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January 09, 2025

Split Ninth Circuit Opinion Imposes Due Process Requirements for “In Rem” Forfeiture of Foreign Assets



In *United States v. Nasri*, the U.S. Court of Appeals for the Ninth Circuit held that the U.S. government must satisfy Due Process requirements before it can seek civil forfeiture of assets located abroad. The 2-1 split panel [opinion](#) calls into question prior case law that had seemingly relaxed this jurisdictional requirement.

The majority opinion highlights important (and potentially dispositive) threshold arguments for counsel to consider in any civil forfeiture proceeding involving assets located outside the United States. The fractured nature of the decision also leaves the door open to further legal challenges on this issue.

Federal Civil Forfeiture Actions

Federal civil forfeiture actions are generally considered “in rem” proceedings. This means that the court’s jurisdiction is based on the legal fiction that the court is proceeding against the ill-gotten *property* itself rather than the *person* who owns the property. The Supreme Court has [held](#) that to establish in rem jurisdiction, a court must have actual or constructive control over the relevant property. But a federal statute, 28 U.S.C. § 1355, also provides district courts with original jurisdiction over civil forfeiture proceedings. And following 1992 amendments to the statute, it specifies that, when property subject to forfeiture under federal law “is located in a foreign country,” the U.S. government may bring a forfeiture action in certain federal district courts, including the court located where “any of the acts or omissions giving rise to the forfeiture occurred.”

Until recently, the Ninth Circuit interpreted this statute literally and [held](#) that it establishes jurisdiction in the appropriate district court “without reference to constructive or actual control” of the property. Several other circuits, including the [D.C. Circuit](#) and the [Third](#) and [Fourth](#) Circuits, have applied similar analyses. But in October 2024, a divided three-judge panel of the Ninth Circuit issued an [opinion](#) in *United States v. Nasri* clarifying that actual or constructive control *is* required for in rem jurisdiction in a forfeiture action, pursuant to Due Process principles.

United States v. Nasri

In *United States v. Nasri*, the U.S. Department of Justice (DOJ) indicted Younes Nasri—a Canadian national living in Dubai—on criminal racketeering and drug conspiracy charges in the U.S. District Court for the Southern District of California. The DOJ also sought civil forfeiture of Nasri’s assets held in a bank account in Lichtenstein, relying on 28 U.S.C. § 1355 to establish the district court’s in rem jurisdiction over the assets. Nasri filed a claim of innocent ownership of the assets. But after the DOJ and Nasri’s negotiations to resolve the criminal and civil claims broke down, Nasri failed to appear and failed to surrender in his criminal case. The DOJ moved to strike Nasri’s claim to the assets under the fugitive disentitlement statute, 28 U.S.C. § 2466, which permits courts to disallow a person’s claim of ownership in a civil forfeiture proceeding where the person has intentionally evaded related criminal proceedings. Relying on prior Ninth Circuit case law, the district court agreed it had in rem jurisdiction and proceeded to strike Nasri’s claim to the funds.

In a 2-1 panel opinion, the Ninth Circuit reversed, holding that the district court’s assertion of jurisdiction over Nasri’s assets held in Lichtenstein violated the Due Process Clause of the Fifth Amendment to the Constitution. Writing for the majority, Judge Desai explained that existing Ninth Circuit civil forfeiture cases under section 1355 had developed in a way that created “a constitutionally untenable result” and “unwittingly created a gaping constitutional hole.” Specifically, although Congress may have *intended* under section 1355 to establish jurisdiction without an analysis of the court’s control over the property, such an analysis is still *required* to satisfy Due Process. The majority explained that “whatever power Congress may possess to alter the historical requirements for in rem jurisdiction, we know of no principle under which Congress can evade the constitutional notice requirements by statute.”

The majority instructed the district court on remand to evaluate whether it has control or constructive control over Nasri’s assets in Lichtenstein sufficient to satisfy Due Process for in rem jurisdiction. The court also provided guidance on the applicable test. It found “instructive” the test applied in a 1995 [Second Circuit](#) case, which held that constructive control exists if the government of the foreign country where the assets are located acts “essentially as an agent of the United States” for purposes of the forfeiture action. In other words, the DOJ must demonstrate that it has received sufficient assurances and cooperation from the foreign government before it can proceed in rem against foreign assets. The exact contours of this test remain to be developed. Going forward, parties in civil forfeiture proceedings in courts within the Ninth Circuit involving foreign assets should anticipate legal challenges to jurisdiction under these principles.

Importantly, the Ninth Circuit’s decision in *United States v. Nasri* was not unanimous and may lead to further legal battles. Judges Bybee and Desai, who comprised the majority, each wrote separate concurrences, and Judge Bennett dissented.

Judge Bybee’s lengthy concurrence explained his view that “this case is about much more than just the Due Process Clause.” Forfeiture actions, although nominally characterized as in rem, are not truly in rem actions because the United States does not *possess* the property against which it is proceeding. Judge Bybee therefore explained that in addition to creating Due Process problems, this also causes the entire action to be “premature and nonjusticiable” under Article III of the Constitution—until the DOJ has either seized or “meaningfully controlled” the property. The concurrence encouraged a legislative solution to this problem, noting that Congress could recognize that civil asset forfeitures involving property outside the United States are “really *quasi in rem* proceedings in which we are asking a foreign government to secure the property, subject to our forfeiture proceedings and any competing claims to the property.” Judge Bybee also conducted a lengthy statutory analysis of section 1355 and encouraged the court to overrule prior case law interpreting section 1355 in an “appropriate case.”

Judge Desai separately concurred, disagreeing with Judge Bybee’s justiciability concerns, but agreeing that “a better path forward” would be to treat civil forfeiture actions over foreign assets as “quasi in rem actions.” Judge Desai noted that this would require action from Congress or the Supreme Court.

Finally, Judge Bennett dissented. In Judge Bennett’s view, the majority erred in deciding the Due Process issue both because Nasri waived the issue and because prior Ninth Circuit [precedent](#) already resolved it. Judge Bennett also disagreed with the majority’s Due Process analysis on the merits, arguing that the DOJ had satisfied Due Process in this case. Judge Bennett criticized the majority for intruding into matters committed to the legislative and executive branches and interfering in foreign relations and the DOJ’s ability to fight crime.

Implications for Future Cases

United States v. Nasri establishes critical jurisdictional requirements in federal civil forfeiture proceedings involving assets located abroad, the contours of which will be subject to future litigation. The opinion is also notable because it leaves the law in the Ninth Circuit regarding in rem jurisdiction in civil forfeiture actions somewhat unsettled, and in tension with the law in other circuits, including the D.C., Third, and Fourth Circuits. As a result, counsel should closely watch for possible en banc proceedings, future clarifying decisions from the Ninth Circuit, and potential opportunities for the Supreme Court to weigh in.

Authors

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