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When Debtors Deal Drugs: *United States v. 92 Buena Vista* Helps Innocent Commercial Lenders Keep Collateral Seized in Federal Civil Forfeiture Actions

When a drug dealer's girlfriend challenged the federal government's action to seize her home under a civil forfeiture statute,¹ she received some support from an unlikely source, the Federal Home Loan Mortgage Corporation.² Freddie Mac³ was soon joined by the American Bankers Association, the American Land Title Association, and the Dade County, Florida Tax Collector.⁴ Although these organizations had little apparent reason to help Beth Ann Goodwin keep the house she purchased with \$240,000 in drug deal proceeds which she received from her boyfriend, these organizations and Ms. Goodwin had a common foe: the doctrine of relation back. Under this doctrine, title to property subject to forfeiture vests immediately in the United States upon commission of the act giving rise to forfeiture.⁵ In the case of Ms. Goodwin, the drug proceeds she used to purchase her house vested in the government the moment of the drug transaction. The relation back doctrine, however, does not affect only property which is related to illegal activity, but also extinguishes any interests in property which are acquired by mortgage lenders, commercial lienholders, and even state and local tax lienholders, subsequent to the

1. Forfeiture is the divestiture of specific property without compensation, in consequence of some act forbidden by law. *State v. De Gress*, 11 S.W. 1029, 1029 (Tex. Sup. Ct. 1888). See *infra* notes 18, 20 and accompanying text (providing the text of 21 U.S.C. § 881(a)(6) under which the United States petitioned to seize the house).

2. Brief for the Federal Home Loan Mortgage Corporation at 1, *United States v. 92 Buena Vista*, 113 S. Ct. 1126 (1993) (No. 91-781); see *United States v. 92 Buena Vista*, 113 S. Ct. 1126, 1137 n.24 (1993) (plurality opinion) (referring to amicus curiae filed by the Federal Home Loan Mortgage Corporation).

3. "Freddie Mac" is an acronym for the Federal Home Loan Mortgage Corporation.

4. Brief for the American Bankers Association at 1, *92 Buena Vista* (No. 91-781); Brief for the American Land Title Association at 1, *92 Buena Vista* (No. 91-781); Brief for the Dade County Tax Collector at 16-17, *92 Buena Vista* (No. 91-781); see *92 Buena Vista*, 113 S. Ct. at 1137 n.24 (plurality opinion) (mentioning the amicus curiae filed by the American Bankers Association, the American Land Title Association, and the Dade County Tax Collector).

5. 21 U.S.C. § 881(h) (1988); see *id.* (stating that all right, title, and interest in property described in § 881(a) vests in the United States upon commission of the act giving rise to forfeiture). The doctrine of relation back has been applied by United States courts to federal civil forfeiture statutes since the eighteenth century. See *infra* notes 44-89 and accompanying text (elaborating how the United States Supreme Court applied the doctrine of relation back to early federal revenue and customs forfeiture statutes).

drug deal.⁶ The drastic impact of this doctrine on innocent third party creditors compelled representatives of the American financial community to join Ms. Goodwin in *United States v. 92 Buena Vista* to urge the United States Supreme Court to allow persons who obtain post-illegal act interests in drug deal proceeds to use their innocence as a defense to civil forfeiture.⁷

Legislation authorizing civil forfeiture has existed in the United States since the first United States Congress.⁸ Traditionally, federal forfeiture statutes involved only the forfeiture of contraband and property used in the commission of illegal activities.⁹ Since proceedings brought under these statutes were *in rem*, the defendant was the property itself, not the property's owner.¹⁰ Because the owner was not a party to the action, the

6. See *infra* notes 236-240 and accompanying text (discussing how innocent lenders and lienholders may lose secured interests because the property used as collateral may be subject to forfeiture to the United States).

7. Brief for the American Bankers Association at 9, *United States v. 92 Buena Vista*, 113 S. Ct. 1126 (1993) (No. 91-781) (advancing the argument that, without an innocent owner defense to civil forfeiture, property used as collateral could be forfeited due to illegal acts that took place months or even years before the forfeiture); Brief for the American Land Title Association at 3, *92 Buena Vista* (No. 91-781) (urging that the mortgage lien is an important interest that should be protected in civil forfeiture proceedings); Brief for the Dade County Tax Collector at 2, *92 Buena Vista* (No. 91-781) (noting that without an innocent owner defense for lienholders, the relation back doctrine extinguishes all state, county, city, and school board real property tax liens filed subsequent to the acts giving rise to forfeiture because the United States obtained title to the real property at the moment of the illegal acts); Brief for the Federal Home Loan Mortgage Corporation at 21, *92 Buena Vista* (No. 91-781) (setting forth the view that, without an innocent owner defense to civil forfeiture, commercial entities which act without any knowledge of or consent to a wrongdoing will bear the burden of debtors' illegal activities).

8. *92 Buena Vista*, 113 S. Ct. at 1132 (plurality opinion).

9. See *id.* at 1134 (plurality opinion) (discussing early statutes which authorize the seizure and forfeiture of ships involved in customs offenses and their cargoes as well as other statutes which authorize the seizure of distilleries and additional property used to defraud the United States of tax revenues from the sale of alcoholic beverages). For examples of federal statutes authorizing the forfeiture of property used in several illegal activities, see 8 U.S.C. § 1324(b) (1988) (conveyances harboring illegal aliens); 15 U.S.C. § 1265(b) (1988) (misbranded or hazardous substances sold via interstate commerce); 18 U.S.C. § 492 (1988) (counterfeiting paraphernalia); *id.* § 2513 (1988) (wire, oral, or electronic communication interception devices used for illegal wiretapping); 19 U.S.C. § 1305(b) (1988) (property used for immoral purposes); *id.* § 1497(a)(1) (1988) (articles not properly declared at customs); *id.* § 1588 (1988) (merchandise shipped in violation of customs laws); *id.* § 1595(a)(1) (Supp. 1990) (merchandise for which customs duties are unpaid); 21 U.S.C. § 334(a) (1988) (adulterated food, drugs, or cosmetics); 22 U.S.C. § 401(a) (1988) (war materials which were illegally exported); 26 U.S.C. §§ 5607-5608 (1988) (spirits produced in violation of distilling laws); *id.* § 5661 (1988) (wine produced in violation of liquor laws); *id.* §§ 5671, 5673 (1988) (beer produced in violation of brewing laws); *id.* § 5683 (1988) (liquors produced in violation of distilling laws); *id.* § 5685(c) (1988) (explosives and firearms use to violate liquor laws); *id.* § 5763(a)-(d) (1988) (equipment connected with illegally produced tobacco); *id.* §§ 7302-7303 (1988) (property used in violation of internal revenue laws); 33 U.S.C. § 384 (1988) (vessels used for piracy); 49 U.S.C. Appx. § 782 (1988) (conveyances used to transport illegal drugs, paraphernalia and firearms).

10. See *infra* notes 40-41 and accompanying text (explaining how equipment used for illegal distilling and vessels used for piracy were the defendants in a forfeiture action).

owner's guilt or innocence was irrelevant.¹¹ These statutes, therefore, did not include provisions for an owner to use innocence as a defense to the forfeiture action.¹² For instance, a shipowner whose ship was stolen and used for piracy or a car dealership which retained a security interest in a car used by the new owner for bootlegging, lost their property interests to the United States despite their innocence.¹³

In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act,¹⁴ which, like previous federal forfeiture statutes, authorized the seizure of only contraband and property used in the illegal drug trade.¹⁵ From its inception, section 881 was intended to deter drug trafficking by greatly reducing the profits involved.¹⁶ In 1978, Congress recognized that this goal was in jeopardy.¹⁷ In order to increase the operation of civil forfeiture, Congress expanded the forfeiture provisions beyond equipment, vehicles, and narcotics to include proceeds traceable to an exchange of controlled substances, such as the house purchased by Ms. Goodwin.¹⁸

Civil forfeiture under section 881, however, often operated to the detriment of innocent third parties whose property was used in, or derived

11. See *infra* notes 40-43 and accompanying text (discussing early federal piracy and revenue statutes which authorized the forfeiture of property used in violation of these statutes even if the owner did not know of the property's illegal use).

12. See *92 Buena Vista*, 113 S. Ct. at 1134 (discussing how early customs laws, piracy laws, and revenue laws contained no innocent owner defense).

13. See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827) (upholding the forfeiture of the ship, since no personal conviction of the owner is necessary to enforce an *in rem* forfeiture); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 513 (1921) (affirming the forfeiture of a taxicab against an innocent lienholder by noting that it is the illegal use of the automobile which is the material issue in a forfeiture).

14. 21 U.S.C. §§ 881-971 (1988).

15. *Id.* § 881(a)(1)-(4)(A)-(B) (1988) (originally enacted 1970); see *id.* (authorizing the forfeiture of all controlled substances, all raw materials used to manufacture controlled substances, and all containers and conveyances used to transport controlled substances); see also *92 Buena Vista*, 113 S. Ct. at 1133 (plurality opinion) (discussing how the original version of § 881 authorized the forfeiture only of illegal substances and the instruments by which they were manufactured and distributed).

16. 124 CONG. REC. 23,056 (1978) (remarks of Senator Culver).

17. See 124 CONG. REC. 23,055 (1978) (remarks of Senator Nunn) (asserting that, in the fight against drugs, the United States was "losing the battles as well as the war").

