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ON THE CONSTITUTIONALITY OF SEIZING AIRCRAFT WITHOUT A HEARING PURSUANT TO SECTION 903(b) OF THE FEDERAL AVIATION ACT OF 1958: PROCEDURAL DUE PROCESS UP IN THE AIR

Edward Burke Arnolds*

THE FEDERAL AVIATION ACT of 1958 1 (Act) and the Federal Aviation Regulations² (FARs) promulgated pursuant thereto provide the Administrator of the Federal Aviation Administration (Administrator) with various methods of enforcing the Act and the FARs. Methods of enforcement include the following: administrative actions, which may result in warning notices³ or letters of correction;⁴ certificate actions, which may result in suspension or revocation of certificates issued by the Federal Aviation Administration (FAA);⁵ and civil penalties, which may result in fines of up to $1,000 for each violation.⁶ In cases in which the Administrator elects to pursue civil penalties, he is authorized immediately to com-

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3 14 C.F.R. § 13.11(b)(1) (1982). A "warning notice" "recites available facts and information about the incident or condition and indicates that a violation may have occurred." Id.

4 14 C.F.R. § 13.11 (b)(2) (1982). A "letter of correction" "confirms a decision by the FAA in the matter of the administrative action and states the necessary corrective action the alleged violator has taken or agrees to take." Id. "If the agreed corrective action is not fully completed, legal enforcement action may be taken." Id.


promise and to settle for a lesser amount. Unless the fine is paid "voluntarily," however, the Administrator is required to instigate proceedings in a United States district court in order to collect the fine. Not surprisingly, few such cases go to trial because the cost of a trial would almost always exceed the maximum fine. Although the maximum fine is relatively small, cases are usually settled for less.

Notwithstanding the small amount of the fine, section 903(b) of the Act and section 13.17 of the FARs still provide the FAA with an extraordinary provisional remedy: a regional director or the chief counsel may authorize summary seizure of an aircraft that is involved in a violation of the Act or a FAR for which a civil penalty may be imposed on its owner or operator. No pre-seizure notice, much less the op-

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9 Letter from Mr. Richard C. Hall, Chief of the National Safety Data Branch of the FAA's Flight Standards National Field Office, to Professor Arnolds (Jan. 25, 1982), (stating that for the period from July 1, 1980 through June 30, 1981, 394 civil penalties were imposed in which three were referred to a United States attorney for collection, and none of the cases actually went to trial).
10 See supra note 7.
13 Relevant portions of the Act are discussed below. According to 49 U.S.C. § 1471(a)(1) (Supp. IV 1980): "[a]ny person who violates . . . any provision . . . of this chapter . . . or any rule, regulation, or order issued thereunder . . . shall be subject to a civil penalty of not to exceed $1,000 for each such violation . . . ."
14 In case an aircraft is involved in such violation and the violation is by the owner or person in command of the aircraft, such aircraft shall be subject to lien for the penalty. According to 49 U.S.C. § 1473(b)(2) (1976): "[a]ny aircraft subject to such lien may be summarily seized by and placed in the custody of such persons as the Board or Administrator may by regulation prescribe . . . ."

Section 1473(b)(3) provides:

The aircraft shall be released from such custody upon payment of the penalty or the amount agreed upon in compromise; or seizure in pursuance of process of any court in proceedings in rem for enforcement of the lien, or notification by the United States attorney of failure to institute such proceedings; or deposit of a bond in such amount and with such sureties as the Board or Administrator may prescribe, conditioned upon the payment of the penalty or the amount agreed upon in compromise.

49 U.S.C. § 1473(b)(3) (1976). The regulations track and implement these statutory provisions but do not make any substantive changes. 14 C.F.R. § 13.17(a) (1982). Sec-
portunity for a pre-seizure hearing is required. Moreover, no

tion 13.17(a) provides:
Under section 903 of the Federal Aviation Act of 1958 (49 U.S.C. 1473), a State or Federal law enforcement officer, or a Federal Aviation Administration safety inspector, authorized in an order of seizure issued by the Regional Director of the region, or by the Chief Counsel may summarily seize an aircraft that is involved in a violation for which a civil penalty may be imposed on its owner or operator.

The FAA's own policies, however, may be slightly different. FAA Order 2150.3, paragraph 1205(a) (May 16, 1980), chapter 12, page 176, of a manual titled “Compliance and Enforcement Program,” states as follows:

Seizure to collect civil penalty. An aircraft involved in a violation may be seized in accordance with Section 903(b) of the Federal Aviation Act of 1958 and Section 13.17 of the F.A.R. when the violation is by the owner or person in command and such violator is known to have insufficient assets, other than the aircraft concerned, to compromise the civil penalty or to satisfy a judgment assessing the civil penalty.

Such a seizure can be made when such violator is believed to intend to remove the aircraft from the jurisdiction of the court which would assess or has assessed the civil penalty, or the aircraft was involved in a serious violation of the Act or regulations subjecting it to such civil penalties and the actions of the violator (owner or person in command) indicate the probability of future serious violations.


Strictly read, paragraph 1205(a) appears to allow seizure only when: (1) the violator is the owner or person in command of the aircraft; and (2) the violator is known to lack sufficient assets, other than the aircraft, with which to pay the penalty; and (3) either (a) the violator is believed to intend the removal of the aircraft from the jurisdiction (presumably the United States), or (b) the aircraft was involved in a serious violation and the violator indicates the probability of future serious violations. Unless the FAA is bound by its internal regulation, the existence of the regulation, which is neither published nor readily available, would not seem to prevent a facial attack on the constitutional validity of the statute or FAR.

14 F.A.A. Order 2150.3, paragraph 1205(b). Subsection (b) states:

(b) Issuance of civil penalty letter. An aircraft may be seized after a civil penalty letter is issued or when the issuance of such letter is contemplated. In the latter case, if immediate action is essential, it is not absolutely necessary that a civil penalty letter be issued since the written notice of seizure to the registered owner of the aircraft serves to advise the owner of the violations committed and the liabilities incurred. If the aircraft is seized after a district court assesses a civil
post-seizure hearing prior to trial is provided. Section 903(b) of the Act and section 13.17 of the FARs merely provide for release of the aircraft when (i) the penalty or a compromise amount plus the costs of seizing, storing, and maintaining the aircraft are paid, (ii) the United States District Attorney refuses to institute proceedings against the owner or operator of the aircraft, or (iii) a bond is posted in the amount prescribed by the FAA. A rough equivalent of section 903(b) would be an ordinance permitting police officers summarily to seize automobiles whenever officers contemplate issuing traffic tickets.

