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Introduction: The Ancient Roots of Modern Forfeiture Law

Jimmy Gurule

Notre Dame Law School, jimmy.gurule.1@nd.edu

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**SYMPOSIUM:
FEDERAL ASSET FORFEITURE REFORM**

**INTRODUCTION: THE ANCIENT ROOTS OF
MODERN FORFEITURE LAW**

Jimmy Gurulé

MR. TUNELL: Thank you very much everyone for showing up this early in the morning. I am Bill Tunell, the Symposium Editor here at the Journal of Legislation. We are very pleased to be presenting a symposium here on a very important and timely issue, one of the most “hot” and current issues in the law, and that is forfeiture law: particularly, Federal Asset Forfeiture law. We have a very distinguished panel, which I won’t introduce, leaving that distinction to our moderator for this event. But as Symposium Editor, it is my honor to be able to introduce our moderator this morning. He is law school Professor Jimmy Gurulé. Professor Gurulé has been a member of the faculty at the law school since 1992. Prior to that, he has had extensive experience as an Assistant Attorney General in Los Angeles. As Assistant Attorney General, he has received numerous awards including the Edmund Randolph Award—given by the Attorney General—the Attorney General’s Distinguished Service Award, and the Attorney General’s Award for Excellence in Management. He has also received the DEA’s Administrative Award, which is the highest award given by the DEA. More importantly, on the Asset Forfeiture issue, we are pleased to have Professor Gurulé moderating for us because he has recently been appointed advisor to the Senate Judiciary Committee. In particular, he will be advising Senator Orrin Hatch on several issues including Asset Forfeiture and the recent legislative reform proposals that are in Congress. So, he will be of major importance in the federal legislation on this matter. We are very impressed and very thankful to have him moderating for us today. With that said, I would like to introduce to you, our own Professor Jimmy Gurulé.

PROFESSOR GURULÉ: Let me also welcome the panelists who have travelled from coast to coast to join us here this morning. I think that we are going to see students coming and going today Before I introduce the panelists and ask them to come up to the podium to make their respective presentations, let me take a few minutes to set the stage, if I might. I would like to provide us with some general background information regarding civil forfeiture in an attempt to frame the controversy that has swirled around civil asset forfeiture, specifically as a result of a number of recent Supreme Court decisions that have been handed down in the past two to three terms of the Court. I would like to discuss those decisions, and then set out which aspects of forfeiture law have been settled, and which aspects still need to be expounded upon—either by the legislature or by the Supreme Court. I dare say that the members of our panel will have a great deal to say—one way or another—about how these issues ultimately are resolved. But in order to appreciate their comments, let me provide some back-

ground.

I. THE ANCIENT ROOTS OF MODERN FORFEITURE LAW

Civil forfeiture is one of the most potent weapons in the prosecutor's armamentarium in the "war on drugs" and traditional organized crime.¹ Like criminal forfeiture, the principal object of civil forfeiture is to strike at the economic power base of criminal enterprises and deprive the wrongdoer of his ill-gotten gains.² However, unlike criminal forfeiture which is an *in personam* proceeding, civil forfeiture is an action *in rem*. Civil forfeiture perpetuates the legal fiction that "property used in violation of law [is] itself the wrongdoer that must be held to account for the harms it ha[s] caused."³ In a civil action, the property, or *res*, is considered the "offender."⁴ "It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental."⁵ Thus, the defendant is the property rather than the property owner.⁶ The *in rem* proceeding stands independent of any criminal prosecution *in personam*.⁷ It is therefore immaterial whether the person whose conduct gave rise to the forfeiture is indicted or convicted of the underlying predicate offense.⁸ A criminal conviction is not a condition precedent to sustaining a judgment of civil forfeiture.

The conceptual underpinnings of civil forfeiture can be traced back to English common law. Three kinds of forfeiture have been recognized historically: "deodand," forfeiture upon conviction for a felony or treason, and statutory forfeiture.⁹ At common law, the value of an inanimate object that directly or indirectly caused the accidental death of a King's subject was forfeited to the Crown as a deodand.¹⁰ It was assumed that the value of the instrument forfeited to the King would be used to pro-

1. See *United States v. Daccaret*, 6 F.3d 37, 46 (2d Cir. 1993); *United States v. Two Tracts of Real Property*, 998 F.2d 204, 213 (4th Cir. 1993) ("One of the most potent weapons in the government's war on drugs is its ability to obtain the civil forfeiture of property that aids violations of the drug laws."); *United States v. 384-390 West Broadway*, 964 F.2d 1244, 1248 (1st Cir. 1992).

2. The legislative intent in enacting civil forfeiture for felony drug violations is clear. Congress expressed the purpose of forfeiture as follows:

[T]he conviction of individual racketeers and drug dealers [is] of only limited effectiveness if the economic power bases of criminal organizations or enterprises [are] left intact Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of this crime. Forfeiture is the mechanism through which such an attack may be made.

S. Rep. No. 225, 98th Cong., 2d Sess. 191 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3374.

3. *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1135 (1993).

4. See *Austin v. United States*, 113 S. Ct. 2801, 2808-09 (1993); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921).

5. *Goldsmith-Grant*, 254 U.S. at 513.

6. The owner of the property is often referred to as the "claimant."

7. See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 16 (1827); *Dobbin's Distillery v. United States*, 96 U.S. 395, 400 (1877) ("[T]he thing in such a case is primarily considered as the offender, or rather that the offence is attached primarily to the thing.")

8. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *United States v. One Parcel of Real Estate*, 906 F.2d 110, 112 (4th Cir. 1990).

9. See *Austin v. United States*, 113 S. Ct. 2801, 2806 (1993); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974).

10. *Calero-Toledo*, 416 U.S. at 680-81.

vide Masses for the good of the dead man's soul, or otherwise put to a charitable use.¹¹

The second kind of common law forfeiture resulted from conviction for a felony or treason. "The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and person, to the Crown."¹² These forfeitures were commonly referred to as forfeitures of estate.¹³ The rationale for forfeiture in this instance was that a breach of the criminal law was an offense to the King's peace, which justified the denial of the right to own property.¹⁴ Finally, the common law "provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws."¹⁵ The most notable of these were the Navigation Acts of 1660 which required that most commodities be shipped in English vessels. A violation of the Act resulted in the forfeiture of the illegally carried goods as well as the ship used to transport them.¹⁶ Forfeiture under the Navigation Acts was justified as a penalty for negligence. The owner of the vessel was held accountable for the wrongdoing of the ship's master and the cargo carried on board.¹⁷

Of these three kinds of forfeiture under English common law, only statutory forfeiture is recognized in the United States.¹⁸ "Deodands did not become part of the common-law tradition of this country."¹⁹ Additionally, the Constitution forbids forfeiture of estate as a punishment for treason "except during the Life of the Person attainted."²⁰ Moreover, "[t]he First Congress abolished forfeiture of estate as punishment for felons."²¹

II. FEDERAL FORFEITURE STATUTES

Civil forfeiture as a weapon against illicit narcotics trafficking was first enacted into legislation as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("Act").²² Originally, the statute was limited in scope and authorized forfeiture of only the illegal substances themselves, the instruments by which they were manufactured and distributed, and conveyances used to transport, or in any manner,

11. *Id.*

12. *Id.* at 682.

13. *See* Austin, 113 S. Ct. at 2806-07; 4 William Blackstone, Commentaries, at 381.

14. *See* Calero-Toledo, 416 U.S. at 682.