18. 21 U.S.C. § 881(a)(6) (1988) (originally enacted 1978); see *id.* (stating that 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 are subject to forfeiture to the United States, as are all proceeds traceable to such an exchange and all moneys, negotiable instruments, and securities used or intended to be used in drug dealings); see also *In re Metmor Fin., Inc.*, 819 F.2d 446, 447 (4th Cir. 1987) (considering a small horse ranch purchased with money traceable to illegal activity to be proceeds); *United States v. 1980 Red Ferrari*, 827 F.2d 477, 478 (9th Cir. 1987) (finding a vehicle purchased with money traceable to illegal activity to be proceeds); *United States v. \$33,000 United States Currency*, 640 F. Supp. 898, 900 (D.Md. 1986) (holding that cash received from the sale of an Arabian horse, valuable coins, and stock were proceeds because the horse and other items were purchased with money traceable to illegal activity).

from, a drug transaction.¹⁹ Thus, concurrent with providing the government with the power to seize drug proceeds, Congress included protection for innocent owners.²⁰ Congress, nevertheless, failed to include a clear definition of "innocent owner" within section 881.²¹ Because of this uncertainty, confusion developed in the federal courts as to whether innocent owners in section 881 were limited to bona fide purchasers for value²² or included innocent donees of drug proceeds.²³

In another attempt to provide stronger mechanisms with which to attack the drug trade, Congress amended section 881 again in 1984, so that the United States' interest in property vested as of the date the illegal act occurred.²⁴ It was this amendment which created the problem faced by Ms. Goodwin because a literal reading of the statute indicated that the United States' ownership interest in Ms. Goodwin's \$240,000 vested *upon the commission* of her boyfriend's drug transactions.²⁵ Thus, no one who

19. Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1256-57 (1989). Congress provided innocent owner protection only for common carriers and conveyances which had been obtained unlawfully. 21 U.S.C. § 881(a)(4)(A)-(B) (1988); *see id.* (providing an innocent owner defense for innocent common carriers and for owners whose property was illegally taken and used for drug dealing, but failing to include innocent owner protection for owners of property that was legally borrowed or lent, then subsequently involved in illegal activity); *see also* United States v. One 1982 Datsun 200SX, 627 F. Supp. 62, 63 (W.D. Pa. 1985) (disallowing an innocent owner defense where an innocent mother lent her car to her son, who subsequently used the car for drug dealing); United States v. One 1978 Chrysler Le Baron Station Wagon, 531 F. Supp. 32, 34 (E.D.N.Y. 1981) (determining that the innocent corporate owner of a laundry delivery vehicle could not establish innocence, since the employee who used the car for drug dealing had possession of the car lawfully).

20. *See* 21 U.S.C. § 881(a)(6) (1988) (originally enacted 1978) (stating that proceeds traceable to an exchange for controlled substances are not subject to forfeiture if the owner of the property did not know that the source of property was illegal activity or did not consent to the use of the proceeds for illegal activity). In 1988, Congress also provided innocent owner protection for owners whose property was used for drug dealing, as long as the owner did not know of or consent to the illegal use or as long as the owner did not remain purposely ignorant of the illegal use. *Id.* § 881(a)(1)-(4)(C) (1988); *see id.* (stating that no conveyance will be forfeited because of any act or omission which the owner can establish occurred without the owner's knowledge or consent, or occurred without the owner remaining willfully blind to the illegal act or omission).

21. *See infra* notes 162-174 and accompanying text (discussing the United States Supreme Court's treatment of this issue in United States v. 92 Buena Vista, 113 S. Ct. 1126 (1993)).

22. *See* One Single Family Residence Located at 2901 S.W. 118th Court, 683 F.Supp. 783, 788 (S.D. Fla. 1988) (holding that the innocent owner exception to forfeiture under § 881(a)(6) protects bona fide purchasers for value).

23. *Compare infra* note 148 and accompanying text (reviewing this issue in United States v. 92 Buena Vista, 738 F. Supp. 854 (D.N.J. 1990)) with *infra* notes 151-154 and accompanying text (reviewing this issue in United States v. 92 Buena Vista, 937 F.2d 98, 100 (3d Cir. 1991)).

24. 21 U.S.C. § 881(h) (1988) (originally enacted 1984); *see supra* note 5 and accompanying text (providing the text of § 881(h)).

25. *See supra* notes 176-178 and accompanying text (providing the United States' argument in United States v. 92 Buena Vista, 113 S. Ct. 1126 (1993) that Respondent never became the owner of the house that she purchased with the cash she received from her boyfriend, since the cash became the property of the United States when the drug deal occurred).

obtained an interest in the money (or property purchased with the money) *after* his illegal acts could obtain an interest in the money or property, since, per section 881, the money or property already belonged to the United States.²⁶ This interpretation of the 1978 and 1984 amendments to section 881 affected any non-culpable party, including third party lenders and lienholders who engaged in legitimate commercial dealings involving assets traceable to wrongdoers, since these lienholders risked securing loans with property which could be subject to forfeiture.²⁷

In *United States v. 92 Buena Vista*,²⁸ a plurality rejected this literal reading.²⁹ The plurality held that owners who obtain an interest in drug dealing proceeds *after* the illegal acts occur can invoke the innocent owner defense.³⁰ As a result, the Court found that the doctrine of relation back vests ownership of the property in the United States only *after* the owner had the opportunity to raise the defense, but was unable to establish innocence.³¹

This Note examines the innocent owner defense to civil forfeiture up to, and after the United States Supreme Court's decision in *92 Buena Vista*.³² Part I examines the history of the use of forfeiture in the United States and examines the development of the innocent owner defense.³³

26. See *infra* notes 135-137 and accompanying text (describing how, under the amendment, the United States technically obtained title *prior* to the time the innocent owner received the proceeds from the illegal activity).

27. See *infra* notes 233-260 and accompanying text (discussing who qualifies as an innocent owner under § 881(a)(6)).

28. 113 S. Ct. 1126 (1993).

29. *Id.* at 1136-37 (plurality opinion); see *infra* notes 176-192 and accompanying text (discussing the plurality's view that the relation back doctrine embodied in § 881(h) is not triggered until the owner of the property interest has the chance to prove his or her innocence).

30. *92 Buena Vista*, 113 S. Ct. at 1137-38 (plurality opinion); see *infra* notes 176-192 and accompanying text (presenting the United States Supreme Court's discussion of whether the relation back doctrine in § 881(h) prevents an innocent owner who obtained a property interest in property subject to forfeiture after the illegal events occurred from invoking the innocent owner defense in § 881(a)(6)).

31. *92 Buena Vista*, 113 S. Ct. at 1136-37 (1993) (plurality opinion). This case also determined that the protection afforded innocent owners under § 881(a)(6) was not limited to bona fide purchasers, and so, this section could be invoked by donees of drug proceeds. *Id.* at 1134.

32. Civil forfeiture is the primary focus of this Note. The criminal forfeiture provision of the Comprehensive Drug Abuse Prevention and Control Act is discussed only as an aid to interpreting the civil forfeiture section of the Act. See *infra* note 82 and accompanying text (providing the text of 21 U.S.C. § 853(a) and (c), the criminal drug forfeiture provision); see generally Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217 (1992) (contrasting innocent owner protections against federal criminal and civil forfeiture for real property owners); Goldsmith & Linderman, *supra* note 19, at 1282-92 (reviewing protections for innocent owners under 21 U.S.C. § 853); David J. Fried, *Criminal Law: Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328 (1988) (discussing whether the proceeds of criminal activity are the proper object of criminal forfeiture).

33. See *infra* notes 36-138 and accompanying text.

Part II reviews the factual and procedural history behind *92 Buena Vista*, as well as the plurality, concurring, and dissenting opinions.³⁴ Finally, Part III discusses the potential legal ramifications of *92 Buena Vista*, emphasizing the effect on innocent third party creditors.³⁵

I. LEGAL BACKGROUND

Civil forfeiture traces its roots to the historical notion of the "deodand."³⁶ Deodand derives from the Latin *Deo Dandum* meaning "to be given to God."³⁷ In medieval England, the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a "deodand."³⁸ While the deodand never became a part of the common law in the United States,³⁹ the First Congress enacted legislation that authorized the forfeiture of ships and cargoes involved in customs offenses and acts of piracy.⁴⁰ Congress also enacted statutes which allowed the seizure and forfeiture of distilleries and equipment used to defraud the United States of tax revenues from the sale of alcoholic beverages.⁴¹ Under these early civil forfeiture statutes, questions arose as to whether an owner could raise innocence as a defense against forfeiture. In situations where property was used for illegal activity, early federal forfeiture statutes usually required the government to proceed against the property *in rem*.⁴² Since the property was itself the defendant,

34. See *infra* notes 139-223 and accompanying text.

35. See *infra* notes 224-300 and accompanying text.

36. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974).

37. *Id.* The origins of the deodand go back to Biblical and pre-Judeo-Christian practices, which reflected the idea that the instrument of death was the accused and that religious atonement was required. *Id.* at 681.

38. *Id.* at 680-81; see *id.* (discussing how the value of the instrument was forfeited to the King, in the belief that the King would provide the money for masses to be said for the decedent's soul or for charitable use); *id.* at 682 (mandating the forfeiture of the chattels of a convicted felon); *id.* (discussing how the basis for these forfeitures was that a breach of criminal law was considered such an offense to the King's peace that denial of the right to own property was justified).

39. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-683 (1974).

40. See Act of July 31, 1789, ch. 5, 1 Stat. 29, 39, 47, *repealed by* U.S. REV. STAT. 2d (1878); Act of August 4, 1790, ch. 35, 1 Stat. 145, 157-58, 161, 163-64, *repealed by* U.S. REV. STAT. 2d (1878) (authorizing the seizure and forfeiture of ships involved in customs offenses and their cargoes); see also Act of March 3, 1819, ch. 75, 3 Stat. 510, 513, *codified as* 33 U.S.C. § 384 (1988) (authorizing the seizure and forfeiture of ships used to commit acts of piratical aggression against the United States).

41. See Act of February 8, 1875, ch. 36, 18 Stat. 307, 310, *repealed by* U.S. REV. STAT. 2d §§ 3258, 3305 (1878), *repealed by* I.R.C. (1939) (authorizing the forfeiture of personal and real property for operating an unregistered still and for the failure to keep records of distilling operations as required by law).

42. See Act of March 3, 1819, ch. 75, 3 Stat. 510, 513, *codified as* 33 U.S.C. § 384 (1988) (authorizing the seizure and forfeiture of ships used to commit acts of piratical aggression against the United States without requiring the personal conviction of the owner of the vessel); Act of July 20, 1868, ch. 186, 15 Stat. 125, 133,

the property's owner was not a party to the action and so, owners could not raise a defense of innocence.⁴³ An issue also arose as to whether the United States' interest vested automatically as of the commission of the illegal act or whether the government had to take some legal action to cause its interest to vest. The United States Supreme Court considered this question in *United States v. Grundy*.⁴⁴

A. The United States Must Receive a Judgment of Forfeiture Before the Doctrine of Relation Back Vests Title to Property Subject to Forfeiture in the Government

In *Grundy*, the Court explained that in all forfeitures occurring at common law, nothing vests in the government until the United States takes some legal step to assert its right to the property, after which the doctrine of relation back carries the title back to the date of the illegal act.⁴⁵ Under a statutory forfeiture, however, the Court explained that whether the United States' interest in the property vested immediately or upon performance of some act by the government was entirely at the discretion of Congress.⁴⁶ Although the *Grundy* Court made a distinction between

repealed by U.S. REV. STAT. 2d § 3305 (1878), repealed by I.R.C. (1939) (allowing for the seizure of personal and real property used for distilling if the distiller fails to keep the records required by law without regard to the property owner's culpability); see also *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (noting that forfeiture actions are brought *in rem* or *in personam*, but the actions are not dependent upon each other for the government to obtain a valid forfeiture).

43. See *Dobbin's Distillery v. United States*, 96 U.S. 395, 403-04 (1878) (providing that an innocent landlord who leased his property for use as a distillery could not invoke his innocence to prevent forfeiture of the property due to his tenant's acts to defraud the United States of revenue, since the property, not the landlord was on trial); *United States v. The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233-34 (1844) (finding that an innocent owner of a ship used for piracy could not use innocence as a defense to the confiscation of the vessel by the government, since the vessel which committed the aggression is treated as the offender, without regard to the personal misconduct of the owner).

44. *United States v. Grundy*, 7 U.S. (3 Cranch) 337 (1806). In *Grundy*, the United States government seized a ship from its current owner due to the fraudulent acts of a prior owner, claiming that title to the ship vested in the United States when the prior owner lied on the ship's registration. *Id.* at 338-39.

45. *Id.* at 350-351; see *United States v. Stowell*, 133 U.S. 1, 16-17 (1890) (explaining the doctrine of relation back). The forfeiture takes effect immediately when the wrongdoer commits the illegal act, thus immediately vesting the right to the property in the United States. *Id.* The government's title, however, is not perfected until the government obtains a judgment of forfeiture, at which time the judgment relates back to the time of the illegal act. *Id.*

46. *Grundy*, 7 U.S. (3 Cranch) at 351; see Registration Act of 1792, ch. 1, 1 Stat. 287, 289 (repealed 1980) (authorizing forfeiture of a vessel or its value if false information is given when the vessel is registered with the United States).

The forfeiture statute in *Grundy* provided the United States with the choice of proceeding *in rem* against a ship used in violation of federal maritime registration law or *in personam* against the wrongdoer for the value of the ship. *Grundy*, 7 U.S. (3 Cranch) at 351. The Court interpreted the statute to mean that only after the government made its election did the United States obtain an ownership interest in the wrongdoer's property.

common law and statutory forfeitures, the Court later applied the common law doctrine described in *Grundy* to the early forfeiture statutes.⁴⁷ This application established the general rule that the government must obtain a judgment of forfeiture before it obtains any interest in the forfeitable property.⁴⁸

The requirement that the government obtain a judgment of forfeiture before its interest vests created problems for innocent owners who obtained an interest in property after the illegal acts occurred, but before the government obtained its judgment. Even if owners who obtained a property interest during that time period did not know that the property was previously used for illegal activity, their interests could be extinguished when a subsequent judgment of forfeiture for the United States related back to the date of the illegal activity.⁴⁹ These innocent owners argued that they could obtain good title to the property as bona fide purchasers, since the government's interest had not yet vested.⁵⁰ In the late nineteenth century, the Court addressed this issue in *United States v. One Hundred Barrels of Distilled Spirits*.⁵¹

Id. at 353; see *Eggleston v. Colorado*, 873 F.2d 242, 246 (10th Cir. 1989) (explaining that application of the relation back doctrine to the statute in *Grundy* was permissive, not mandatory, since the statute gave the government the option of either an *in rem* or an *in personam* proceeding).

47. See *infra* notes 52-91 and accompanying text (describing how the Supreme Court applied the doctrine of relation back in *Stowell* and *United States v. One Hundred Barrels of Distilled Spirits*, 81 U.S. (14 Wall.) 44 (1872) (hereinafter and universally known as *Henderson's Distilled Spirits*) to federal statutes involving the forfeiture of property used in illegal distilling).

48. See *Stowell*, 133 U.S. at 16-17 (holding that, although forfeiture takes effect immediately when the wrongdoer commits the illegal act, and vests the right to the property immediately in the United States, the government's title is not perfected until judicial condemnation); *Motlow v. State ex rel. Koeln*, 295 U.S. 97, 99 (1935) (holding that, where the government does not obtain a judgment, title does not vest in the United States); see also Case Comment, *In re Metmor Financial, Inc.: The Better Approach to Post-Seizure Interest Under the Comprehensive Drug Abuse Prevention and Control Act*, 65 NOTRE DAME L. REV. 853, 862 (1990) (explaining that actual judicial condemnation of the property is only used to formalize the transfer).

49. See *infra* notes 78-82 and accompanying text (discussing how, in *Stowell*, the purchase by a bona fide purchaser of malt, hops, horses, and a harness after the chattels became subject to forfeiture to the United States could not defeat the government's right to seize the property); *infra* notes 52-57 and accompanying text (setting forth, in *Henderson's Distilled Spirits*, how a bona fide purchaser could obtain no interest in distilled spirits after they were moved from a warehouse with the intent to defraud the United States, since the spirits were forfeited to the United States as of the moment of the illegal act).

50. See *infra* notes 73-74 and accompanying text (discussing the argument presented in *Stowell* that bona fide purchasers of distilling equipment should not lose their property to forfeiture, since they bought the equipment with no knowledge that it previously had been used for illegal distilling); *infra* note 54 and accompanying text (setting forth the assertion in *Henderson's Distilled Spirits* that a bona fide purchaser of distilled spirits subject to forfeiture could avoid forfeiture since, at the time of the purchase, he had no knowledge of the spirits' illegal character).

51. 81 U.S. (14 Wall.) 44 (1872).

B. The Common Law Doctrine of Relation Back Extinguishes Property Interests of Bona Fide Purchasers Who Obtain a Property Interest During the Time Period Between the Illegal Acts and the United States' Judgment of Forfeiture

In *Henderson's Distilled Spirits*, the government seized spirits from a New Orleans warehouse.⁵² The Government claimed that the distiller moved the spirits to the warehouse with the intent to defraud the United States of a distiller's tax.⁵³ The owner, who purchased the spirits from the distiller, claimed to be an innocent owner because he had bought the spirits without knowledge that the spirits had already become subject to forfeiture.⁵⁴

The Court invoked the relation back doctrine from *Grundy*, stating that once the government obtained a judgment of forfeiture, the United States' interest in the property related back to the time of the commission of the wrongful act, avoiding any sales and alienations of property which occurred after the illegal act and before the United States' judgment, even to purchasers in good faith.⁵⁵ Subsequent payment of the taxes was no defense, since forfeiture divested the owner of all interest in the goods seized and vested complete ownership in the United States as of the date the distiller moved the spirits to the warehouse with the intent to defraud the government.⁵⁶ The Court concluded that the distiller did not have the power to defeat the forfeiture by the subsequent transfer of the spirits, even to a bona fide purchaser for value who knew nothing of the tax obligations.⁵⁷

Nineteen years after the Supreme Court's decision in *Henderson's Distilled Spirits*, the Court again examined the rights of innocent owners when it addressed a case involving bona fide purchasers who purchased

52. *Id.* at 52.