The purpose of this article is to discuss the procedural due process problems presented by section 903(b) of the Act. First, this paper will examine the cases decided under this statute. Second, the constitutionality of section 903(b) will be discussed in light of relevant United States Supreme Court (Supreme Court) decisions.

I. CASES ARISING UNDER SECTION 903(b)

Only two cases have dealt directly with the issue of the constitutionality of seizing aircraft pursuant to section 903(b), Aircrane, Inc. v. Butterfield and United States v. Vertol.
These cases reached different results. Both cases, however, turned on their own facts rather than on the legal issue of the constitutionality of section 903(b).

In Airplane, Inc. v. Butterfield, a federal district court decided in favor of the FAA, upholding the Act and the FARs against a challenge that the Act and the FARs worked a deprivation of property without due process of law. In Airplane, the FAA seized a Sikorsky H-37 (H-37) rebuilt military surplus helicopter owned by Airplane. This seizure resulted in two suits. In the first suit, Airplane sued the Administrator seeking declaratory judgments that the Act and the FARs were unconstitutional insofar as they prohibited use of the H-37 to haul any external loads for "compensation or hire," and insofar as they authorized seizure of the H-37 for violations of regulations without prior notice or a hearing. In the second suit, the government sought, inter alia, to collect civil penalties from Airplane for violations of FARs that prohibited an aircraft certificated in the "restricted" category from carrying persons or property for "compensation or hire."

The two suits were heard together and the court held for the FAA in both. On the seizure question, the court formulated the following issue: "[D]oes the 'compensation or hire' regulation further a governmental interest of sufficient magnitude that violation of the regulation justifies dispensing with the usual procedural protections, permitting summary seizure?" Applying a balancing test, the court decided in favor of the government. The court stated that the deprivation of the aircraft was minimal because Airplane could recover the use of its helicopter simply by posting a $1,000

\[18\] 545 F.2d 648 (9th Cir. 1976).
\[20\] Airplane contended that it was unconstitutional to arbitrarily deny to one category of aircraft the right to carry external loads for hire while granting the same right to others. Id. at 610.
\[21\] Id. at 600.
\[22\] A "restricted" category aircraft is one which is limited to "special purpose operations." 14 C.F.R. § 21.25 (1982).
\[24\] Id. at 607, 613.
\[25\] Id. at 605.
bond. Moreover, Aircrane had an opportunity to present complete information to the FAA before seizure and to contest the claim for penalty after seizure. In the court’s opinion, Aircrane’s interest did not outweigh the substantial public-safety-related governmental interest which was the basis for the restrictions imposed on “restricted” category aircraft.

The court, however, did not explain how the seizure advanced a legitimate governmental interest in air safety when Aircrane was able to regain use of the H-37 by posting the bond. The decision seems to imply that if the public safety factor had not been present, if the posting of the bond had imposed a greater burden, and if the FAA had not been communicating with Aircrane prior to the seizure, the court would have declared the seizure unconstitutional.

In United States v. Vertol H21C the Court of Appeals for the Ninth Circuit held the seizure of an aircraft unconstitutional. Vertol also involved a helicopter allegedly being used for “compensation or hire” in external load operations while the aircraft was licensed in the “restricted” category. Having unilaterally determined that the owner of the helicopter had violated certain FARs the FAA sought $6,000 in civil penalties from the owner and seized the helicopter. Approximately one month later, the FAA initiated suit in federal court to collect the $6,000. More than a year and a half later, the FAA released the helicopter in exchange for a $6,000 bond. Shortly thereafter, the district court granted the owner’s motion to release the bond, holding that the seizure of the helicopter violated the owner’s due process.

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**Id.** at 608.
**Id.** at 607.
**Id.**
**Id.** at 605, 607-09.
545 F.2d 648 (9th Cir. 1976).
**Id.** at 650.
United States v. Vertol H21C, 545 F.2d at 649.
**Id.**
**Id.** at 650.
**Id.** The district court’s holding that the seizure of the helicopter violated the owner’s right to due process was based on the court’s finding that the government
The court of appeals affirmed.\(^{37}\) Also applying a balancing test, the appellate court noted that the seizure "effectively paralyzed"\(^{38}\) the owner's business while the government's interest in the matter was slight.\(^{39}\) Rejecting the claim that the seizure was related to safety, the court emphasized that the statutory scheme of section 903(b) permitted the aircraft to be reclaimed and put back into operation upon deposit of a bond.\(^{40}\) The court stated that other procedures were available which permitted the FAA to take summary action when safety was truly involved.\(^{41}\) The court found that the government's interest in the instant case was merely to facilitate collection of the $6,000, and held that this interest was insufficient to support summary seizure.\(^{42}\)

The appellate court refused to extend to the FAA the power summarily to take property as security when the court was of the opinion that the civil penalties eventually would be paid.\(^{43}\) The court stated that such a holding would be particularly inappropriate when no need existed for prompt action and nothing indicated that the owner could not pay the penalty in fact assessed.\(^{44}\) The court further noted that the government did not contend that a requirement for a pre-seizure hearing would unduly hamper FAA enforcement efforts.\(^{45}\)

*Airplane* and *Vertol*, although reaching different results, seem to agree in principle that the FAA cannot seize an aircraft without prior notice and the opportunity for a pre-seizure hearing absent extraordinary circumstances such as protecting the public safety. The seizure of an aircraft to in-

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\(^{37}\) *Id.* at 650.

\(^{38}\) *Id.* at 651.

\(^{39}\) *Id.*

\(^{40}\) *Id.*


\(^{42}\) United States v. *Vertol H21C*, 545 F.2d at 651.