15. *Id.*

16. *See* Austin, 113 S. Ct. at 2807; *see generally* L. Harper, THE ENGLISH NAVIGATION LAWS (1939). Additionally, when a ship was engaged in acts of "piratical aggression," it was subject to confiscation and forfeiture. The Palmyra, 25 U.S. (12 Wheat.) 1, 8 (1827). Congress subsequently enacted legislation authorizing the forfeiture of distilleries and other property used to defraud the United States of tax revenues from the sale of alcoholic beverages. *See* United States v. Stowell, 133 U.S. 1, 11-12 (1890).

17. Austin, 113 S. Ct. at 2807.

18. Almost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to federal forfeitures, as well as vessels used to deliver slaves to foreign countries and to this country. Calero-Toledo, 416 U.S. at 683. Today, forfeiture is authorized by more than 100 federal statutes. *See* Anthony J. Franze, Note, *Casualties of War?: Drugs, Civil Forfeiture, and the Plight of the "Innocent Owner,"* 70 NOTRE DAME L. REV. 369, 376-77 (1994).

19. Calero-Toledo, 416 U.S. at 682.

20. U.S. Const., Art. III, § 3, cl. 2.

21. *See* Austin, 113 S. Ct. at 2807 (citing the Act of April 30, 1790, ch. 9, § 24, 1 Stat. 117).

22. Pub. L. No. 91-513, § 511, 84 Stat. 1236, 1276 (1970), (*codified as amended at* 21 U.S.C. § 881 (1988)).

facilitate the transportation, sale, receipt, possession, or concealment of illegal controlled substances.²³ In 1978, Congress amended the Act and expanded the reach of civil forfeiture to authorize the seizure of proceeds derived from illegal drug dealing.²⁴ Under 21 U.S.C. § 881(a)(6), money is subject to forfeiture if it was: "(1) furnished or intended to be furnished in exchange for a controlled substance; (2) traceable to such an exchange; or (3) used or intended to be used to facilitate a violation of federal drug laws."²⁵ The 1978 amendments also provided for an "innocent owner" defense.²⁶

The Act was amended once again when Congress enacted the Comprehensive Forfeiture Act of 1984 ("CFA").²⁷ The CFA is significant in two respects. First, it authorized forfeiture of real property for the first time. The CFA added section 881(a)(7), which permits the forfeiture of all real property which is used, or intended to be used to commit or facilitate the commission of a federal narcotics felony.²⁸ Sec-

23. The Act provided:

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

- (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.
- (2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this title.
- (3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).
- (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2)
- (5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this title.

Id. § 511(a).

24. Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 92 Stat. 3768, 3777, (codified as amended at 21 U.S.C. § 881), provides:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

- (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

25. *United States v. \$30,060.00 in U.S. Currency*, 39 F.3d 1039, 1041 (9th Cir. 1994) (quoting *United States v. \$191,910 in U.S. Currency*, 16 F.3d 1051, 1071 (9th Cir. 1994)).

26. The "innocent owner" defense provides an exception to the forfeiture of property described in the Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 92 Stat. 3768, 3777 (codified as amended at 21 U.S.C. § 881(a)(6)). The statute reads as follows:

[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

See United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126 (1993), where the Supreme Court sets forth an excellent analysis of the contours of the "innocent owner" defense.

27. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, 98 Stat. 2050 (1984).

28. *See United States v. Real Estate Known as 916 Douglas Ave.*, 903 F.2d 490, 492 (7th Cir. 1990) ("By omitting real estate from § 881(a), Congress had inadvertently left a wide range of property used to facilitate commerce in illegal drugs outside of its reach."). Section 881(a)(7) provides:

(a) The following shall be subject to forfeiture to the United States and no property

ond, the CFA codified the so-called "relation-back" doctrine which provides that all right, title, and interest in property described in § 881(a) shall vest in the United States upon the commission of the act giving rise to forfeiture.²⁹

The majority of drug-related civil forfeiture actions are filed under either of three subsections of 21 U.S.C. § 881(a). Section 881(a)(4) authorizes the forfeiture of conveyances used, or intended to be used, to facilitate the commission of a narcotics felony. Illicit proceeds traceable to the commission of a felony drug offense are forfeitable under § 881(a)(6). Finally, the forfeiture of real property used, or intended to be used, to facilitate the commission of a drug felony is permitted under § 881(a)(7).

The Money Laundering Control Act of 1986 also authorizes civil forfeiture.³⁰ Section 981(a)(1), of Title 18, United States Code, provides for civil forfeiture of any property, real or personal, *involved in a transaction or attempted transaction* in violation of any of the following statutes: Title 31, United States Code, § 5313(a) (failure to file a currency transaction report); § 5324(a) (structuring a transaction to evade the reporting requirements); Title 18, U. S. C., § 1956 (the domestic money laundering provision); or § 1957 (the international money laundering statute).³¹

III. PROPOSED LEGISLATIVE REFORM

Although civil forfeiture is an invaluable prosecution tool, it is not without its critics and detractors. The opponents of civil forfeiture maintain that it is abused by law enforcement, which has a vested interest in the property forfeited. The proceeds of forfeited assets are often distributed to law enforcement agencies through the Federal Asset Forfeiture Fund.³² In many cases, forfeiture provides a needed budgetary supplement to law enforcement agencies. Moreover, criticism is directed at the fact that the government is not required to meet the more demanding criminal standard of "beyond a reasonable doubt." Instead, civil forfeiture only requires a showing of "probable cause" that the subject property was used for, or derived from, a prohibited purpose. In a civil forfeiture proceeding, "the government bears the initial burden of establishing probable cause to connect the property to be forfeited with some form of criminal wrongdoing."³³

right shall exist in them:

(7) All real property, including any right title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner, to have been committed or omitted without the knowledge or consent of that owner.

29. 21 U.S.C. § 881(h) (1988).

30. Pub. L. No. 99-570, 100 Stat. 3207, codified at 18 U.S.C. § 981.

31. 18 U.S.C. § 981(a)(1)(A) (emphasis added). See *United States v. 1988 Oldsmobile Cutlass Supreme*, 983 F.2d 670, 673-74 (5th Cir. 1993); *United States v. Dollar Bank Money Mkt. Account*, 980 F.2d 233, 236 (3d Cir. 1992); *United States v. \$448,342.85, 969 F.2d 474, 476* (7th Cir. 1992).

32. See, e.g., 19 U.S.C. § 1613(b) (1988 & Supp. V 1993) (establishing the Customs Forfeiture Fund); 21 U.S.C. § 1509 (1988 & Supp. V 1993) (establishing the National Drug Control Policy's Special Forfeiture Fund); 28 U.S.C. § 524(1) (Supp. V 1993) (establishing the U.S. Department of Justice Assets Forfeiture Fund).

33. *United States v. Eighty-Seven Thousand Sixty Dollars*, 23 F.3d 1352, 1354 (8th Cir. 1994); see also *United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489, 493 (9th Cir. 1994) ("The standard for probable cause in forfeiture proceedings resembles that required to support a search

Two bills have been introduced to Congress seeking major legislative reform. A House bill introduced by Congressman Henry Hyde [R-IL], ("Hyde Bill"), is directed at, among other things, amending the "innocent owner" defense.³⁴ The Hyde Bill seeks to avail the defense to an owner who was either without knowledge, or did not consent to the illegal conduct giving rise to forfeiture. This would resolve a current split in the circuits concerning whether a claimant must prove both that the illegal use of the property occurred without the owner's knowledge and without his consent.³⁵ It also authorizes the district court to appoint counsel for indigent claimants. Perhaps more importantly, it seeks to enhance the standard needed for the government to sustain a forfeiture from the current probable cause to a "clear and convincing" standard.³⁶ Finally, the American Civil Liberties Union and National Association of Criminal Defense Lawyers have joined Congressman Hyde in seeking major legislative changes to the forfeiture laws.