53. *Id.*; see Act of July 13, 1866, ch. 184, 14 Stat. 93, 157 repealed by U.S. REV. STAT. 2d (1878) (stating that a tax of \$2.00 per gallon must be paid by the distiller, owner, or any person having possession of distilled spirits); *id.* at 151, repealed by I.R.C. (1939) (stating that all taxable goods or commodities which are concealed with the intent to defraud the United States are subject to forfeiture).

54. *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) at 55. The owner argued that he paid the tax when he purchased the spirits from the distiller. *Id.*

55. *Id.* at 56-57; see *United States v. Stowell*, 133 U.S. 1, 16-17 (1890) (holding that distilling equipment was subject to forfeiture even though it was owned by an innocent bona fide purchaser); *Thacher's Distilled Spirits*, 103 U.S. 679, 682 (1880) (holding that after receiving a judgment of forfeiture against distilled spirits, the government may pursue attachment regardless of who owns the property); *supra* notes 73-89 and accompanying text (discussing the effect of the relation back doctrine on innocent owners in *Stowell*).

56. *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) at 56-57.

57. *Id.* at 57.

property subject to forfeiture both before and after the illegal acts occurred. In *United States v. Stowell*,⁵⁸ Thomas Dixon owned a brewery.⁵⁹ In June 1883, Dixon gave Joseph Stowell a mortgage, secured by the brewery's real property, which was duly recorded.⁶⁰ The next year, Dixon sold distilling equipment to Stowell.⁶¹ Dixon also borrowed more money from Stowell, secured by malt and hops.⁶² At the same time, Dixon borrowed money from Thomas Bevington, secured by horses, wagons, and a harness.⁶³ Both Stowell and Bevington left these chattels in Dixon's possession.⁶⁴ In October 1884, Dixon defaulted on his mortgage.⁶⁵ Stowell attempted to foreclose, but instead purchased the property for \$8,000, accepting a quitclaim deed for the premises.⁶⁶

Meanwhile, William Stone and Eli Bellows, with Dixon's consent, operated a distillery on Dixon's land.⁶⁷ Unbeknownst to Dixon, however, Stone and Bellows operated the distillery in violation of the Revenue Act of 1875.⁶⁸ The United States seized Stowell's real property, as well as all the personal property on the premises.⁶⁹ Neither Stowell nor Bevington knew the still had been set up on the premises until the seizure, and both

58. 133 U.S. 1 (1890).

59. *Id.* at 3.

60. *Id.* at 4; see JESSE DUKEMINIER, PROPERTY, 589 n.10 (2d ed. 1988) (describing how under the traditional "title theory" of mortgages, the mortgagee obtains legal title to the land and the mortgagor retains only the equity of redemption); *id.* at 590 (discussing how the mortgagor's equity of redemption consists of the right to pay the lender after the date the payment was due).

61. *Stowell*, 133 U.S. at 4. In June 1884, Dixon borrowed money from Stowell on a note secured by distilling equipment. *Id.* In November 1884, Dixon defaulted and Stowell foreclosed on the note, thus taking possession of the distilling equipment. *Id.*

62. *Id.* In November 1884, Dixon borrowed \$100 from Stowell on an unrecorded note secured by malt and hops. *Id.* Dixon never paid the note, so Stowell foreclosed. *Id.*

63. *Id.* Dixon borrowed \$700 from Bevington on a recorded note. *Id.* Dixon never paid the note, so Bevington foreclosed. *Id.*

64. *Id.* at 4-5.

65. *Id.* at 4.

66. *Stowell*, 133 U.S. at 4.

67. *Id.* at 3. Stone and Bellows began distilling operations in September 1884. *Id.*

68. *Id.*; see Act of February 8, 1875, ch. 36, 18 Stat. 307, 310, repealed by U.S. REV. STAT. 2d §§ 3258, 3305 (1878), repealed by I.R.C. (1939) (authorizing the forfeiture of personal and real property for operating an unregistered still and for the failure to keep records of distilling operations as required by law). This statute provides that a person who operates a distillery with the intent to defraud the United States of tax revenues must be fined and imprisoned. *Id.* The statute also provides that all distilled spirits, wines, or personal property owned by the illegal distiller must be forfeited to the United States. *Id.* All distilled spirits, wines, or personal property found in the distillery, on the premises, or in any building, room, yard, or enclosure connected therewith also must be forfeited to the United States, as well as any interest in the land on which the distillery is situated, and any interest in the distillery owned by anyone who knows of the distillery's illegal use. *Id.* Stone and Bellows failed to register the still, post a bond, and pay the taxes required by law. *Stowell*, 133 U.S. at 3.

69. *Stowell*, 133 U.S. at 2-3. The United States seized the property in late November 1884. *Id.* at 3.

filed claims for their respective property.⁷⁰ The trial court granted them relief and the court of appeals affirmed.⁷¹ The United States appealed to the United States Supreme Court.⁷²

Stowell argued that the statute did not apply to either his distilling equipment or his mortgage interest in Dixon's real property, since he did not participate in or have any knowledge of the illegal distilling.⁷³ Stowell asserted that the Court should not construe the statute to authorize the seizure of the property of innocent owners, since the purpose of the statute was to enforce the payment of taxes on all manufactured liquor and to punish persons attempting to defraud the government of the tax.⁷⁴ The Court rejected Stowell's defense of innocence as to Stowell's distilling equipment, however, reasoning that the statute's language expressly stated that all property found in the distillery or in any building constituting a part of the premises was subject to forfeiture.⁷⁵ Although the statute limited the forfeiture to personal property on the brewery premises, nothing in the statute limited the forfeiture to property owned by one with knowledge of the illegal distilling.⁷⁶ Therefore, the Court determined that since Stowell's equipment was found at the distillery while the illegal distilling took place, the equipment was forfeited.⁷⁷

The Court next stated that an even clearer case existed for the United States regarding Stowell's claim for the malt and hops and for Bevington's claim for the horses, wagons, and harness.⁷⁸ As in *Henderson's Distilled Spirits*, under the doctrine of relation back, title to all the property found in the distillery vested in the United States at the time that Stone and

70. *Id.* at 3-4.

71. *Id.* at 5.

72. *Id.*

73. *See Stowell*, 133 U.S. at 6-11 (asserting that even though the statute did not authorize the use of innocence as a defense, since forfeiture is a punishment, no act of a third party, unknown to the owner, can deprive the owner of property); *id.* at 11 (arguing simply that no question exists that Stowell's interest in the real property is subject to forfeiture); *see also supra* note 68 and accompanying text (providing the full text of the Act of February 8, 1875, ch. 36, 18 Stat. 307, 310, *repealed by* U.S. REV. STAT. 2d §§ 3258, 3305 (1878), *repealed by* I.R.C. (1939), which makes no mention of an exception for innocent owners).

74. *See Stowell*, 133 U.S. at 10 (arguing that Congress would never attempt to rob innocent citizens of their property when they had committed no crimes).

75. *Id.* at 13-14; *see id.* at 14-15 (setting forth the Court's description of the Act of February 8, 1875 which provides for the forfeiture of all personal property permitted by the owner to remain on the premises of an illegal distillery, even if the owner has no knowledge of the unlawful acts).

76. *Id.* at 18; *see id.* (noting that persons who entrust their personal property to the custody and control of a third party at the third party's place of business run the risk of the property being subject to forfeiture if the third party violates federal revenue laws).

77. *Stowell*, 133 U.S. at 18.

78. *Id.*; *id.* at 20.

Bellows operated the illegal distillery.⁷⁹ Since Stowell's and Bevington's loans to Dixon did not occur until after Stone and Bellows began their illegal distilling operations,⁸⁰ Dixon had no property interest to convey when he secured his loans to Stowell and Bevington with the distilling equipment, horses, wagons, and harness.⁸¹ Since Stowell and Bellows received no property interest when they loaned money to Dixon, these chattels were also forfeited.⁸²

C. The Development of Protection for Innocent Third Parties: The United States Takes Forfeited Property Subject to Mortgages Recorded Prior to Illegal Acts

Although the *Stowell* Court held against Stowell with respect to his distilling equipment, the Court considered Stowell's innocence when it examined the effect of the seizure on Stowell's mortgage, which he obtained against the property more than a year before Stone and Bellows began their illegal distilling operations.⁸³ The Government argued that, once the illegal distilling began, Dixon's interest vested in the United States, so that Dixon had nothing to transfer when he attempted to sell the land to Stowell with a quitclaim deed.⁸⁴ The Government also argued that

79. *Id.* at 19; see Case Comment, *In re Metmor Financial, Inc.: the Better Approach to Post-Seizure Interest Under the Comprehensive Drug Abuse Prevention and Control Act*, 65 NOTRE DAME L. REV. 853, 862 (1990) (discussing how *Stowell* stands for the proposition that when property is subject to forfeiture due to its involvement in an illegal act, forfeiture takes place immediately upon the commission of the act); see also *supra* notes 51-57 and accompanying text (reviewing the doctrine of relation back as described in *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44 (1872)).

80. *Stowell*, 133 U.S. at 19; see *supra* notes 62, 67 and accompanying text (describing how Stone and Bellows began their illegal distilling operations in September 1884, while Stowell and Bevington did not receive Dixon's notes until November 1884).