\(^{43}\) *Id.*

\(^{44}\) *Id.*

\(^{45}\) *Id.* n.6.
sure the payment of a possible judgment is not a sufficient governmental interest." Other factors must be considered such as did the FAA in fact afford the owner or the operator an opportunity to be heard and what was the actual impact of the seizure on the owner or the operator. Thus, in *Aircrane* the court found that the posting of a $1,000 bond was a "minimal" inconvenience when the owner had been afforded an opportunity to present his case to the FAA prior to the seizure," while in *Vertol*, the court said the summary seizure requiring a $6,000 bond "effectively paralyzed" the owner and "drove him to the wall." By deciding the cases on their individual facts, the *Aircrane* court and the *Vertol* court never faced the issue of whether the Act or the FARs are facially constitutional as to summary seizures of aircraft. Neither the Act nor the FARs provide for pre-seizure notice, pre-seizure hearing, prompt post-seizure hearing, or any balancing of interests. Unless the owner or

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" See also United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 394 (9th Cir. 1979). In *Lockheed*, the L-188 was seized and released when the owner posted a $25,000 bond. When the government sued to collect civil penalties, the owner counterclaimed for $10,000 damages under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1976) on the theory that the seizure without prior notice or opportunity for hearing constituted an unconstitutional forfeiture, being a taking of property without just compensation in violation of the fifth amendment. Noting its decision in *Vertol*, the court distinguished the cases on procedural grounds. The court stated that in *Vertol*, the owners had raised the question of illegal seizure as a defense to the forfeiture proceeding, whereas in *Lockheed* the question was raised as a counterclaim. Acknowledging a split of authority on the question of whether one sued by the government can counterclaim under the Tucker Act, the court declined to decide the issue, affirming the district court's decision on the ground that dismissal of the counterclaim was appropriate because the unconstitutionality of the seizure could have been raised as an affirmative defense in the forfeiture proceeding. *Id.* at 396. The court said, however, that its decision did not foreclose the owner from bringing its Tucker Act claim as an independent action in the district court or the Court of Claims. *Id.* at 397. Perhaps *Lockheed* is better understood in light of the fact that a jury found 522 separate violations, subjecting the aircraft to $165,000 in fines, *id.* at 393, although the government had stipulated that if it won a judgment in excess of $25,000 the bond plus interest would be taken in full satisfaction of the judgment. *Id.* at 393 n.4. The owner hoped to offset the judgment by $10,000. *Id.* at 395.


" United States v. *Vertol* H21C, 545 F.2d 648, 651 (9th Cir. 1976).

" *Id.*

" See supra note 13. Compare United States v. *Vertol* H21C, 545 F.2d 648 (9th Cir. 1976) (unilateral "determination by the FAA that the helicopter was involved in violations of regulations") and United States v. Lockheed L-188 Aircraft, 656 F.2d
the operator pays the fine or posts a bond conditioned on the amount of the penalty and storage costs, he must normally await the outcome of the trial for collection of the fine before reclaiming his aircraft.\(^{51}\)

II. RELEVANT SUPREME COURT CASES

The Supreme Court has recently taken several different approaches in determining the constitutionality of pre-seizure hearings when provisional remedies have involved the temporary deprivation of property. These cases have left the procedural due process question somewhat confused.

The first relevant case decided by the Supreme Court was *Sniadach v. Family Finance Corp.* \(^{52}\) In *Sniadach*, a finance company brought a garnishment action in a Wisconsin state court against the defendant, Sniadach, and her employer, as garnishee, on a $420 promissory note. In its answer, the garnishee stated that it owed $63.18 to the defendant in unpaid wages and that, in accordance with a Wisconsin statute, the garnishee would pay one-half to the defendant as a subsistence allowance and hold the other one-half subject to an order by the court.\(^{54}\)

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\(^{53}\) Id. at 338.

\(^{54}\) Id. According to Wis. Stat. § 267.18(2)(a):

[when] wages or salary are the subject of garnishment action, the gar-
Under the Wisconsin statute, the clerk of the court could issue a garnishment summons at the request of the plaintiff's lawyer. The plaintiff's lawyer could then freeze a defendant's wages by serving the garnishee. The plaintiff's lawyer, then was required to serve the defendant with a summons and a complaint within ten days after service on the garnishee. If the defendant prevailed on the merits at trial, the defendant's wages would be restored. In the meantime, the defendant was deprived of the wages.\footnote{395 U.S. at 338 n.1.}

In \textit{Sniadach}, the defendant moved to dismiss the garnishment proceeding for its failure to comply with the due process requirements of the fourteenth amendment.\footnote{Id. at 339.} The Wisconsin Supreme Court refused to dismiss the proceeding, holding that no due process violation had occurred.\footnote{Id. at 338.} On writ of certiorari, the United States Supreme Court reversed.\footnote{Id. at 342.} Noting that wages are a specialized type of property presenting distinct problems in our economic system,\footnote{Id. at 340.} the Supreme Court, in an opinion written by Justice Douglas, held that the failure to provide notice and an opportunity to be heard prior to the garnishment of the wages violated the defendant's due process.\footnote{Id. at 342.}

Three years after \textit{Sniadach}, in \textit{Fuentes v. Shevin}, \footnote{407 U.S. 67 (1972).} the Supreme Court made clear that the right to pre-attachment notice and hearing extended to other kinds of property besides

\begin{itemize}
\item Garnishee shall pay to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance out of the wages or salary then owing, the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of fifty percent of the wages or salary owing.
\end{itemize}
wages. Mrs. Fuentes had purchased a stove, a service policy, and a stereo from the Firestone Tire and Rubber Company (Firestone) under a conditional sales contract. The contract provided for monthly payments by the buyer and repossession by the seller in case the buyer defaulted on any payment. A dispute arose concerning the servicing of the stove. Mrs. Fuentes stopped making payments while still owing approximately $200 under the contract. Firestone brought an action for repossession and at the same time obtained a writ of replevin. The writ of replevin ordered the sheriff to seize the stove and the stereo pursuant to a Florida statute which provided for summary issuance of a writ of replevin on the ex parte application to the clerk of the court by a person suing on a claim of wrongfully detained property.

Under the statute, a plaintiff was required to post a bond for double the value of the property prior to obtaining a writ of replevin. After the writ of replevin was issued, the property would be held for three days by the seizing agent, during which time the defendant could regain possession by posting a bond double the value of the property. If the defendant did not post a bond, the property would pass to the plaintiff pending the final outcome of the trial.