A second bill introduced by Congressman John Conyers [D-MI], ("Conyers Bill"), is much more ambitious.³⁷ It proposes sweeping changes that would in effect dismantle civil forfeiture. The Conyers Bill would mandate that forfeiture proceedings be conducted only upon the conviction of the property owner for the relevant crime. Accordingly, a criminal conviction would be a necessary precondition to civil forfeiture. It would also require the government to show by "clear and convincing evidence" that the property was subject to forfeiture. In addition, claimants unable to afford legal representation would receive court-appointed counsel. The right to a jury trial would also be extended to civil forfeiture proceedings. Furthermore, bona fide attorney's fees would be exempted from forfeiture and the value of forfeited property would be limited so as not to exceed the pecuniary gain derived by the wrongdoer from the offense.³⁸

warrant. The determination of probable cause is based upon a totality of circumstances test and the government's evidence must be more than that which gives rise to a mere suspicion, although it need not rise to the level of prima facie proof." (citations omitted); *United States v. 255 Broadway*, 9 F.3d 1000, 1003 (1st Cir. 1993); *United States v. 785 St. Nicholas Ave. and 789 St. Nicholas Ave.*, 983 F.2d 396, 403 (2d Cir. 1993), *cert. denied*, 113 S.Ct. 2349 (1993); *United States v. 6250 Ledge Rd.*, 943 F.2d 721, 725 (7th Cir. 1991).

34. See H.R. 2417, 103d Cong., 1st Sess. (1993) (entitled the Civil Asset Forfeiture Reform Act).

35. Several circuits have adopted a disjunctive reading of the "innocent owner" defense requiring that the claimant demonstrate that the illegal use of the property occurred either without his knowledge or without his consent, not both. See *United States v. 77 Walnut St.*, 923 F.2d 840 (1st Cir. 1990) (unpublished opinion), (claimant raising innocent owner defense under § 881(a)(7) entitled to judgment by proving "that the illegal use of the property occurred either without her knowledge or without consent."); *United States v. 141st St. Corp.*, 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991), ("We conclude that a claimant may avoid forfeiture by establishing either that he had no knowledge of the narcotics activity or, if he had knowledge, that he did not consent to it."); *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 624 (3d Cir. 1989) ("knowledge of the illegal usage does not deprive the owner of an interest when the owner can demonstrate the property was used without her consent"); *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1503 n. 3 (11th Cir. 1992) ("[E]ither ignorance or non-consent is sufficient to make out an innocent owner defense."). The Ninth Circuit is the only circuit to embrace the conjunctive interpretation. The Ninth Circuit would require the claimant to prove both lack of knowledge and lack of consent. See *United States v. Lot 111-B*, Tax Map Key 4-4-03-71(4), 902 F.2d 1443, 1445 (9th Cir. 1990) (per curiam).

36. George Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 N.Y. Law School L. Rev. 121 (1994).

37. See H.R.3347, 103d Cong., 1st Sess (1994) (entitled the Asset Forfeiture Justice Act).

38. In contrast, the Department of Justice has recently completed drafting the Forfeiture Act of 1995. Their bill would substantially strengthen federal civil forfeiture by attempting to resolve many of the ambiguities created by recent Supreme Court decisions and addressing many legal issues that have

IV. RECENT SUPREME COURT DECISIONS AND THEIR IMPLICATIONS ON CIVIL FORFEITURE

A. The Double Jeopardy Dilemma

While Congress has been actively re-examining the civil forfeiture laws, the United States Supreme Court has not stood silent on the subject. During the last three terms of the Court, it has issued several major civil forfeiture decisions, of which two have substantially restricted the use of civil forfeiture.³⁹ In *Austin v. United States*, the Supreme Court pierced the legal fiction of *in rem* forfeitures and held that civil forfeiture under §§ 881(a)(4) and (a)(7) is punitive in nature and, therefore, subject to the constraints of the Excessive Fines Clause of the Eighth Amendment.⁴⁰ The defendant, Austin, was convicted in state court for possessing two grams of cocaine with the intent to distribute. Following his conviction, the United States filed an *in rem* action seeking forfeiture of his mobile home and auto body shop, the locations of the drug transaction which led to his conviction.⁴¹ Austin argued that the forfeiture of his mobile home and auto body shop would violate the Eighth Amendment prohibition against excessive fines. The district court rejected the excessive fines argument and entered summary judgment for the government.⁴² The Eighth Circuit affirmed the conviction.

The Supreme Court, reversing the Eighth Circuit, concluded that the forfeiture constituted punishment and reasoned that the Eighth Amendment, unlike other amendments, does not contain language expressly limiting itself to criminal cases.⁴³ The Court noted that the purpose of the Eighth Amendment is to limit the government's power to punish. Thus, the Court stated that the dispositive question is not whether the forfeiture provisions are characterized as criminal or civil, but whether the forfeiture served in part to punish.⁴⁴ If so, civil forfeiture under §§ 881(a)(4) and (a)(7) is limited by the Excessive Fines Clause.

The Supreme Court proceeded to analyze whether civil forfeiture was considered, to serve in part to punish, at the time the Eighth Amendment was ratified. The Court also questioned whether forfeiture under §§ 881(a)(4) and (a)(7) should be construed as imposing punishment today. After engaging in an historical review of civil forfeiture, the Court concluded that even though the "innocence" of the owner could not

divided the federal circuits. For example, the DOJ's proposed legislation would reform the innocent owner defense requiring the claimant to prove both that he lacked knowledge of the illegal use of the property and that the property was used without his consent. The proposed legislation would also provide for a uniform definition of "innocent owner," eliminating the "willful blindness" requirement found in certain civil forfeiture provisions. See 18 U.S.C. § 981 (1988).

39. See *Austin*, 113 S. Ct. 2801 (1993) (holding that forfeiture under §§ 881(a)(4) and (a)(7) constitutes punishment and, thus, are limited by the Excessive Fines Clause of the Eighth Amendment); 92 *Buena Vista Ave.*, 113 S. Ct. 1126 (1993) (holding that to qualify as an "innocent owner," the claimant need not be a bona fide purchaser for value and that the "innocent owner" defense trumps the relation-back doctrine); see also *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993) (holding that the owner is entitled to a pre-seizure hearing when the government seeks to forfeit real property).

40. 113 S. Ct. at 2812.

41. *Id.* at 2803.

42. *Id.*

43. *Id.* at 2805-06.

44. *Id.* at 2806.

serve as a common-law defense, forfeiture consistently has been recognized as serving, at least in part, the goal of punishing and deterring the owner.⁴⁵

The Court next considered whether the forfeiture statutes at issue are properly considered punishment today. Three reasons were advanced in support of the conclusion that §§ 881(a)(4) and (a)(7) are properly considered punishment. First, the Court reasoned that the forfeiture provisions expressly provide an "innocent owner" defense which serves to focus on the culpability of the owner.⁴⁶ From this, the Court inferred a "congressional intent to punish only those involved in drug trafficking."⁴⁷ Second, the Court noted that the congressional intent was to tie the availability of civil forfeiture directly to the commission of drug offenses. Third, the legislative history reveals that Congress intended forfeiture to serve as "a powerful deterrent" or punishment against those dealing in illicit drugs.⁴⁸ In enacting § 881(a)(7) in 1984, Congress recognized "that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs."⁴⁹

Finally, the Court rejected the government's arguments that the civil forfeiture provisions should be considered remedial in nature, rather than punitive. The Court found an insufficient nexus between the value of the forfeited property and any damages sustained by the government. The Court commented that the "forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law."⁵⁰ Even assuming that §§ 881(a)(4) and (a)(7) serve some remedial purpose, the Court stated that the Government's argument must fail because "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."⁵¹ Therefore, absent a purpose that is solely remedial in nature, the Court concluded that civil forfeiture under §§ 881(a)(4) and (a)(7) cannot properly be characterized as a civil sanction. Since the forfeiture of the property constitutes punishment, the Court held that the provisions are subject to the Excessive Fines Clause.⁵²

45. *Id.* at 2810; *see also* Calero-Toledo, 416 U.S. at 686 (forfeiture serves "punitive and deterrent purposes").