81. *Stowell*, 133 U.S. at 19; see Case Comment, *In re Metmor Financial, Inc.: The Better Approach to Post-Seizure Interest Under the Comprehensive Drug Abuse Prevention and Control Act*, 65 NOTRE DAME L. REV. 853, 862 (1990) (giving the example of how an owner who uses his or her vehicle to transport an illegal substance, and then attempts to sell the vehicle to a third party, cannot pass a valid interest to the third party because title to the vehicle vested in the government at the time of the illegal activity).

82. *Stowell*, 133 U.S. at 19; *id.* at 20; see *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 627-30 (1989) (relying on *Stowell* to hold that a drug dealer had no federal constitutional right under the criminal statute to use drug proceeds to pay for his defense, since title to the proceeds vested in the United States at the time of the illegal transaction); see also 21 U.S.C. § 853(a) (1988) (stating that any person convicted of a violation of § 853 must forfeit to the United States any property used to violate § 853 or any proceeds received from the criminal act); *id.* § 853(c) (1993) (stating that title to property subject to forfeiture under § 853(a) vests in the United States when the criminal act occurred, unless the forfeitable property is subsequently transferred to a bona fide purchaser for value who, at the time of purchase, reasonably did not believe that the property was subject to forfeiture).

83. *Stowell*, 133 U.S. at 19-20.

84. *Id.* at 19.

the statute extinguished Stowell's mortgage, since the statute authorized the forfeiture of any interest in real property on which an illegal still is located, whether or not the mortgagee obtained its interest before or after the commencement of the illegal activities.⁸⁵

The Court agreed that the operation of the illegal still triggered the doctrine of relation back, so that the sale was voided.⁸⁶ The Court rejected the Government's contention that Stowell's mortgage was forfeited, however, instead concluding that Congress intended that the forfeiture of *real property* should extend only to the interests of persons who participated in, or consented to, the distilling operations.⁸⁷ Since Dixon gave Stone and Bellows his consent to operate the still, the Court found that Dixon's equitable interest was forfeited to the United States when the illegal acts began.⁸⁸ Nevertheless, since the still was operated without Stowell's knowledge or consent, the Court held that the United States took the property subject to Stowell's mortgage.⁸⁹

The *Stowell* Court focused its analysis on the language of the statute to determine whether an owner could use innocence as a defense to civil forfeiture.⁹⁰ Until the late 1970's, the United States Supreme Court

85. *Id.*; see Act of February 8, 1875, ch. 36, 18 Stat. 307, 310, *repealed by* U.S. REV. STAT. 2d § 3305 (1878), *repealed by* I.R.C. (1939) (authorizing the forfeiture of any interest in real property used for distilling without regard to the property interest holder's culpability); see also *supra* note 68 and accompanying text (setting forth additional text of the Act of February 8, 1875).

86. *Stowell*, 133 U.S. at 19; see *id.* (asserting that since the quitclaim deed was void or voidable, Dixon's mortgaged estate was left exactly as it was before the deed was given to Stowell).

87. *Id.* at 16. The Court relied on an interpretation of a similar forfeiture statute which provided protection for mortgagees from forfeiture if they were unaware of the presence of a distillery on land in which they had legal title. *Id.* at 15; see U.S. REV. STAT. 2d § 3262 (1878), *repealed by* I.R.C. (1939) (providing that real property on which an illegal still is located is subject to forfeiture if the distiller operates the still without proper registration). In order to obtain a bond to operate a still legally, the statute requires any distiller who is not the owner of the real property to obtain the written consent of all persons with an interest in the property, including mortgagees and lienholders. *Id.* If the distiller operated the still without the mortgagees' consent, the Court determined that Congress intended that the property interests of these innocent mortgagees were not forfeited under the statute. *Stowell*, 133 U.S. at 15; *id.* at 14 (asserting that Congress clearly indicated that the forfeiture of land and buildings should only reach the interests of the distiller or of other persons who consented to the operation of the distillery).

88. *Stowell*, 133 U.S. at 19.

89. *Id.* at 20. *But see* *United States v. Real Property Located at 12921 Treeline Ave.*, 837 F. Supp. 1168, 1172 (M.D. Fla. 1993) (holding that, under the federal civil forfeiture statute, the relation back doctrine vested title to drug proceeds in the United States as of the date of the drug dealing, avoiding local tax liens which attached to property subsequently purchased with the proceeds).

90. See *Stowell*, 133 U.S. at 16 (concluding that the most reasonable construction of the statutes before the Court was that Congress intended to forfeit personal property used for illegal distilling without regard to the owner's culpability, but intended only to forfeit real property owned by persons who participate in the distilling or consent to the use of their property for illegal purposes); Act of February 8, 1875, ch. 36, 18 Stat. 307, 310, *repealed by* U.S. REV. STAT. 2d §§ 3258, 3305 (1878), *repealed by* I.R.C. (1939); see also *supra* note 68 and accompanying text (providing text of the Act of February 8, 1875). *But see supra* notes 86-89 and accompanying

consistently applied the rule from *Stowell* and held that, unless the statute specifically provided for an innocent owner defense, an owner's innocence was irrelevant to an *in rem* forfeiture proceeding.⁹¹ The Court did not provide innocent owners with any additional guidance until one hundred years later in its decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁹² one of the Court's leading decisions regarding the rights of innocent owners in federal civil forfeiture actions.

D. An Innocent Owner's Property Is Subject to Forfeiture Even Though Used Illegally by a Third Party: Calero-Toledo v. Pearson Yacht Leasing Co.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Court addressed the Constitutional validity of forfeiture of property owned by persons who did not know that a third party used the property for illegal activities.⁹³ The Court also attempted to define exactly what constituted innocence in certain civil forfeiture scenarios.⁹⁴ In *Calero-Toledo*, Pearson Yacht Leasing Company rented a pleasure yacht to two Puerto Rican residents.⁹⁵ Authorities discovered marijuana on board the yacht and charged one of the lessees with a violation of the Controlled Substances Act of Puerto

text (discussing how the Supreme Court found, under a statute requiring the forfeiture of real property, that Congress intended that mortgagees who have no knowledge of illegal activity occurring on real property in which they have an interest can invoke innocence as a defense).

91. See *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510-13 (1921) (holding that the United States did not obtain title to an automobile illegally used to transport liquor subject to the interest of an innocent lienholder, since the statute did not provide for an innocent owner exception); Act of July 13, 1866, ch. 184, 14 Stat. 98, 156, *repealed by* REV. STAT. 2d § 3450, *repealed by* I.R.C. (1939) (authorizing the forfeiture of distilled spirits produced with the intent to defraud the United States of tax revenues); see also *J.W. Goldsmith, Jr.-Grant Co.*, 254 U.S. at 510-511 (holding that the federal tax fraud forfeiture statute which made no mention of an innocent owner defense did not deprive an innocent lienholder of his property in violation of the Fifth Amendment of the United States Constitution); *Van Oster v. Kansas*, 272 U.S. 465, 466-68 (1926) (holding that forfeiture of an automobile entrusted by an innocent lienholder to a driver who used a car in violation of federal revenue laws did not violate either the Fifth or Fourteenth Amendment).

92. 416 U.S. 663 (1974).

93. *Id.* at 663.

94. *Id.* at 689-90; see *infra* notes 111-114 and accompanying text (discussing the Court's suggestion that civil forfeiture of the property of owners whose property was used for illegal activity without the owner's consent or where the owner did everything reasonable to prevent the property's illegal use might violate the Due Process Clause of the Fifth Amendment); see also U.S. CONST. amend. V (setting forth that the United States may not deprive any person of life, liberty, or property, without due process of law).

95. *Calero-Toledo*, 416 U.S. at 665.

Rico.⁹⁶ The authorities seized the yacht without prior notice or a hearing to either the lessor or lessee.⁹⁷ Pearson Yacht first learned of the seizure when it tried to repossess the yacht from the lessees for their failure to pay rent.⁹⁸ Pearson Yacht then filed a suit seeking a declaration that it was denied due process of law under the United States Constitution, since the statute authorized seizure of the vessel without notice or an adversary hearing.⁹⁹ Pearson Yacht also claimed that the statute unconstitutionally deprived innocent parties of property without just compensation.¹⁰⁰ The district court found for Pearson Yacht and the authorities appealed.¹⁰¹

The United States Supreme Court reviewed several prior decisions dealing with statutes which involved forfeiture of the property of innocent owners.¹⁰² In each case, the Court held the statutes constitutional and rejected the owners' innocence as a defense.¹⁰³ The Court reaffirmed that property which was used in violation of the law was itself the offender.¹⁰⁴ The guilt or innocence of the owner was irrelevant.¹⁰⁵

Pearson Yacht argued that the purpose behind forfeiture statutes is to impose a penalty only upon those who were significantly involved in a criminal enterprise.¹⁰⁶ The Court disagreed, however, stating that Pearson

96. *Id.* at 665-68; see P.R. LAWS ANN. tit. 24, § 2512(a)(4) and (b) (1979) (stating that all conveyances which are used or are intended to be used, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of controlled substances, are subject to forfeiture to the Commonwealth of Puerto Rico). The authorities were the Superintendent of Police and the Chief of the Office of Transportation of the Commonwealth of Puerto Rico. *Calero-Toledo*, 416 U.S. at 668.

97. *Calero-Toledo*, 416 U.S. at 667.

98. *Id.* at 668.

