *supra* note 18.

²⁵⁹ Valukas & Walsh, *supra* note 13, at 31.

²⁶⁰ Clark, *supra* note 19, at 498.