46. *Id.* at 2810-11.

47. *Id.* at 2811.

48. *Id.* at 2811 (quoting S. Rep. No. 98-225, at 195 (1983)).

49. *Id.* at 2811 (quoting S. Rep. 98-225, at 191 (1983)).

50. *Id.* at 2812 (quoting *United States v. Ward*, 448 U.S. 242, 254 (1980)).

51. *Id.* at 2812 (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)).

52. The Supreme Court in *Austin* side-stepped and left to the lower courts what test to be applied and factors to be considered in determining whether the forfeiture in a given case is constitutionally disproportionate. *Id.* at 2812. This issue has since divided the federal courts. The federal circuits that have addressed the issue have adopted either an instrumentality or proportionality test, or a hybrid test of the two. *See United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995) (adopting a hybrid instrumentality/proportionality test for civil forfeiture.) *United States v. Chandler*, 36 F.3d 358, 364 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995), (in adopting an instrumentality test the court held that the question of excessiveness for in rem forfeiture is directly tied to the "guilt of the property" or the extent to which it was involved in drug activity, not its value); *United States v. 9638 Chicago Heights*, 27 F.3d 327, 330 (8th Cir. 1994) (expressly rejecting the instrumentality test in favor of a broader analysis taking into consideration the monetary value of the property, the extent of criminal activity associated with the property, the fact that the property was a residence, and the effect on innocent occupants of the residence); *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 38-39 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 55 (1992), (applying a proportionality analysis which takes into consideration: (1) the inherent gravity of the offense; (2) the sentences imposed for similarly grave offenses in the same jurisdiction; and (3) sentences imposed for the same

The Supreme Court's holding in *Austin*, has generated a firestorm of judicial controversy. In light of its decisions in *United States v. Halper*⁵³ and *Department of Revenue of Montana v. Kurth Ranch*,⁵⁴ the central question is whether a criminal prosecution following a judgment of civil forfeiture for the underlying offense which gave rise to forfeiture violates the Double Jeopardy Clause of the Fifth Amendment. Conversely, protections afforded under the Double Jeopardy Clause are implicated where a civil forfeiture action is filed after a criminal prosecution. At least three divergent views have emerged on the double jeopardy issue.

1. Single vs. Multiple Proceedings

The Second and Eleventh Circuits have adopted the position that the Double Jeopardy Clause is not violated where the civil forfeiture suit and the criminal prosecution constitute a single prosecution against the defendant-claimant. In *United States v. Millan*, the defendant was indicted for conspiracy to distribute "massive amounts of heroin."⁵⁵ The government thereafter filed an *in rem* forfeiture action against certain property, including bank accounts claimed by the defendant. The defendant entered into a stipulation on the assets subject to civil forfeiture and the civil suit was subsequently dismissed.⁵⁶ Before the start of the criminal trial, the defendant filed a motion to dismiss the criminal charges on double jeopardy grounds. The district court dismissed the motion and the defendant was convicted at trial on the drug charges.

In affirming the judgment of the district court denying the motion to dismiss, the Second Circuit recounted that multiple punishments arising from a single proceeding fall outside the scope of the Supreme Court's decision in *Halper*. The Court posited that "it is well-established that Congress may impose multiple punishments for a single crime without violating the Constitution's double jeopardy restrictions."⁵⁷ The Second Circuit defined the threshold issue as whether the civil forfeiture suit was part of "a single, coordinated prosecution" of persons involved in criminal activity.⁵⁸ If so, the

crime in other jurisdictions); *United States v. RR No. 1 Box 224*, 14 F.3d 864 (3d Cir. 1994) (adopting a proportionality test for excessiveness); *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493, 1498-99 (11th Cir. 1994) (while failing to articulate a precise test for excessiveness, the court appears to have engaged in some sort of proportionality analysis in finding the forfeiture of a home valued at \$150,000, in comparison to the gambling activity that took place at the residence, unconstitutionally excessive).

53. 490 U.S. 435, 448 (1989). In *Halper*, the defendant was convicted of submitting 65 false claims for government reimbursement for providing medical services for patients eligible for Medicare benefits. The defendant was convicted under the criminal false claims statute and sentenced to prison and fined \$5,000. The government then filed a civil action against the defendant under the federal civil False Claims Act. The district court granted summary judgment in favor of the government and imposed a civil penalty of \$2,000 on each of the 65 false claims totaling \$130,000. The actual loss to the government was \$16,000. The Supreme Court held that the civil sanction of \$130,000 bore no "rational relation" to the sum of the government's actual loss plus its costs in investigating and prosecuting the false claims and, thus, constituted punishment in violation of the Double Jeopardy Clause.

54. 114 S. Ct. 1937 (1994) (striking down a state of Montana drug tax imposed after a criminal conviction, finding that it constituted a second punishment for the same drug offense in violation of the defendant's protection against double jeopardy).

55. 2 F.3d 17, 18 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

56. Pursuant to the stipulation, the government agreed to release \$101,000 in cash, as well as, other real and personal assets in order to enable defendant to pay attorneys' fees. In return, the defendant agreed to forfeit certain properties—including \$236,804.48 in bank deposits, two parcels of real estate, and two business interests—to the government. *Id.* at 19.

57. *Id.* at 20.

58. *Id.*

defendant's double jeopardy rights would not be offended by the imposition of multiple punishment in a single prosecution. The Court concluded that the civil and criminal proceedings constituted "a single, coordinated prosecution", relying on the following factors:

In the instant case warrants for the civil seizures and criminal arrests were issued on the same day, by the same judge, based on the same affidavit by the DEA agent Furthermore, the civil complaint incorporated the criminal indictment. Finally, the [defendants] were aware of the criminal charges against them when they entered into the Stipulation.⁵⁹

Given these circumstances, the Second Circuit reached the conclusion that the civil and criminal actions were simply different prongs of a single prosecution. Additionally, the Court recognized the concern raised in *Halper*, that the government might be abusively seeking the second punishment because it was dissatisfied with the punishment imposed in the first proceeding. The court held that this was not present in the instant case because the civil and criminal proceedings were contemporaneous and not consecutive.⁶⁰

In *United States v. 18755 North Bay Road*,⁶¹ the Eleventh Circuit reached the same conclusion as *Millan*. Citing the Second Circuit's decision in *Millan* with approval, the Eleventh Circuit opined that "the circumstances of the simultaneous pursuit by the government of criminal and civil sanctions . . . falls within the contours of a single, coordinated prosecution."⁶² The Court also found no evidence that the government was seeking a second punishment because it was dissatisfied with the punishment levied in the criminal prosecution.⁶³

2. *The Drug Proceeds Exception*

In *United States v. Tilley*, the Fifth Circuit recognized a "drug proceeds" exception to the double jeopardy prohibition.⁶⁴ In *Tilley*, defendants sought dismissal of criminal charges, arguing that the prior civil forfeiture of \$650,000 in proceeds from illicit drug sales constituted punishment and any additional criminal punishment would violate protections afforded under the Double Jeopardy Clause. The Fifth Circuit disagreed, holding that the civil forfeiture of drug profits is remedial in nature, not punitive and, thus, does not pose a double jeopardy bar to a defendant's subsequent criminal prosecution.⁶⁵

The Fifth Circuit advanced three reasons in support of its holding. First, the Court asserted that the forfeiture of drug proceeds is rationally related to the costs to government and society incurred by narcotics trafficking. The forfeiture of illegal drug profits "serves the wholly remedial purposes of reimbursing the government" for the detection, investigation and prosecution of drug dealers, and society for health care costs and lost worker productivity.⁶⁶

59. *Id.*

60. *Id.* at 20-21.