99. *Id.* The unconstitutionality of the statutes was alleged under both the Fifth and Fourteenth Amendments of the United States Constitution. *Id.* at n.5; see U.S. CONST. amend. XIV, § 1 (providing that no State may deprive any person of their life, liberty or property without due process of law); *supra* note 94 and accompanying text (setting forth the text of the Fifth Amendment).

100. *Calero-Toledo*, 416 U.S. at 668; see U.S. CONST. amend. V (setting forth that the United States may not take private property for public use without just compensation).

101. *Calero-Toledo*, 416 U.S. at 669.

102. *Id.* at 680.

103. *Id.* at 683; see *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510-11 (1921) (holding that the federal tax fraud forfeiture statute did not deprive an innocent lienholder of his property in violation of the Fifth Amendment); *Van Oster v. Kansas*, 272 U.S. 465, 466-68 (1926) (holding that forfeiture of an automobile entrusted by an innocent lienholder to a driver who used the car in violation of federal revenue laws did not violate either the Fifth or Fourteenth Amendment).

104. *Calero-Toledo*, 416 U.S. at 684; see *supra* notes 42-43 and accompanying text (discussing how, in an *in rem* proceeding, the property to be forfeited is considered the offender).

105. *Calero-Toledo*, 416 U.S. at 684.

106. *Id.* at 688; see *United States v. United States Coin and Currency*, 401 U.S. 715, 721-22 (1971) (finding that, viewed as a whole, Congress intended that forfeiture statutes impose a penalty only upon those significantly involved in a criminal enterprise). In *United States Coin and Currency*, the defendant's cash was seized for his failure to pay taxes on his illegal bookmaking profits. *Id.* at 716; see 26 U.S.C. § 7302 (1988) (providing that any property to be used to violate the internal revenue laws will be forfeited to the United

Yacht's argument would prevail only in cases where courts have interpreted the particular forfeiture statute to apply only to wrongdoers.¹⁰⁷ Moreover, the Court found that the punitive and deterrent purposes behind forfeiture laws are sufficient to uphold the seizure of property of innocent owners against federal constitutional challenge.¹⁰⁸ The Court stated that innocent owners, by negligently transferring possession of their property to wrongdoers, were partly responsible for the forfeiture of their property, and so, were properly punished by forfeiture.¹⁰⁹ The Court held that the authorities' seizure of Pearson Yacht Leasing Company's yacht was constitutional.¹¹⁰

The Court in this case alluded to situations where an owner claiming innocence might raise a successful constitutional challenge against a statute

States). The defendant argued that the Fifth Amendment's privilege against self-incrimination allowed him to avoid filing tax returns on his illegal activities. *United States Coin and Currency*, 401 U.S. at 716-17. The Government argued that the forfeiture was not a criminal proceeding for Fifth Amendment privilege purposes, since the property could be forfeited without regard to the defendant's guilt or innocence. *Id.* at 718-19. The Court determined, however, that the particular forfeiture statute involved was to be applied only to persons significantly involved in criminal activity. *Id.* at 721-22. Therefore, the Court held that the defendant had the right to raise his Fifth Amendment privilege to establish his innocence. *Id.*

107. *Calero-Toledo*, 416 U.S. at 688. The Court found that *United States Coin and Currency* did not overrule prior decisions which allowed the forfeiture of property belonging to innocent parties under statutes which were not limited in application to people involved in criminal activities. *Id.*; see *supra* note 103 and accompanying text (discussing cases which rejected innocence as a defense to forfeiture).

108. *Calero-Toledo*, 416 U.S. at 686; see *id.* (discussing how such purposes included preventing further illicit use of the property and imposing an economic penalty on drug dealers to render the illegal behavior unprofitable).

109. *Id.*; see *id.* at 687-88 (stating that, if courts apply forfeiture statutes to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing the innocent owners to exercise greater care in transferring possession of their property).

110. *Id.* at 690. The Supreme Court confirmed that statutes which authorize the seizure of property used for illegal purposes without notice and a hearing until after seizure do not deny procedural due process if the situation is "extraordinary." *Id.* at 676-80 (discussing *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972)). The Court examined three factors which must be met to justify seizure without notice. *Id.* at 678. First, the seizure must be necessary to secure an important governmental or general public interest. *Id.* Second, a special need for very prompt action must exist. *Id.* at 668. Third, the person initiating the seizure must be a governmental official capable of applying the narrow standards of the statute and of determining that the seizure was necessary and justified in the particular instance. *Id.* at 678. Applying the test, the Court concluded that the facts in this case satisfied all three factors: first, seizure under the statute served the significant government purpose of preventing continued use of the yacht for illegal acts; second, pre-seizure notice and hearing could frustrate these interests, because the drug smugglers could move or destroy the yacht before a hearing; finally, the decision to seize property was made by commonwealth officials who were qualified to determine whether seizure was appropriate in the particular circumstances. *Id.* at 679. Therefore, the Court concluded that seizure of the yacht was an "extraordinary" situation, justifying a lack of pre-seizure notice and a hearing. *Id.* But see *United States v. Good*, 114 S. Ct. 492, 508-09 (1993) (holding that seizure of real property without pre-seizure notice and a hearing for the owner violates the Due Process Clause of the Fifth Amendment, unless the United States can establish that less restrictive measures would not suffice to protect the government's interest in preventing the destruction or continued unlawful use of the real property); see also *supra* note 94 and accompanying text (providing the text of the Due Process Clause of the Fifth Amendment).

authorizing the seizure of property of innocent owners.¹¹¹ One situation might be where the wrongdoer took an owner's property for illegal purposes without the owner's consent.¹¹² Another situation might be where an owner was unaware that a wrongdoer had used the owner's property for illegal purposes, but the owner had done all that reasonably could be expected to prevent the property's illegal use.¹¹³ Although the Court noted that it had not yet had the opportunity to address either of these situations, the Court found that it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive in those situations.¹¹⁴ The Court also noted that under some forfeiture statutes, administrative remission and mitigation procedures are available

111. *Calero-Toledo*, 416 U.S. at 688-89.

112. *Id.* at 689; *see* *United States v. One Parcel of Real Estate at 1012 Germantown Rd.*, 963 F.2d 1496, 1505 (11th Cir. 1992); *United States v. 141st St. Corp.*, 911 F.2d 870, 878-79 (2d Cir. 1990) (holding that to show lack of consent, owners who know that their property is being used for illegal activities must also prove that they did all that they reasonably could to stop the illegal activity). *But see* *United States v. Lots 12, 13, 14 and 15, Keeton Heights Subdivision*, 869 F.2d 942, 946-47 (6th Cir. 1989); *United States v. Certain Real Property and Premises Known as 171-02, Liberty Ave.*, 710 F. Supp. 46, 48-49 (E.D.N.Y. 1989) (holding that the owner who had knowledge of illegal activity on his property was required to prove only that he did not consent to such activity and did not have to prove that he did all that he reasonably could to stop it). Cases involving property used for illegal purposes without the owner's consent differ from the facts in *Calero-Toledo*, since Pearson Yacht Co. voluntarily rented the vessel to the lessees.

113. *Calero-Toledo*, 416 U.S. at 689. In assessing the reasonableness of a third party's precautionary measures, the courts have considered several factors. *See* *United States v. One Blue Lobster Vessel Named Tony, Jr.*, 639 F. Supp. 865, 872 (S.D. Fla. 1986) (listing factors used to determine the reasonableness of a commercial third party's actions, including failure to determine where the owner's property was to be taken, failure to require a written contract when renting, failure to obtain a clear understanding as to when property would be returned, failure to require money from a renter prior to turning over possession of property, and failure to carry insurance on the property); *see also* *United States v. 1966 Beechcraft Aircraft*, 777 F.2d 947, 951-52 (4th Cir. 1985); *United States v. One Defender Lobster Vessel Named Betty II*, 606 F. Supp. 32, 36 (S.D. Fla. 1984) (applying the above factors). Courts have imposed more stringent standards on commercial third parties than on friends or family members. *See* *United States v. One 1981 Datsun 280ZX*, 644 F. Supp. 1280, 1287 (E.D. Pa. 1986) (noting that commercial lessors are expected to take precautions such as a reasonable investigation of the persons to whom they are leasing the property and of how the property will be used); *see also* *United States v. One 1983 Homemade Vessel Named Barracuda*, 625 F. Supp. 893, 899 (S.D. Fla. 1986) (holding that statutes are not designed to propel individuals beyond the parameters of reasonable behavior); *United States v. 1985 Chevrolet Camaro Z28*, No. CV 85-6348-ER, slip op. at 2, 3 (C.D. Cal. Sept. 11, 1986) (stating that, absent any reason to suspect the borrower's conduct, the owner did all he reasonably could to prevent the proscribed use of his property). This situation differs from *Calero-Toledo*, since Pearson Yacht Co. did not offer any evidence that it had tried to prevent the illegal use of its boat. *Calero-Toledo*, 416 U.S. at 689-90.