The day the writ of attachment was issued the sheriff served Mrs. Fuentes and seized the stove and the stereo. Shortly thereafter, Mrs. Fuentes sued in federal court and challenged the replevin procedure on due process grounds. Mrs. Fuentes lost in the district court, but the Supreme Court reversed. The majority opinion, written by Justice Stewart and joined by Justices Douglas, Brennan, and Marshall, held that the challenged procedure violated due process because

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62 Id. at 70.
63 Id.
64 Id.
65 Id.
66 Id. at 74.
67 Id. at 73-75.
68 Id. at 75.
69 Id. at 79.
70 Id.
71 Id. at 97.
the procedure failed to provide for notice and an opportunity to be heard prior to the deprivation of a possessory interest in the property.\textsuperscript{72} Justice White, joined by Chief Justice Burger and Justice Blackmun, dissented on the ground that protection of the creditor's property justified the procedure.\textsuperscript{73} Justices Rehnquist and Powell did not participate in the case.\textsuperscript{74}

The third case, \textit{Mitchell v. W. T. Grant Co.},\textsuperscript{75} was decided two years after \textit{Fuentes}. W. T. Grant Co. (Grant) sold various items to Mitchell on an installment sales contract basis.\textsuperscript{76} When Mitchell defaulted in payments, Grant sued, alleging a vendor's lien, and simultaneously obtained a writ of sequestration.\textsuperscript{77}

Under a Louisiana statute, sequestration was allowed if the plaintiff claimed ownership, a right to possession, or a lien and if the defendant had the power to dispose of or remove the property.\textsuperscript{78} The sequestration statute did not provide for notice or a hearing prior to seizure.\textsuperscript{79} The statute did require the plaintiff to state specific facts by way of affidavit supporting issuance of the writ and to file a bond sufficient to protect the defendant against any damage arising from wrongful issuance.\textsuperscript{80} Although issuance of the writ was accomplished by a plaintiff's \textit{ex parte} application to a judge, the defendant could immediately seek dissolution, which the court would grant, unless the plaintiff could prove the ground upon which the

\textsuperscript{72} \textit{Id.} at 96. The Supreme Court also invalidated a Pennsylvania law which was similar.

\textsuperscript{73} \textit{See Fuentes}, 407 U.S. at 99-102 (White, J., dissenting).

\textsuperscript{74} \textit{Fuentes}, 407 U.S. at 97.

\textsuperscript{75} 416 U.S. 600 (1974).

\textsuperscript{76} \textit{Id.} at 601.

\textsuperscript{77} \textit{Id.} at 602.

\textsuperscript{78} The Louisiana statute extant at the time of the decision in \textit{W. T. Grant} provided:

\begin{quote}
When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenue therefrom, or remove the property from the parish, during the pendency of the action.
\end{quote}


\textsuperscript{79} 416 U.S. at 605-07.

\textsuperscript{80} \textit{Id.}
writ was issued. The defendant also could regain possession by posting his own bond.

After Mitchell was served with the writ of sequestration, and his disputed goods were seized, he moved to dissolve the writ for failure of procedural due process. The state courts denied the motion and upheld the procedure. A writ of certiorari was obtained from the Supreme Court. Justice White, joined by the two dissenters in Fuentes plus Justices Powell and Rehnquist, wrote the majority opinion which affirmed the decisions of the state courts. The Supreme Court stated that Mitchell was distinguishable from Fuentes in that in Fuentes a clerk had ordered the writ of replevin, whereas in Mitchell the judge had ordered the writ of sequestration. Furthermore, the Supreme Court in Mitchell emphasized that the Louisiana law (i) required a detailed affidavit showing a plaintiff's right to possession, (ii) provided the opportunity for an immediate post-seizure hearing, (iii) provided for damages for wrongful sequestration, and (iv) in general, involved more judicial supervision. The dissenters in Mitchell, Justices Stewart, Douglas, and Marshall, argued that the majority in Mitchell had merely adopted the dissent in Fuentes.

The last case in the series, North Georgia Finishing, Inc. v. DiChem, Inc., involved the garnishment of a bank account and was therefor unlike the previously discussed cases in that the plaintiff did not claim a pre-existing right in the seized property. More importantly, the writ was issued pursuant to a Georgia statute by the clerk of the court on an affidavit which

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81 Id.
82 Id. at 607.
83 Id. at 602.
84 Id. at 603.
86 416 U.S. at 603.
87 Id. at 615.
88 Id.
89 Id. at 616.
90 Id. at 615-18.
91 Id. at 634. (Stewart, J., dissenting).
merely stated that the plaintiff had "reason to apprehend the loss of said sum or some part thereof unless process of Garnishment [sic] issues." No other details were offered and the Georgia statute did not provide for an immediate post-seizure hearing.

The Georgia courts upheld the garnishment procedure against the claim that it violated the due process clause. On writ of certiorari, the Supreme Court reversed. Justice White, writing for the majority, distinguished Mitchell on the grounds that the Louisiana sequestration statute required a pre-seizure judicial determination based on a detailed affidavit and entitled the debtor to an immediate post-seizure hearing whereas the Georgia garnishment statute had none of the "saving characteristics." Likening the case to Fuentes, Justice White stated that the seizure without prior notice violated due process.

A coherent rule regarding the procedural due process requirements for a prejudgment seizure is difficult to discern from Sniadach, Fuentes, Mitchell, and Di-Chem. The majority in Di-Chem claimed to rely on Fuentes, and Justice Stewart, concurring in Di-Chem, thought Fuentes had been resuscitated. One might wonder, however, whether the Georgia statute would have been upheld if the statute had provided for an immediate post-seizure hearing. Based on the previously discussed Supreme Court decisions, it is unclear whether Mitchell is the standard (due process requirements are met without a pre-seizure hearing so long as a judge issues the writ and a post-seizure hearing is available) or whether Mitchell is the exception to the Fuentes standard (due pro-

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98 Id. at 604.
99 Id. at 607.
100 Id. at 605.
101 Id.
97 Id. at 607.
98 Id. at 605-08.
99 Id. at 608.
100 See North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 609-14 (Powell, J., concurring) (procedural due process would be satisfied when adequate, pre-seizure security measures are established before a neutral officer and a prompt post-garnishment judicial hearing is given).
cess generally requires notice and an opportunity for a pre-
seizure hearing).