61. 13 F.3d 1493 (11th cir. 1994).

62. *Id.* at 1499.

63. *Id.*

64. 18 F.3d 295 (5th cir. 1994).

65. *Id.* at 298-99.

66. *Id.* at 299.

Second, the Court posited that the logic of *Austin* is inapplicable to § 881(a)(6) drug proceeds cases. The Court correctly observed that *Austin* dealt only with whether forfeitures under §§ 881(a)(4)—involving conveyances and other means of transporting drugs—and (a)(7)—real property used to facilitate drug trafficking—“constituted punishment under the Excessive Fines Clause.”⁶⁷ The *Austin* Court did not have occasion to address whether forfeiture of drug profits constitutes punishment. The Fifth Circuit opined that the Supreme Court’s ruling that forfeiture under §§ 881(a)(4) and (a)(7) constitutes punishment was based in large part on the Court’s finding that conveyances and real estate have no proportional relationship to the harm inflicted upon the government and society. The *Tilley* court observed that forfeiture of drug proceeds will always be directly proportional to the amount of drugs sold. “The more drugs sold, the more proceeds that will be forfeited,” and proceeds “are roughly proportional to the harm inflicted upon the government and society by the drug sale.”⁶⁸

Lastly, the Fifth Circuit equated the forfeiture of illicit proceeds with the seizure of proceeds from a bank robbery. Instead of punishing the forfeiting party, confiscation of the stolen money from a bank robber “merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme.”⁶⁹ The Fifth Circuit stressed that this is not punishment “within the plain meaning of the word.”⁷⁰

3. The Restrictive View

In *United States v. \$405,089.23 in U.S. Currency*, the Ninth Circuit adopted a restrictive view, finding that a subsequent civil forfeiture action always violates double jeopardy.⁷¹ In *\$405,089.23 in U.S. Currency*, the Ninth Circuit considered a double jeopardy challenge to a civil forfeiture of drug proceeds filed under § 881(a)(6) proceeding the defendants’ convictions on narcotics charges. The defendants were indicted on various counts of narcotics trafficking and money laundering. Five days later, the government instituted a civil forfeiture action against several hundred thousand dollars of property, including the following: a \$405,089.23 bank account; \$8,929.93 in three bank accounts; \$123,000 in cash; 138 silver bars; a helicopter; an airplane; two boats and eleven automobiles.⁷² The government argued “that the property was forfeitable on two independent grounds: as proceeds of illegal narcotics transactions and as property involved in money laundering under 18 U.S.C. § 981(a)(1)(A).”⁷³ The defendants were subsequently convicted of the criminal charge. Eight months later, the government moved for summary judgment in the parallel civil forfeiture action, relying in large part on the defendants’ criminal convictions to establish probable cause.⁷⁴ The district court granted the government’s motion and ordered the entire *res* forfeited.

67. *Id.* at 300.

68. *Id.* at 300.

69. *Id.*

70. *Id.* (quoting *United States v. Halper*, 490 U.S. 435, 449 (1989)). The Ninth Circuit in *United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489, 495 (9th Cir. 1994), indicated that the double jeopardy dilemma can be avoided by predicating the civil forfeiture on some offense other than the offenses for which the defendant has been tried criminally.

71. 33 F.3d 1210 (9th Cir. 1994).

72. *Id.* at 1214.

73. *Id.* at 1214.

74. *Id.* at 1214.

The Ninth Circuit reversed, holding that the government violated the Double Jeopardy Clause by obtaining criminal convictions and then continuing to pursue a civil action.⁷⁵ The Court based its conclusion on two reasons. First, the Court concluded that the criminal prosecution and civil forfeiture action subjected the claimants to separate proceedings in violation of the Double Jeopardy Clause. The Ninth Circuit explicitly rejected the view espoused by the Second and Eleventh Circuits in *Millan*⁷⁶ and *18755 North Bay Road*.⁷⁷ The Ninth Circuit did not agree that “two separate actions, one civil and one criminal, instituted at different times, tried at different times before different fact finders, presided over by different district court judges, and resolved by separate judgments, constitute the same ‘proceeding.’”⁷⁸ The Court posited that civil forfeiture and criminal prosecution would constitute the same proceeding only if they were brought in the same indictment and tried at the same time.⁷⁹

Secondly, the Court disagreed with the Fifth Circuit’s holding in *United States v. Tilley*, which said that forfeiture of drug proceeds does not constitute punishment.⁸⁰ In analyzing the issue, the Court refused to apply a case-by-case approach to determine whether forfeiture of proceeds is so excessive in relation to any remedial goal that it must be construed as “punishment.” Instead, the Ninth Circuit read *Austin* as mandating an abstract, “categorical” approach to determining whether a civil forfeiture is punitive:

Under *Austin*, in order to determine whether a forfeiture constitutes ‘punishment,’ we must look to the entire scope of the statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to forfeit [T]he *Austin* Court explicitly refused to apply . . . a case-by-case approach to determining whether a forfeiture constitutes ‘punishment.’⁸¹

Under this categorical approach, the Ninth Circuit indicated that it must look at the characteristics of the forfeiture statute rather than the characteristics of the property forfeited.⁸² In examining § 881(a)(6) as a whole, the Court determined that it was not limited to the forfeiture of proceeds, which arguably is remedial, but instead encompassed all money furnished or *intended to be furnished* by any person in exchange for a controlled substance, as well as to any money used or *intended to be used* to facilitate any violation of this subchapter.⁸³ The Court observed: “Rather than rendering only the *profits* of drug dealers subject to forfeiture, the statute applies to nearly any

75. *Id.* at 1214.

76. 2 F.3d at 17.

77. 13 F.3d 1493.

78. 33 F.3d at 1216.

79. *Id.* at 1216.

80. 33 F.3d at 1220 (citing *United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994)).

81. 33 F.3d at 1220. The Ninth Circuit misconstrued the meaning of *Austin*. In *Austin*, the Supreme Court adopted a categorical approach for determining whether forfeiture under §§ 881(a)(4) and (a)(7) was excessive because it found the relationship between the actual costs incurred by the government and the amount of the sanction (the value of the mobile trailer and auto body shop) to be purely coincidental. In other words, the Supreme Court found no “rational relation” between the forfeiture and any losses incurred by the government. In contrast, in the case of drug proceeds there is a “rational relation” between the forfeiture of drug profits and the quantity of drugs distributed, as well as the harm caused to society. Accordingly, the reasons advanced by the Supreme Court in *Austin* for adopting a categorical approach in §§ 881(a)(4) and (a)(7) cases, do not necessarily apply in § 881(a)(6) drug proceeds cases.