114. *Calero-Toledo*, 416 U.S. at 689. The Court concluded that, since Pearson Yacht Co. had voluntarily entrusted the lessees with possession of the yacht, and since Pearson Yacht Co. did not offer any proof that the company did all it reasonably could to avoid having its property put to an unlawful use, the yacht was subject to forfeiture. *Id.* at 690. Pearson Yacht Co., however, did not make this argument because no prior Supreme Court decision had recognized this principle. *Goldsmith & Linderman*, *supra* note 19, at 1266 n.56.

where the violations are incurred without willful negligence or an intent to commit the offense.¹¹⁵

In *Calero-Toledo*, the United States Supreme Court examined the rights of innocent owners under a statute which did not include innocence as a defense to forfeiture.¹¹⁶ The Court faced different issues when it addressed cases concerning a federal forfeiture statute, passed in 1970, which expressly authorized owners to invoke innocence as a defense.¹¹⁷ In an attempt to restrict the growth of the illegal drug trade, Congress enacted a civil forfeiture provision because traditional penalties such as fines and imprisonment had proved to be inadequate to deter drug dealing.¹¹⁸ Although the provision provided some protection for innocent owners, a later amendment which vested the government's interest in the forfeited property in the United States as of the date of the illegal transaction created a conflict as to which innocent owners could avoid forfeiture of their property.¹¹⁹

115. *Calero-Toledo*, 416 U.S. at 689 n.27 (1974); 19 U.S.C. § 1618 (1988); 19 C.F.R. § 171.13(b) (1993); see *infra* note 119 and accompanying text (discussing remission and mitigation under 21 U.S.C. § 881 (1988)).

116. *Calero-Toledo*, 416 U.S. at 680-91; P.R. LAWS ANN. tit. 24, § 2512(a)(4), (b) (1979); see *supra* note 96 and accompanying text (providing the text of § 2512(a)(4) and (b)).

117. The Comprehensive Drug Abuse Prevention and Control Act of 1970, *codified as* 21 U.S.C. § 831-971 (1988).

118. *Id.* § 881(a)(4)(A)-(B) (1988) (originally enacted 1984); see *infra* note 122 and accompanying text (providing the text of the statute); see also 124 CONG. REC. 23,055-57 (1978) (discussing Congress' intent to use forfeiture to deter and punish drug traffickers by laying heavy economic sanctions on drug traffickers' predatory business practices).

119. 21 U.S.C. § 881(h) (1988) (originally enacted 1984); see *supra* note 5 and accompanying text (providing the text of the amendment). Another remedy provided to innocent owners by the statute was the right to petition the Department of Justice for remission and mitigation. *Id.* § 881(d) (1988); see *id.* (providing that petitions for remission and mitigation under § 881 follow procedures established for remission of property forfeited under customs offenses); 19 U.S.C. § 1618 (1988). Upon receipt of a petition for remission or mitigation, the Asset Forfeiture Office of the Criminal Division prepares a report based upon the allegation of the petition and the report of the seizing agency. 28 C.F.R. § 9.3(d) (1993). No hearing is held. *Id.* § 9.3(d) (1993). Upon the basis of the Asset Forfeiture Office's report alone, the Director either grants or denies the petition. *Id.* Even if an owner satisfies the standards for obtaining remission set forth in the regulations, the Department may still refuse to grant a complete recovery to the owner. See *id.* § 9.5(c) (1993) (stating that mitigation may be granted when the overall circumstances are such that in the opinion of the determining official, complete relief is not warranted).

E. The Legislative History of the Innocent Owner Defense and the Relation Back Doctrine Under the Comprehensive Drug Abuse Prevention and Control Act

In enacting the Comprehensive Drug Abuse Prevention and Control Act of 1970, Congress intended to strip drug offenders of their economic power.¹²⁰ The original version of the civil forfeiture provision paralleled prior federal statutes by allowing only for the forfeiture of contraband and property used in the commission of drug trafficking.¹²¹ Protection for innocent owners under the statute was limited to common carriers whose vehicles were used for drug dealing without the owners' consent and owners of stolen vehicles later used for illegal activity.¹²²

120. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989); see *United States v. One 1972 Datsun*, 378 F. Supp. 1200, 1205 (D.N.H. 1974) (discussing how the primary purpose of legislation providing for forfeiture of property used for drug activities is to cripple illegal drug trafficking by depriving dealers of the tools of their trade); 124 CONG. REC. 23,055-57 (1978) (discussing Congress' intent to use forfeiture to deter and punish drug traffickers by laying heavy economic sanctions on drug traffickers' predatory business practices); see also Mark A. Jankowski, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 167 (1990) (discussing Congress' desire to deter and punish drug dealers by removing them from positions of ownership and by applying heavy sanctions on their business practices).

121. 21 U.S.C. § 881(a)(1)-(4)(A)-(B) (1988); see *infra* note 122 and accompanying text (providing the text of the statute). Forfeiture proceedings arising out of violations of the Comprehensive Drug Abuse Prevention and Control Act are governed by the same statutory provisions as apply to customs forfeitures brought under 19 U.S.C. §§ 1595-1612 (1988). *United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112, 1114 (1st Cir. 1975); see 21 U.S.C. § 881(d) (1988) (providing that any property subject to forfeiture to the United States under § 881 may be seized by the United States Attorney General via the rules for admiralty claims); see also 19 U.S.C. § 1595a(a) (1988) (setting forth that every vessel, vehicle or other thing used to transport any article into the United States contrary to law may be seized). For the conveyance to be subject to forfeiture, the Government must establish probable cause to believe that the conveyance was used for drug dealing. *United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106, 1107 (9th Cir. 1976).

122. See 21 U.S.C. § 881(a)(4)(A) (1988) (allowing that no conveyance used by any person as a common carrier will be forfeited unless the owner consents to its illegal use); *id.* § 881(a)(4)(B) (1988) (stating that no conveyance shall be forfeited if the conveyance was used for an illegal act while it was unlawfully in the possession of someone other than the owner). Once the government establishes probable cause, the burden shifts to the owner to prove by a preponderance of the evidence that the conveyance was not used in violation of the Act. *EA Shipping Co. v. Bazemore*, 617 F.2d 136, 138 (5th Cir. 1980); *id.* (placing the burden on a corporate shipowner to prove by a preponderance of the evidence that its ship was being operated as a common carrier and that the shipmaster did not know of the narcotics transported in the ship). Note that this statute did not protect an innocent owner if the person engaging in the illegal transaction legally acquired the owner's property. See *United States v. One 1982 Datsun 200SX*, 627 F. Supp. 62, 63 (W.D. Pa. 1985) (holding that a mother's car used by her son in a drug transaction was subject to forfeiture, despite the mother's lack of knowledge of the transaction); *United States v. One 1978 Chrysler Le Baron Station Wagon*, 648 F. Supp. 1048, 1051 (E.D.N.Y. 1986) (holding that an automobile used by the owner's son for an illegal transaction was subject to forfeiture, since the owner consented to the son's use of the car with full knowledge of the son's prior criminal involvement). *But see United States v. One 1979 Datsun 280ZX*, 720 F.2d 543, 544 (8th Cir. 1983) (holding that, where an ex-wife loaned a car to her ex-husband to show to a prospective buyer and her ex-husband used the vehicle for a drug deal, forfeiture of the car would not serve the goal of imposing a penalty only on those

In 1978, however, Congress amended the Act to include the forfeiture of anything of value used to buy drugs or received in exchange for drugs, and any proceeds traceable to illegal activity.¹²³ This amendment was codified in section 881(a)(6).¹²⁴ To describe the purpose of the amendment, Congress issued a Joint Explanatory Statement.¹²⁵ According to the statement, property would be forfeited only if a traceable connection existed between the property and an illegal exchange of controlled substances.¹²⁶ Under section 881(a)(6), if a drug dealer commingled drug sale proceeds with other legitimate assets, the proceeds would be subject to forfeiture only to the extent that the government could trace the proceeds to the illegal exchange.¹²⁷

Section 881(a)(6) also included a defense for innocent owners of such proceeds.¹²⁸ Congress stated that the term "owner" is to be interpreted broadly to include any person with a recognizable legal or equitable interest in the property seized.¹²⁹ Specifically, property under section 881(a)(6) is subject to forfeiture only if the owner knew the property was actually used for drug dealing or knew the proceeds were traceable to illegal activity.¹³⁰ Congress left unclear, however, whether it intended to limit the innocent owner defense to bona fide purchasers for value or whether the defense was to apply to all innocent owners, including donees of the proceeds of illegal activity.¹³¹

significantly involved in a criminal enterprise).

123. See 21 U.S.C. § 881(a)(6) (1988) (stating that 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 are subject to forfeiture to the United States, as are all proceeds traceable to such an exchange and all moneys, negotiable instruments, and securities used or intended to be used in drug dealing); see also *supra* note 18 and accompanying text for examples of property which are considered proceeds under § 881(a)(6).

124. 21 U.S.C. § 881(a)(6) (1988).

125. Joint Explanatory Statement of Titles II & III of the Psychotropic Substances Act of 1978, 124 CONG. REC. S17,647 (1978), reprinted in 1978 U.S.C.C.A.N. 9496, 9518-9523.

126. See *id.* at 9522 (describing money, negotiable instruments, or securities used for drug dealing as forfeitable only if it has some substantial connection to the commission of the underlying criminal activity).

127. *Id.*

128. 21 U.S.C. § 881(a)(6) (1988). The statute provides that proceeds which are traceable to an exchange for controlled substances are not subject to forfeiture if the owner of the property did not know that the source of property was used for illegal activity or did not consent to the proceeds' use for illegal activity. *Id.* The original Comprehensive Drug Abuse Prevention and Control Act protected only those owners whose property was *illegally* taken from their possession. *Id.* § 881(a)(4)(B) (1988). Property which the owner *voluntarily* lent to the wrongdoer and which was subsequently illegally used was subject to forfeiture, even though the owner did not know of the illegal activity. *Id.*

129. Joint Explanatory Statement of Titles II & III of the Psychotropic Substances Act of 1978, 124 CONG. REC. S17,647 (1978), reprinted in 1978 U.S.C.C.A.N. 9496, 9522-23.