Regardless of which case states the general rule, section
903(b) of the Federal Aviation Act and Section 13.17 of the
FARs clearly do not meet the standard of either Mitchell or
Fuentes.101 The government is required to post no bond. No
judicial procedure is involved prior to seizure. Furthermore,
neither the statute nor the regulations provide for any type of
post-seizure hearing before the trial on the underlying cause
of action.102

The Supreme Court in Fuentes, however, noted that in a
few “extraordinary,”103 “truly unusual,”104 “limited”105 situa-
tions, outright seizure without an opportunity for a prior
hearing was constitutionally permissible.106 The Supreme
Court in prior cases allowed summary seizure of property to
protect the public from contaminated food,107 from a bank
failure,108 and from misbranded drugs.109 The Supreme Court
also provided for summary proceedings to aid in the collection
of taxes,110 to aid the war effort,111 and to secure jurisdiction
in state court.112 The Supreme Court in Fuentes characterized
these situations as follows:

First, in each case, the seizure has been directly necessary to
secure an important governmental or general public interest.
Second, there has been a special need for very prompt action.
Third, the State has kept strict control over its monopoly of
legitimate forces: the person initiating the seizure has been a
government official responsible for determining, under stan-

101 Cf. United States v. Vertol H21C, 545 F.2d 648, 652 (9th Cir. 1976) (“Thus, in
all important respects, the seizure in this case lacks the protections which the Su-
preme Court emphasized in Mitchell v. W.T. Grant . . . .”)

102 See supra note 13 for relevant portions of the Act and FARs.

103 Fuentes, 407 U.S. at 90.

104 Id.

105 Id.

106 Id. at 90-91.


111 United States v. Pfitsch, 256 U.S. 547 (1921).

112 Ownbey v. Morgan, 256 U.S. 94 (1921).
dards of a narrowly drawn statute, that it was necessary and
justified in the particular instance.\footnote{Fuentes, 407 U.S. at 91.}

In a post-\textit{Fuentes} case the Supreme Court extended the list
of “extraordinary situations”\footnote{Id. at 90.} to include a Puerto Rican for-
feiture statute. In \textit{Calero-Toledo v. Pearson Yacht Leasing
Co.},\footnote{416 U.S. 663 (1974).} the Puerto Rican authorities found marijuana on a
yacht which had been leased to Puerto Rican residents.\footnote{Id. at 665.} The
Puerto Rican statute provided for the forfeiture of vessels
used for unlawful purposes without prior notice or an oppor-
tunity to be heard.\footnote{Id. at 665-67.} As a result, the authorities seized the

\begin{quote}
\footnote{\textit{Fuentes}, 407 U.S. at 91.}
\footnote{Id. at 90.}
\footnote{416 U.S. 663 (1974).}
\footnote{Id. at 665.}
\footnote{Id. at 665-67. The following Puerto Rico Statutes are relevant to the case. According to \textit{P.R. LAWS ANN. tit. 25 §§ 2512(a) (4), 2512(b)}.}
\begin{itemize}
\item[(a)] The following shall be subject to forfeiture to the Commonwealth of Puerto Rico:
\begin{itemize}
\item[(4)] All conveyances, including aircraft, vehicles, mount or ves-
\item[(b)] Any property subject to forfeiture under clause (4) of subsection
\item[(a)] of this section shall be seized by process issued pursuant to Act No.
\item[(a)] of June 4, 1960, as amended, known as the Uniform Vehicle,
\item[(b)] of Title 34.
\end{itemize}
\end{itemize}

\begin{itemize}
\item[(a)] The proceedings shall be begun by the seizure of the property by the Secretary of Justice, the Secretary of the Treasury or the Police Superintendent, through their delegates, policemen or other peace officers. The officer under whose authority the action is taken shall serve notice on the owner of the property seized or the person in charge thereof or any person having any known right or interest therein, of the seizure and of the appraisal of the properties so seized, said notice to be served in an authentic manner, within ten (10) days following such seizure and such notice shall be understood to have been served upon the mailing thereof with return receipt requested. The owners, persons in charge, and other persons having known interest in the property so seized may challenge the confiscation within the fifteen (15) days following the service of the notice on them, through a complaint against the officer under whose authority the confiscation has been made, on whom notice shall be
\end{itemize}

\begin{itemize}
\item[(b)] Any property subject to forfeiture under clause (4) of subsection
\item[(a)] of this section shall be seized by process issued pursuant to Act No.
\item[(a)] of June 4, 1960, as amended, known as the Uniform Vehicle,
\item[(b)] of Title 34.
\end{itemize}

\begin{itemize}
\item[(a)] The proceedings shall be begun by the seizure of the property by the Secretary of Justice, the Secretary of the Treasury or the Police Superintendent, through their delegates, policemen or other peace officers. The officer under whose authority the action is taken shall serve notice on the owner of the property seized or the person in charge thereof or any person having any known right or interest therein, of the seizure and of the appraisal of the properties so seized, said notice to be served in an authentic manner, within ten (10) days following such seizure and such notice shall be understood to have been served upon the mailing thereof with return receipt requested. The owners, persons in charge, and other persons having known interest in the property so seized may challenge the confiscation within the fifteen (15) days following the service of the notice on them, through a complaint against the officer under whose authority the confiscation has been made, on whom notice shall be
yacht. The owner of the yacht, who was not involved or aware

served, and which complaint shall be filed in the Part of the Superior Court corresponding to the place where the seizure was made and shall be heard without subjection to docket. All questions that may arise shall be decided and all other proceedings shall be conducted as in an ordinary civil action. Against the judgment entered no remedy shall lie other than a certiorari before the Supreme Court, limited to issues of law. The filing of such complaint within the period herein established shall be considered a jurisdictional prerequisite for the availing of the action herein authorized.

(b) Every vehicle, mount, or any vessel or plane so seized shall be appraised as soon as taken possession of by the officer under whose authority the seizure took place, or by his delegate, with the exception of motor vehicles, which shall be placed under the custody of the Office of Transportation of the Commonwealth of Puerto Rico, which shall appraise same immediately upon receipt thereof.