82. *Id.*

83. *Id.* at 1221 (quoting 21 U.S.C. § 881(a)(6) (1988) (emphasis added by the Court)).

money that is involved in a narcotics transaction in some fashion."⁸⁴ Thus, the Court concluded that the forfeiture statute at issue does not solely serve a remedial purpose. Because the civil forfeiture statute in the abstract permits the imposition of punishment, the Court held that the forfeiture is barred by the Double Jeopardy Clause.⁸⁵

The federal circuits have thus embraced widely divergent views of *Austin* and whether civil forfeiture and criminal prosecution for the conduct giving rise to the forfeiture offend the protections afforded under the Double Jeopardy Clause. Depending on the particular jurisdiction, the government runs the risk that by obtaining a judgment of civil forfeiture it may be subsequently barred on double jeopardy grounds from pursuing criminal prosecution of the owner of the tainted property.⁸⁶ The court's ruling on the double jeopardy issue may thus reap an unexpected windfall for the defendant, either immunizing him from prosecution for the offense upon which the prior forfeiture was based or, if prosecuted criminally, protecting his illegally acquired property from subsequent forfeiture.⁸⁷

At the same time, whether the defendant's double jeopardy rights are offended may turn fortuitously on where the defendant is prosecuted or where the civil forfeiture action is filed. For example, civil forfeiture of narcotics proceeds will survive a constitutional challenge if the suit is filed in the Fifth Circuit, under that court's decision in *United States v. Tilley*.⁸⁸ In contrast, the same civil forfeiture action, if filed in the Ninth Circuit, will be deemed punitive, imposing multiple punishment in violation of the Double Jeopardy Clause.⁸⁹ On the other hand, if the criminal prosecution and civil suit are brought simultaneously, regardless of the nature of the property subject to forfeiture, the judicial proceedings may be viewed as "a single, coordinated prosecution," and the government may withstand a double jeopardy challenge.⁹⁰ The Ninth Circuit does not recognize this legal fiction and a forfeiture action and criminal prosecution would constitute the "same" proceeding only if brought in the same indictment and tried at the same time.⁹¹

The current status of the law, as it relates to civil forfeiture and double jeopardy jurisprudence, is contradictory, confusing and has resulted in inconsistent rulings by the federal circuits.⁹² The Department of Justice has filed a petition for writ of certiorari

84. *Id.* at 1221.

85. *Id.* at 1222.

86. See *Ragin v. United States*, 1995 U.S. Dist. LEXIS 9005; ("jeopardy attaches when final judgment of forfeiture is entered and not when the claim or answer is filed or the property is seized"). Three circuits hold that jeopardy does not attach in an uncontested administrative civil forfeiture action. See *United States v. Baird*, ___ F.3d ___, *United States v. Cretacci*, 1995 U.S. App. LEXIS 20618 (9th Cir.); *United States v. Torres*, 28 F.3d 1463, 1466 (7th Cir. 1994).

87. At least one circuit has recognized that in order to implicate double jeopardy protections, the criminal prosecution and civil forfeiture action must be based upon the "same offense." See *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 568 (9th Cir. 1995) (finding no double jeopardy violation where criminal conviction was for conspiracy to import marijuana and hashish and judgment of civil forfeiture was based upon currency transaction violation); See also *U.S. v. Chick*, 1995 U.S. App. LEXIS 17041 (9th Cir.).

88. *Tilley*, 18 F.3d at 300.

89. See *United States v. \$405,089.23 in U.S. Currency*, 33 F.3d at 1214.

90. See *United States v. 18755 North Bay Road*, 13 F.3d 1493, 1499 (11th Cir. 1994); *United States v. Millan*, 2 F.3d 17, 17 (2d Cir. 1993).

91. See 33 F.3d at 1216.

92. See *United States v. \$69,292.00 in U.S. Currency*, 1995 WL 461884 (9th Cir.) (Forfeiture of funds for failing to report the export of monetary instruments in excess of \$10,000.00 constitutes punishment for purposes of double jeopardy).

with the Supreme Court in *United States v. \$405,089.23 in U.S. Currency*, in order to reconcile these inconsistent federal circuit holdings.⁹³ On *certiorari*, the Supreme Court should address whether under *Halper*, the forfeiture of drug proceeds is remedial, or instead, constitutes punishment within the meaning of the Double Jeopardy Clause. The Court should also consider whether *Austin* mandates the "categorical" approach taken by the Ninth Circuit in *\$405,089.23 in U.S. Currency* in drug proceeds cases, rather than a case-by-case analysis of the property forfeited. Additionally, the Court should resolve whether the legal fiction, that criminal and civil forfeiture proceedings brought simultaneously (even though filed separately) constitute "a single, coordinated prosecution," created by the Second and Eleventh Circuits in *Millan* and *18755 North Bay Road*, is consistent with the protections afforded under the Double Jeopardy Clause.

B. The Innocent Owner Defense

The Supreme Court's ruling in *United States v. 92 Buena Vista Avenue* has likewise been controversial and has created a split in the circuits.⁹⁴ The decision is significant for two reasons. First, the Court held that the innocent owner defense is not limited to bona fide purchasers.⁹⁵ Accordingly, a donee, someone who paid no value and received the tainted property as a gift, can claim the defense. Second, the Supreme Court opined that the innocent owner defense trumps the relation-back doctrine.⁹⁶ Thus, a donee who was without knowledge or did not consent to the property being used for criminal purposes holds a superior title over the government.

The Court's holding in *92 Buena Vista Avenue* has given added importance to whether the language of the innocent owner defense "without knowledge or consent" should be construed in the disjunctive or the conjunctive. If interpreted disjunctively, to require that the owner only demonstrate he lacked either knowledge or consent, a post-offense transferee could prevail over the government even if he had knowledge at the time of the transfer that the property was tainted, but did not consent to the illegal activity. This would enable a defendant to avoid civil forfeiture entirely by simply transferring his ill-gotten gains to a third-party who had knowledge of the origins of the property, but did not consent to the defendant trafficking in narcotics. Since the post-illegal act transferee would qualify as an innocent owner, the property would be immunized from civil forfeiture. Moreover, the post-illegal act transferee will almost always be able to satisfy the lack of consent requirement to qualify as an innocent owner. Since the post-illegal act transferee had no interest in or control over the property prior to its receipt, there would be no reason for him to consent or withhold his consent to the illegal acts supporting the forfeiture. The post-illegal act transferee would therefore always qualify as an innocent owner and hold superior title over the government.⁹⁷

93. *United States v. \$145,139.00*, 18 F.3d 73 (2d Cir. 1994) (the Second Circuit reached the opposite conclusion, finding that money was instrumentality of the crime).

94. 113 S. Ct. 1126 (1993).

95. *Id.* at 1134.

96. *Id.* at 1136-37. The relation-back doctrine provides that the government's interest vests after the offense giving rise to forfeiture. See 21 U.S.C. § 881(h).

97. The requirements to qualify as an innocent owner under the criminal forfeiture provision are much more demanding. To qualify as an innocent owner under 21 U.S.C. § 853(c), the criminal forfeiture statute, a third-party claimant must demonstrate that he is a bona fide purchaser for value and

Prior to the Supreme Court's decision in *92 Buena Vista Avenue*, a number of federal circuits adopted the disjunctive interpretation of the "without knowledge or consent" language. These included the First Circuit in *United States v. 77 Walnut St.*,⁹⁸ the Second Circuit in *United States v. 141st Corp. By Hersh*,⁹⁹ the Third Circuit in *United States v. 6109 Grubb Road*,¹⁰⁰ and the Eleventh Circuit in *United States v. 1012 Germantown Road*.¹⁰¹ These cases all involved pre-illegal act owners, as compared to post-illegal act transferees. Prior to *92 Buena Vista Avenue*, it was presumed that a post-illegal act transferee could never raise the innocent owner defense because the relation-back provision vested title in the government at the time of the illegal act and, thus, a post-illegal act transferee could never be an owner.¹⁰² The Ninth Circuit is the only circuit to embrace the conjunctive interpretation.¹⁰³ The dispositive question is, therefore, whether the circuits that adopted a disjunctive reading of the statute prior to *92 Buena Vista Avenue* will continue to construe the innocent owner defense in the disjunctive when applied to post-illegal act transferees.

Since the Court's ruling in *92 Buena Vista Avenue*, three circuits have addressed the disjunctive-conjunctive issue. The Eleventh and Ninth Circuits have construed the statute in the conjunctive, finding innocence incompatible with knowledge of the illegal acts giving rise to forfeiture. In *United States v. 6640 SW 48th Street*, the Eleventh Circuit explicitly rejected claimant's argument that he was an innocent owner, while conceding knowledge, because he did not consent.¹⁰⁴ The Eleventh Circuit posited that it must interpret § 881(a)(7) so as to give it a logical meaning which is not at odds with its purpose and avoid an absurd result. The Court observed that a post-ille-

was reasonably without cause to believe that the property was subject to forfeiture. Section 853(c) provides:

All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

98. 923 F.2d 840 (1st Cir. 1990) (claimant raising innocent owner defense under § 881(a)(7) entitled to judgment by proving "that the illegal use of the property occurred either without her knowledge or without her consent").

99. 911 F.2d 870, 878 (2d Cir. 1990) ("We conclude that a claimant may avoid forfeiture by establishing either that he had no knowledge of the narcotics activity or, if he had knowledge, that he did not consent to it.").

100. 886 F.2d 618, 624 (3d Cir. 1989) ("knowledge of the illegal usage does not deprive the owner of an interest when the owner can demonstrate the property was used without her consent").

101. 963 F.2d 1496, 1503 n. 3 (11th Cir. 1992) ("[E]ither ignorance or non-consent is sufficient to make out an innocent owner defense."). *But see* *United States v. 6960 Miraflores Ave.*, 995 F.2d 1558 (11th Cir. 1993) (following a conjunctive application).

102. *See* *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 801 (3d Cir. 1994).

103. *See* *United States v. Lot 111-B, Tax Map Key*, 902 F.2d 1443, 1445 (9th Cir. 1990) (*per curiam*).

104. 41 F.3d 1448, 1453 (1995). The Eleventh Circuit also recognized the intra-circuit split regarding whether the innocent owner defense should be construed in the disjunctive or conjunctive. *See* *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1500 (11th Cir. 1992) (interpreting the statute in the disjunctive); *United States v. 6960 Miraflores Avenue*, 995 F.2d 1558, 1564 (11th Cir. 1993) (interpreting the statute in the conjunctive); *United States v. 15603 85th Avenue North*, 933 F.2d 976, 981 (11th Cir. 1991) (adopting a conjunctive application). The Court stated that it need not resolve this intra-circuit split at this time because those cases involved pre-illegal act owners. *Id.* at 1452.

gal act transferee would always be able to show lack of consent if he had no legal interest in or control of the property at the time of the occurrence of the illegal acts.¹⁰⁵ The Court opined that to construe the statute in the disjunctive would "create a sweeping grant of immunity from forfeiture and a gaping hole in an intentionally comprehensive forfeiture statute."¹⁰⁶ Thus, the Court held that a post-illegal act transferee cannot rely on the consent prong of the innocent owner defense.¹⁰⁷

In *United States v. 10936 Oak Run Circle*, the Ninth Circuit vacated a judgment of forfeiture based on the Supreme Court's decision in *92 Buena Vista Avenue* and remanded the case to determine whether the claimant had knowledge of the previous owner's drug activities when he acquired an interest in the real property.¹⁰⁸ The Ninth Circuit held that the statute bars an owner with knowledge that the property was acquired with drug proceeds from asserting the innocent owner defense.¹⁰⁹ The Court commented "that innocence is incompatible with knowledge that puts the owner on notice that he should inquire further."¹¹⁰

In contrast, the Third Circuit reached the opposite conclusion. In *United States v. One 1973 Rolls Royce*, the Third Circuit construed the innocent owner defense in the disjunctive and vacated an order forfeiting a Rolls Royce that had been given to a prominent Philadelphia defense lawyer by Nicodemo Scarfo, Sr., the former reputed boss of the Philadelphia branch of the La Cosa Nostra.¹¹¹ The Rolls Royce had been given as repayment for \$16,000 paid by the attorney to cover the costs of a lavish party given by Scarfo's son to celebrate the elder Scarfo's acquittal at a murder trial where the attorney served as one of the defense counsel.¹¹² The government seized the Rolls Royce contending that it was used to shuttle people to and from meetings conducted as part of the Scarfo family's drug distribution business, and, therefore, facilitated narcotics activity.¹¹³ The attorney filed a claim maintaining he was an innocent owner because he did not consent to the use of the Rolls Royce in connection with drug transactions.

In a two-member panel majority decision, the Third Circuit held that the claimant qualified as an innocent owner because he did not consent to the criminal acts supporting forfeiture. The Court cited its earlier decision in *6109 Grubb Road*, where it con-

105. *Id.* at 1472.

106. *Id.*

107. *Id.*

108. 9 F.3d 74 (1993).

109. *6640 SW 48th St.*, 41 F.3d at 1453 n. 13. The Southern District of Michigan has also adopted this approach. See *United States v. Certain Real Property* (S.D. Mich. June 8, 1994) (An inquiry into consent is "not appropriate . . . where a claimant acquired the property after the illegal activity took place").

110. *10936 Oak Run Circle*, 9 F.3d at 76. Claimants maintained that Edwards (the purported drug dealer) was romantically involved with their daughter and they loaned him \$6,000 on one occasion and forgave a \$5,000 debt on another occasion. Claimants contended that they agreed to cancel the \$11,000 debt and to assume the mortgage on the forfeited property if Edwards transferred the property to them. It was uncontradicted that the property was worth at least \$190,000 with an outstanding mortgage of \$102,000. *Id.* at 75. The Court characterized this as a remarkable bargain and on remand directed that the district court inquire why Edwards would give them such a bargain and whether they inquired why. *Id.* at 76.

111. *United States v. Rolls Royce*, 43 F.3d 794 (3rd Cir. 1994).

112. *Id.* at 799. Scarfo had been tried for the murder of Salvatore Testa, who had been the boss of the Philadelphia La Cosa Nostra. Scarfo was his "consigliere" at the time. Scarfo was subsequently acquitted of Testa's murder.

113. *Id.* at 799-800.

strued the “knowledge or consent” language in the disjunctive in a pre-illegal act owner case, involving forfeiture under § 881(a)(7).¹¹⁴ The Court acknowledged the problem created by this interpretation of the innocent owner defense in post-illegal act transferee cases. The Court observed that a post-illegal act transferee, aware of the property’s taint could benefit from the defense. Moreover, the disjunctive construction “creates the problem of insulating certain owners who one reasonably might not consider to be deserving.”¹¹⁵

The Court considered the possibility of limiting the disjunctive application of the defense as mandated in *6109 Grubb Road* to pre-illegal act owners and applying the statute conjunctively in post-illegal act cases. However, it rejected this application of the statute, which it characterized as an act of “judicial legislation,” finding instead that the statute simply draws no distinction between pre-illegal act owners and post-illegal act transferees.¹¹⁶ Recognizing the ambiguity in the statutory language and finding that the statute is punitive in nature, the Court reasoned that the rule of lenity applies. It requires that any ambiguity must be resolved in favor of the claimant.¹¹⁷ Furthermore, the Court attempted to support its decision by citing to *dicta* in *92 Buena Vista Avenue* (which actually weighs against the majority’s ruling)¹¹⁸ and quoting from Justice Scalia’s concurrence which suggests that protecting post-illegal act transferees from forfeiture would not necessarily lead to an absurd result.¹¹⁹

Finally, the Third Circuit opined that the statutory construction problem arises not from the *92 Buena Vista Avenue* decision or the Court’s interpretation of the statute in *6109 Grubb Road*, but rather that “the problem originated in Congress when it failed to draft a statute that takes into account the substantial differences between those owners who own the property during the improper use and some of those who acquire it afterwards.”¹²⁰ The Court strongly admonished Congress to redraft the statute.