In the event of a judicial challenge of the seizure, the court shall, upon request of the plaintiff and after hearing the parties, determine the reasonableness of the appraisal as an incident of the challenge.

Within ten (10) days after the filing of the challenge, the plaintiff shall have the right to give bond in favor of the Commonwealth of Puerto Rico before the pertinent court's clerk to the satisfaction of the court, for the amount of the assessed value of the seized property, which bond may be in legal tender, by certified check, hypothecary debentures, or by insurance companies. Upon the acceptance of the bond, the court shall direct the property be returned to the owner thereof. In such case, the provisions of the following paragraphs (c), (d) and (e) shall not apply.

When bond is accepted the subsequent substitution of the seized property in lieu of the bond shall not be permitted, said bond to answer for the seizure if the lawfulness of the latter is upheld, and the court shall provide in the resolution issued to that effect, for the summary forfeiture execution of said bond by the clerk of the court and for the covering of such bond into the general funds of the Government of Puerto Rico in case it may be in legal tender or by certified check; the hypothecary debentures or debentures of insurance companies shall be transmitted by the pertinent clerk of the court to the Secretary of Justice for execution.

(c) After fifteen (15) days have elapsed since service of notice of the seizure without the person or persons with interest in the property seized have [sic] filed the corresponding challenge, or after twenty-five (25) days have elapsed since service of notice of the seizure without the court's having directed that the seized property be returned on account of the bond to that effect having been given, the officer under whose authority the seizure took place, the delegate thereof, or the Office of Transportation, as the case may be, may provide for the sale at auction of the seized property, or may set the same aside for official use of the Government of Puerto Rico. In case the seized property cannot be sold at auction or set aside for official use of the Government, the property may be destroyed by the officer in charge, setting forth in
of the wrongdoing, brought suit in federal court contending that the forfeiture statute violated due process. A three-judge panel relying principally on Fuentes held that the failure to provide for pre-seizure notice and a hearing rendered the statute unconstitutional.

The Supreme Court reversed. Justice Brennan, writing for the majority, stated as follows:

The considerations that justified postponement of notice and hearing in [the above cited contaminated food, bank failure, misbranded drugs, collection of taxes, war effort, and state jurisdiction] cases are present here. First, seizure under the Puerto Rican statutes serves significant governmental purposes: Seizure permits Puerto Rico to assert in rem jurisdiction over the property in order to conduct forfeiture proceedings thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized—as here, a yacht—will often be a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given. And finally, unlike the situation in Fuentes, seizure is not initiated by self-interested private par-

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a minute which he shall draw up for the purpose, the description of the property, the reasons for its destruction and the date and place where it is destroyed, and he shall serve notice with a copy thereof on the Secretary of Justice.

(d) In case the vehicle, mount, or vessel or plane is sold at auction, the proceeds from the sale shall be covered into the general fund of the Government of Puerto Rico, after deducting and reimbursing expenses incurred.

(e) If the seizure is judically challenged and the court declares same illegal, the Secretary of the Treasury of Puerto Rico shall, upon presentation of a certified copy of the final decision or judgment of the court, pay to the challenger the amount of the appraisal or the proceeds from the public auction sale of such property, whichever sum is the highest, plus interest thereon at the rate of 6% per annum, counting from the date of the seizure.

Subsections (b) and (c) were amended in 1975. "Office of Transportation" was changed to "General Services Administration." P.R. LAWS ANN. tit. 34 §§ 1722(b), 1722(c) (Equity Supp. 1980).

118 416 U.S. at 668.
119 Id. at 669.
120 Id.
ties; rather, Commonwealth officials determine whether seizure is appropriate under the provisions of the Puerto Rican statutes. In these circumstances, we hold that this case presents an "extraordinary" situation in which postponement of notice and hearing until after seizure did not deny due process.\footnote{121}

Due to the fact that section 903(b) is also a type of forfeiture statute,\footnote{122} the statute should be analyzed in accordance with the considerations articulated in \textit{Fuentes} and applied in \textit{Calero-Toledo}. The first consideration in \textit{Fuentes}, "governmental or general public interest"\footnote{123} as it relates to the attachment of an aircraft pursuant to section 903(b), arguably could include the following: (1) in rem jurisdiction; (2) the public safety; and (3) the assurance that the fine will be paid if the government wins the collection case. The governmental interest in attachment in order to procure in rem jurisdiction does not seem compelling for two reasons. First, the Act allows the government to proceed in personam against the person subject to the penalty\footnote{124} as well as to proceed in rem against the aircraft. Second, after the Supreme Court decided \textit{Shaffer v. Heitner},\footnote{125} a federal or state court's in rem jurisdiction in a forfeiture proceeding cannot be more extensive than its in personam jurisdiction.\footnote{126} Thus, the federal government's

\footnote{121} \textit{Id.} at 679-80 (footnotes omitted).
\footnote{122} \textit{See} United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 396 (9th Cir. 1979). Forfeitures may be criminal or civil, in civil forfeitures the issue usually is whether the property was used in an unlawful manner. The property owner's innocence is normally not a defense. \textit{See generally} Kandaras, \textit{Due Process and Federal Property Forfeiture Statutes: The Need for Immediate Post-Seizure Hearing}, 34 Sw. L.J. 925 (1980).
\footnote{123} \textit{Fuentes}, 407 U.S. at 91.
\footnote{125} 433 U.S. 186 (1977).
\footnote{126} \textit{Shaffer} overruled Pennoyer v. Neff, 95 U.S. 714 (1877), to the extent that it was inconsistent with \textit{Shaffer}, and held that because an adverse judgment in rem directly affects the property owner by divesting him of rights in property before the court, the same fourteenth amendment due process "minimum contacts" standard of fair play and substantial justice as was held to govern in personam actions in \textit{International Shoe v. Washington}, 326 U.S. 310 (1945) governs all assertions of state court jurisdiction, including in rem jurisdiction. \textit{See} \textit{Shaffer v. Heitner}, 433 U.S. 186, 216-
interest in in rem jurisdiction over the aircraft is slight in light of the availability of in personam jurisdiction over the owner of the aircraft. The public safety issue, as was em-

17 (1977).

In federal court, the due process clause of the fifth amendment must be satisfied. Recent decisions have required a "minimum contacts" analysis, analogous to that in International Shoe except that the relevant contacts are those with the United States. Thus, the person whose property rights are being affected must have sufficient contacts with the United States before a federal court can constitutionally terminate those rights. See, e.g., Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175, 1177-78 (9th Cir. 1980), cert. denied, 449 U.S. 1062 (1980) (in personam jurisdiction case); Fitzsimmons v. Barton, 589 F.2d 330, 332-34 (7th Cir. 1979). See generally Comment, Fifth Amendment Due Process Limitation on Nationwide Federal Jurisdiction, 61 B.U.L. Rev. 403 (1981).

Presumably, the commission of a violation of the FARs within the United States is a sufficient contact to permit a federal court to take jurisdiction over the violator and even over the owner of an aircraft involved in such a violation, when the owner was somehow involved, or at least acquiesced, in the violation. One might question whether the presence of an aircraft in the United States would be a sufficient contact to allow a federal court to declare the aircraft forfeited when the owner was not involved in the violation of a FAR and had no other significant contacts with the United States. Compare Calero-Toledo v. Gleason Yacht Leasing Co., 416 U.S. 663 (1974) (Court seemed to be of the opinion that the presence of a ship in a country was sufficient contact to allow a court in that country to declare the ship forfeited except in cases in which the ship was stolen, on the "Deodand" theory that property used in wrongdoing is itself "guilty") with World-Wide Volkswagen v. Woodson, 444 U.S. 286, 298 (1980) ("It is foreseeable that the purchasers of automobiles sold by [defendants] may take them to Oklahoma. But the mere 'unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the require-

ment of contact with the forum state "). Perhaps the more interesting question, but one which is beyond the scope of this article, is to what extent the "Deodand" theory can survive Shaffer's recognition that all actions are really against persons. Significantly, section 901(b) of the Federal Aviation Act creates a lien against the aircraft even when the non-owner pilot in command has committed a violation. It should be emphasized that Calero-Toledo relied on Ownbey v. Morgan, 256 U.S. 94 (1921), for the proposition that attachment to establish in rem jurisdiction serves a significant governmental purpose. Mitchell v. W.T. Grant Co., 416 U.S. at 679 n.13. Fuentes also cited Ownbey for the proposition that foreign attachments are an exception to the pre-seizure hearing requirement. Fuentes, 407 U.S. at 91 n.23. In Shaffer, however, the Supreme Court stated:

The only question before the Court in Ownbey, was the constitutional-

ity of a requirement that a defendant whose property has been at-

tached file a bond before entering appearance. We do not read the re-

cent references to Ownbey as necessarily suggesting that Ownbey is

consistent with more recent decisions interpreting the Due Process

Clause. Shaffer v. Heitner, 433 U.S. at 194 n.10. See also Jonnet v. Dollar Saving Bank of

N.Y., 530 F.2d 1123, 1128 (3d Cir. 1976) ("The rationale of Ownbey is no longer in harmony with the principles of Fuentes and its progeny.").

127 A situation could occur when the fifth amendment would permit a federal dis-
phasized by the court of appeals in *United States v. Vertol H21C*, 128 is not persuasive because upon the posting of a bond the aircraft can be returned to use.129 Finally, the governmental interest in assuring that a fine will be paid if the government wins the collection case is, of course, the same interest any creditor has in prejudgment attachment or in garnishment and is not in any principled way different from the plaintiffs' interests in *Sniadach, Fuentes, Mitchell, andDi-Chem*.130

As to the second consideration articulated in *Fuentes* and *Calero-Toledo*, that a special need for prompt action exists, it is certainly true that an aircraft, like a yacht, can be moved, destroyed, or concealed. Neither the Act nor the FARs, however, require a showing of the necessity for prompt action prior to notice of seizure. While one might conclude that prompt action is always necessary in an action to declare a vessel forfeited for being used in an unlawful purpose, the same can hardly be said of the majority of section 903(b)
cases. In most section 903(b) cases, a maximum penalty of $1,000 can be imposed for the violation of a FAR. Therefore, it is unlikely that an owner or an operator will secret away an aircraft to avoid a fine as small as $1,000.

Finally, the FAA does not meet the third consideration in *Fuentes*. The FAA does not have strict control over the procedure of seizing aircraft. The FAA scheme, like the Puerto Rican forfeiture statute in *Calero-Toledo*, allows a governmental official to initiate the seizure. The official, however, is hardly required to determine “under standards of a narrowly drawn statute, that [the seizure] was necessary and justified in the particular instance.”

Section 903(b) can be distinguished from the Puerto Rican forfeiture statute that was upheld in *Calero-Toledo* on the basis that the three considerations stated in *Fuentes*, that “the seizure has been directly necessary to secure an important governmental or general public interest,” “that there has been a special need for prompt action,” and that “the State has kept strict control over its monopoly of legitimate forces,” are not compelling as they relate to section 903(b). Therefore, section 903(b) would seem to be unconstitutional for failure to provide the opportunity for a hearing prior to the seizure of an aircraft. Moreover, the lack of any provision in the Act or the FARs for a post-seizure hearing would certainly seem to render the procedure of the FARs unconstitutional.

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131 In *Calero-Toledo*, for example, the lessor of a yacht forfeited the yacht because the lessee left a marijuana cigarette on it. Faced with such a harsh judgment, the owner of a ship or an aircraft might well be tempted to secret it away. The same can hardly be said when the owner-pilot of an expensive aircraft is faced only with a relatively small fine for having flown too low, the most common violation of the FARs in calendar year 1979. “Enforcement Activity General Aviation,” Annual Statistical Summary Paper, U.S. Dept. of Trans., F.A.A. 9 (1979).


134 *Fuentes*, 407 U.S. at 91.

135 Id.

136 Id.
tional. In *Mitchell* and *Calero-Toledo* the statutory schemes that the Supreme Court upheld provided for prompt post-seizure hearings. Even assuming that *Mitchell* and not *Fuentes* controls after *Di-Chem* on the question of whether a post-seizure hearing as opposed to a pre-seizure hearing is required, it is difficult to imagine that the Supreme Court would approve of a scheme which provided neither a pre-seizure hearing nor a prompt post-seizure hearing. Significantly, in *Mitchell*, the Supreme Court based its decision upholding the Louisiana sequestration procedure on two grounds. First, the statute required a pre-seizure judicial determination, albeit in an *ex parte* proceeding, that the creditor had demonstrated a right in the property and the necessity of seizing the property without prior notice. Second, the debtor was afforded an immediate post-seizure hearing in which the burden was on the creditor to prove his right to possess the property pending the outcome of the case.