Circuit Judge Nygaard authored a highly critical dissenting opinion. He characterized the majority opinion as “more an act of judicial abdication than judicial restraint” and stated that the court is obligated to construe the statute in a manner that avoids a result that contradicts its purpose.¹²¹ In his view, the majority’s reading of the statute contravenes the very purpose of promulgating § 881, which is to curb drug activity.¹²² Moreover, Judge Nygaard maintained that neither *92 Buena Vista Avenue*

114. *Id.* at 801-02.

115. *Id.* at 818.

116. *Id.* at 818.

117. *Id.* at 819.

118. The plurality in *Buena Vista Avenue* suggested that equitable principles (not the statutory language) might prevent a post-illegal act transferee with knowledge of the illegal act from having the benefit of the innocent owner defense. The Court ultimately avoided this issue by stating that respondent has assumed the burden of convincing the trier of fact that she had no knowledge of the alleged source of [the property].” 113 S. Ct. 1126 at 1137.

119. *United States v. Rolls Royce*, 43 F.3d at 819. The Third Circuit engages in a disingenuous argument when it states that the principal goal of §§ 881(a)(4) and (a)(7) was to give owners of property an incentive to prevent use of their property in the drug trade. The Court contends that because post-illegal act transferees were not in a position to prevent the improper use of the property at the time, punishing those owners would do little to accomplish the purpose of the statutes. Rather, the primary intent of Congress was to deprive drug traffickers of their illicit proceeds. Moreover, this purpose would be served by forfeiting property transferred to a third party with knowledge of its illegal origin where the intent of the transferor was to evade forfeiture by the government. *Id.*

120. *Id.* at 820.

121. *Id.* at 821.

122. *Id.*

nor *6109 Grubb Road* apply to post-illegal act transferees and, therefore, are not dispositive of the instant case.¹²³

The Third Circuit's decision in *One 1973 Rolls Royce* has, thus, created an intolerable split in the circuits. In light of the inconsistent application of the innocent owner defense by the federal courts, any proposed legislative reform must confront the pre-illegal act versus the post-illegal act dilemma. The defendant should not be permitted to immunize his property from forfeiture by simply transferring it to a third-party. Furthermore, as the Ninth Circuit indicated in *United States v. 10936 Oak Run Circle*, "innocence is incompatible with knowledge."¹²⁴ If a post-illegal act transferee has knowledge that the property was acquired with drug proceeds, he should not qualify as an innocent owner.

Any legislative amendments to the innocent owner defense should distinguish between a pre-illegal act owner and post-illegal act transferee. In addressing the requirements for a pre-illegal act owner, if the pre-illegal act owner was without knowledge that his property was being used for an illegal purpose, since he did not engage in and was not aware of any wrongdoing, it would be unfair to punish him by forfeiting his property. Moreover, since he could not consent without first having knowledge, it would not be necessary to prove lack of consent. Proof of lack of knowledge would end the inquiry. On the other hand, if the owner had knowledge, he should then be required to prove lack of consent. Furthermore, lack of consent should be construed to mean that the claimant took all reasonable steps to prevent his property from being used illegally.¹²⁵ The pre-illegal act owner should not be permitted to qualify as an innocent owner if he had knowledge and took no action to prevent the unlawful conduct, in effect, permitting his property to be used for an illegal purpose. Only if the pre-illegal act owner can show that he took all reasonable efforts to prevent the illegal conduct could he prevail as an innocent owner.

With regards to the post-illegal act transferee, the consent requirement is rather meaningless since prior to acquiring the property the post-illegal act transferee has no interest in or control over the property and therefore no reason to withhold his consent. In the case of a post-illegal act transferee, the test for innocent owner should simply be knowledge. If the post-illegal act transferee has knowledge at the time of the transfer that the property was derived from illicit activity or was used to facilitate prohibited criminal conduct, the post-illegal act transferee should not qualify as an innocent owner. The government should prevail against a post-illegal act transferee with guilty knowledge. This construction of the statute would prevent sham transfers of property intended to avoid forfeiture and further comport with the intent of Congress, which is to deprive the wrongdoer of his ill-gotten gains. Moreover, where the post-illegal act transferee acquires the property with guilty knowledge, forfeiture of the property does not violate principles of equity. The post-illegal act transferee should have suspected that his possession of tainted property could be subject to legal challenge at a later time. By analogy, the situation is similar to a person who purchases stolen property at an unreasonably low price. Under the law, the purchaser is deemed to have constructive knowledge and not only is he not permitted to retain the property, but may himself

123. *Id.*

124. 41 F.3d at 1453 n. 13.

125. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

be guilty of receipt of stolen property. A person who knowingly receives drug proceeds or property believed to be purchased with illicit narcotics proceeds is no less guilty of wrongdoing than the person who receives stolen property. The post-illegal act transferee with knowledge should not be entitled to protection under the innocent owner defense.

V. CONCLUSION

Civil forfeiture is a potent weapon in the war against drugs and international narcotics trafficking. If the government is to wage a successful assault on organized drug trafficking, it must continue to strike at the economic base of criminal enterprises and deprive its members of their illicit profits. On the other hand, because of the civil nature of the proceedings and the application of the less demanding standard of proof in civil forfeiture cases, there remains the potential for abuse. The problem is further aggravated when local law enforcement agencies stand to directly benefit and profit from the seized property. Accordingly, civil forfeiture is the subject of strong competing interests and concerns.

There is currently federal legislation which considers scaling back the reach of civil forfeiture. At the same time, recent Supreme Court decisions have recognized the punitive aspects of civil forfeiture and limited the application of civil forfeiture. In *Austin v. United States*, the Supreme Court held that civil forfeiture under 21 U.S.C. § 881 (a)(4) and (a)(7) constitutes punishment and, thus, is limited by the Excessive Fines Clause of the Eighth Amendment. While the Court in *United States v. 92 Buena Vista Avenue*, concluded that an innocent donee qualifies as an innocent owner and as between the government and an innocent owner, the latter should prevail.

These recent Supreme Court rulings, however, have divided the federal circuits and resulted in inconsistent holdings by the courts. In certain instances, these decisions have severely weakened the civil forfeiture laws by interpreting the "innocent owner" defense so as to enable the defendant to immunize property from forfeiture by transferring it to a person with guilty knowledge. In other cases, the federal circuits have construed the Double Jeopardy Clause to immunize from criminal prosecution individuals who have been subject to a prior judgment of civil forfeiture. Furthermore, where the defendant has been criminally prosecuted, the courts have held that because civil forfeiture constitutes punishment in every case, double jeopardy prohibits a subsequent civil forfeiture suit. Finally, it is clear that the proposed legislation by Representatives Hyde and Conyers fails to take into consideration the import of these recent Supreme Court forfeiture decisions. Consequently, in an effort to reform civil forfeiture, there is a real danger that the proposed civil forfeiture bills will further dilute the effectiveness of civil forfeiture as a prosecutorial weapon against narcotics trafficking. For instance, the Hyde Bill would have the effect of codifying the Third Circuit's construction of the innocent owner defense in *United States v. One 1973 Rolls Royce*, where the court vacated an order of forfeiture because the post-illegal act transferee did not consent to the criminal activity supporting forfeiture. Thus, before the enactment of civil forfeiture reform legislation, there remain numerous issues that need to be resolved and the impact of recent Supreme Court decisions on forfeiture must be fully considered. It is furthermore imperative that the Supreme Court grant *certiorari* in *United States v. \$405,089.23 in U.S. Currency* and *United States v. One 1973 Rolls Royce*, or some other appropriate case, to resolve the legal issues that divide the federal circuits on the issue of double jeopardy.