Although the Supreme Court has never ruled directly on the question of the need for a prompt post-seizure hearing in forfeiture cases, the Supreme Court’s decision in *Mathews v. Eldridge*, provides a framework for assessing the constitutional sufficiency of the governmental procedure used to seize and to retain property pending final adjudication. *Mathews* held that the due process clause did not require an opportunity for an evidentiary hearing prior to the termination of social security disability benefits pending final adjudication of the case. The Supreme Court indicated, however, that due process does require that the procedure used to terminate benefits contain safeguards against erroneous deprivation.

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137 See supra notes 75-91 and accompanying text.
140 Id. at 349.
141 Id. at 334-35.
While no single procedure is constitutionally mandated, three factors should be considered under the Mathews analysis: (1) the private interests involved; (2) the risk of an erroneous seizure in light of the probable value of a post-seizure hearing; and (3) the government's interest, including the function involved and the fiscal and the administrative burdens that alternative proceedings would entail.

When these three factors are applied to the seizure of aircraft, it becomes obvious that pre-seizure or post-seizure hearings should be available under section 903(b). When an aircraft is seized, the private interests of the owner are significantly affected. An owner's interest may be influenced by the setting of a high bond, by the length of a pretrial delay, or by the fact that the aircraft is used in the owner's business. The Supreme Court has required pretrial hearings when a person's private interests have been affected by the deprivation of a horse trainer's license, utility service, a high school education, government employment, a driver's license, or welfare benefits. If these types of property deprivations require a pretrial hearing, then the seizure of an aircraft even if used purely for pleasure at least should be classified as "important."

The second factor of the Mathews analysis, risk of erroneous deprivation, could occur if an aircraft is seized pursuant to section 903(b). Section 903(b) only seems to require an ex parte determination by the FAA that the aircraft seized was

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142 Id. at 334.
involved in violating a FAR for which the issuance of a civil penalty letter is contemplated. The FAA takes the position that the notice of seizure can serve to inform the owner of the violations and the liabilities involved.

Obviously, the risk of error is heightened when the aircraft is seized without the owner having an opportunity to provide information. In similar situations, the Supreme Court has required the imposition of an impartial decisionmaker to determine whether a person may be deprived of his property while a final adjudication is pending. When no pre-seizure hearing is required, a prompt post-seizure hearing before an impartial decisionmaker, as Mitchell illustrates, may alleviate the harm resulting from an initial error by reducing the period of wrongful deprivation.

The third factor considered in Mathews, the fiscal and the administrative burden caused by affording a hearing, seems to weigh in favor of requiring a hearing before a section 903(b) seizure. Considering the significance of the private interest involved, the administrative and the fiscal burdens of a hearing would be negligible. The seizure order already provides notice to the owner of the aircraft who allegedly violated the Act or FARs. A prompt post-seizure hearing before an impartial and independent government officer where the owner could be represented by counsel and could present evidence on his own behalf, and where the government would have the burden of showing probable cause that the aircraft be subject to a

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163 See supra note 50.
164 See supra note 14.
165 See supra note 50.
167 See also Mackey v. Montrym, 443 U.S. 1 (1979).
168 In United States v. Vertol H21C, 545 F.2d 648, 651 n.6 (9th Cir. 1976), the court noted that the government had not contended that a pre-seizure hearing would unduly hamper FAA enforcement efforts.
169 14 C.F.R. § 13.17(c) (1982).
170 The fourth amendment prohibits the government from seizing property without probable cause. U.S. Const. amend. IV.
lien, does not seem unduly burdensome.\textsuperscript{160}

III. Conclusion

No pre-seizure or prompt post-seizure hearing is required by the Act or by the FARs when an aircraft is seized pursuant to section 903(b). Whether the Supreme Court's decisions in \textit{Sniadach}, \textit{Fuentes} and \textit{Di-Chem} require a pre-seizure hearing when read in the light of \textit{Calero-Toledo}, the Supreme Court's decisions in \textit{Mitchell} and \textit{Mathews} would clearly seem to require a prompt post-seizure hearing. The failure to provide a prompt post-seizure hearing enables the FAA to hold an aircraft pending the outcome of a trial in federal district court. As a result, the FAA may be able to hold the aircraft for a long time.\textsuperscript{161} The owner would not be able to regain possession of his aircraft unless the owner paid a (generally) high bond,\textsuperscript{162} paid the fine assessed by the FAA, or compromised his position.\textsuperscript{163} This procedure could cause an imbalance in negotiating positions which could prompt the aircraft owner to accept a settlement, simply to obtain the release of his aircraft.\textsuperscript{164} Section 903(b) of the Act and section 13.17 of the


\textsuperscript{162} Although the civil penalties here under consideration are limited to $1,000 per violation, more than one violation may be alleged and the violation may be considered continuing. Thus, in United States v. Vertol H21C, 545 F.2d 648, 649 (9th Cir. 1976), bond was set at $6,000, and in United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 394 (9th Cir. 1979), the bond was $25,000.

\textsuperscript{163} See supra note 15.

\textsuperscript{164} In \textit{Sniadach} v. \textit{Family Fin. Corp.}, 395 U.S. 337, 341 (1969), the Supreme Court based its decision in part on the consideration that just such an imbalance in negotiating positions would make it likely that the debtor would accept an unfair settlement and abandon a good defense on the merits.
FARs thus work to deprive the owner of property without due process and are facially unconstitutional.\textsuperscript{166}

\textsuperscript{166} Significantly, few cases have been decided on the basis of section 903(b) seizures. See Letter from Richard C. Hall, Chief of Nat'l Safety Data Branch of FAA Flight Standards Nat'l Field Office, to Edward B. Arnolds, (Mar. 31, 1982) (the letter stated that no aircraft had been seized pursuant to section 13.17 of the FARs between July 1, 1980 and the date of the letter).