130. *Id.*

131. See *infra* notes 162-192 and accompanying text (reviewing the plurality opinion in *United States v. 92 Buena Vista* which discusses the scope of Congress' protection for innocent owners).

Congress made another amendment to the Act in 1984 to address how and when the United States' interest in property subject to forfeiture vests.¹³² The amendment, codified as section 881(h), provides that all right, title, and interest in property described in section 881(a) vests in the United States upon the commission of the acts giving rise to the forfeiture.¹³³ The purpose behind this amendment was to permit the government to void fraudulent transactions in which drug dealers shelter drug proceeds by transferring the proceeds to third parties.¹³⁴

Section 881(h) does not specifically contain an innocent owner defense as did section 881(a).¹³⁵ This omission by Congress produces some harsh results. If an innocent owner obtains an interest in property subject to forfeiture *after* the illegal acts occur, section 881(h), when read with section 881(a), seems to vest ownership of that property in the United States before the owner could have an opportunity to raise the defense.¹³⁶ Since Congress did not indicate that the statute was limited to owners who obtained their property *prior* to the illegal activity, the lower courts split on the issue of whether the innocent owner defense was available to an owner who obtained an interest in property subsequent to the illegal acts.¹³⁷ The United States Supreme Court addressed this issue in *United States v. 92 Buena Vista*.¹³⁸ The Court confronted the difficult task of reconciling the harsh results of the relation back doctrine in section 881(h) with the innocent owner provision of section 881(a)(6), so as to comply with Congress' dual goals of attacking the economic base of the illegal drug trade, while protecting a broad spectrum of innocent owners from forfeiture.

132. S. REP. No. 225, 98th Cong., 1st Sess. 215 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3398.

133. 21 U.S.C. § 881(h) (1988).

134. S. REP. No. 225, 98th Cong., 1st Sess. 215 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3383-84, 3398.

135. *See supra* notes 5, 18, 20 and accompanying text (setting forth the text of § 881(a)(6) and (h)).

136. *United States v. 92 Buena Vista*, 937 F.2d 98, 102 (3rd Cir. 1991); *see id.* (declaring that, if section 881(h) is applied before section 881(a)(6), no one who obtained an interest in property subject to forfeiture would be able to assert the innocent owner defense in section 881(a)(6)); 21 U.S.C. §§ 881(a)(6), (h) (1988).

137. *Compare In re One 1985 Nissan, 300ZX*, 889 F.2d 1317, 1320 (4th Cir. 1989) (holding that no third party, including bona fide purchasers for value, can acquire a legally valid interest in the property forfeited from anyone other than the United States *after* the illegal act takes place) *with Eggleston v. Colorado*, 873 F.2d 242, 247 (10th Cir. 1989) (holding that, when the Government brings an action for forfeiture under 21 U.S.C. § 881, the Government's interest in the forfeited property vests as of the moment of the illegal act, subject to the innocent owners exception in § 881(a)(6)).

138. 113 S. Ct. 1126 (1993).

II. THE CASE

A. The Factual and Procedural History

In *United States v. 92 Buena Vista*, Joseph Brenna gave respondent Beth Ann Goodwin approximately \$240,000 which she used to purchase a home located at 92 Buena Vista Avenue in Rumson, New Jersey.¹³⁹ The respondent resided there with her two children and was the sole owner of the property after she purchased it in 1982.¹⁴⁰ On April 3, 1989, the United States filed an *in rem* action against the parcel of land on which the respondent's home was located.¹⁴¹ The complaint alleged that the funds used for the purchase of the property were traceable to an unlawful exchange for controlled substances; therefore, the property was subject to forfeiture under section 881(a)(6).¹⁴²

On April 12, 1989, the United States District Court for the District of New Jersey found that the Government had probable cause to believe that the funds respondent used to buy the house were the proceeds of illegal drug trafficking and subject to forfeiture.¹⁴³ The district court then issued a summons and warrant, authorizing the United States Marshal to take possession of the premises.¹⁴⁴ Respondent asserted a claim to the property, was granted the right to defend the property, and filed a motion for summary judgment.¹⁴⁵ In her claim, respondent raised the innocent

139. *United States v. 92 Buena Vista*, 113 S. Ct. 1126, 1130 (1993) (plurality opinion). From 1981 until 1987, respondent maintained an intimate personal relationship with Brenna. *Id.*

140. *Id.* Respondent held title to the house, paying all taxes, maintenance, and improvements. Respondent's Brief at 2, *United States v. 92 Buena Vista*, 113 S. Ct. 1126 (1993) (No. 91-781).

141. *92 Buena Vista*, 113 S. Ct. at 1130.

142. *Id.* The United States brought the forfeiture proceeding against the respondent as a consequence of the indictment of Joseph Brenna. *United States v. 92 Buena Vista*, 937 F.2d 98, 104 (3d Cir. 1991). The indictment alleged that on or about January 1982, Brenna and others engaged in a continuing criminal enterprise in violation of 21 U.S.C. § 848, participated in a conspiracy to import more than 1,000 kilograms of marijuana into the United States in violation of 21 U.S.C. § 963, and knowingly imported in excess of 1,000 kilograms of marijuana into the United States in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2(a), (b). *Id.* at 100; *see* 21 U.S.C. § 848 (a), (b) (1988) (describing the fines and punishments for anyone who engages in a continuing criminal enterprise against the United States); *id.* § 952(a) (1972) (declaring that importing controlled substances into the United States is illegal); *id.* § 963 (1993) (providing that anyone who attempts or conspires to violate federal controlled substances laws is subject to the same penalties as a principal); 18 U.S.C. § 2(a), (b) (1988) (stating that anyone who commits an offense or willfully causes another to commit an offense against the United States is punishable as a principal).

143. *92 Buena Vista*, 113 S. Ct. at 1130 (plurality opinion).

144. *Id.*

145. *Id.*

owner defense included in 21 U.S.C. § 881(a)(6), swearing that she had no knowledge of the funds' origins.¹⁴⁶

The district court rejected the defense for two reasons.¹⁴⁷ First, the court adopted the Government's position and ruled that the innocent owner defense was limited to bona fide purchasers for value.¹⁴⁸ Second, the court interpreted the statute to mean that the defense was available only to persons who acquired an interest in the property *before* the acts giving rise to forfeiture took place.¹⁴⁹

Respondent then made an interlocutory appeal to the United States Court of Appeals for the Third Circuit.¹⁵⁰ The court of appeals disagreed

146. *Id.*

147. *Id.*; *United States v. 92 Buena Vista*, 738 F. Supp. 854, 860 (D.N.J. 1990).

148. *92 Buena Vista*, 113 S. Ct. at 1130; *92 Buena Vista*, 738 F. Supp. at 860. The district court noted that the typical case in which the innocent owner defense is applied is where a person used untainted funds to purchase property which was later used by a drug trafficker for illegal activity without the owner's knowledge or consent. *Id.*; see *United States v. One Single Family Residence Located at 2901 S.W. 118th Ct.*, 683 F. Supp. 783, 786 (S.D. Fla. 1988) (asserting that the innocent owner defense is most commonly claimed by someone who allows a third party to use their car, boat, or real property, only to discover that the third party has used the owner's property for drug dealing). The court stated that an innocent owner defense is necessary in such a case, because, if the property is subject to forfeiture, owners could lose property they legitimately purchased due to reasons entirely beyond their control. *92 Buena Vista*, 738 F. Supp. at 860. The same reasoning does not apply where the drug dealer transferred the property to the third party as a *gift*, since the donee did not make any investment in the property. *Id.* The district court explained that its conclusion that the innocent owner defense cannot be invoked by donees of drug proceeds is supported by the fact that the innocent owner exception under the criminal forfeiture statute protects only owners who are bona fide purchasers for value. *Id.* at 860-61; see 21 U.S.C. § 853(c) (1988) (providing an innocent owner defense expressly to bona fide purchasers). The court also reasoned that the innocent owner defense's limit to bona fide purchasers is supported by two traditional rules of law. *92 Buena Vista*, 738 F. Supp. at 861. First, one who does not have legal title to property cannot validly transfer valid title to another unless the recipient is a bona fide purchaser. *Id.* Second, where someone transfers property as part of a fraudulent conveyance, traditional rules of law often protect bona fide purchasers, but not donees. *Id.*

149. *92 Buena Vista*, 113 S. Ct. at 1130; *92 Buena Vista*, 738 F. Supp. at 860. The district court found that the language of § 881(a)(6) implies that the acts or omissions giving rise to forfeiture must be committed *after* the third party acquires a legitimate ownership interest in the property. *Id.* The court stated that its finding is consistent with the language of the civil forfeiture statute which provides that no property will be forfeited to the extent of an interest of *an owner*, because of an act or omission committed or omitted without the knowledge or consent of *that owner*. *Id.* (emphasis in original).

150. *92 Buena Vista*, 113 S. Ct. at 1131; *92 Buena Vista*, 937 F.2d 98, 100 (3d Cir. 1991). On appeal, respondent first asserted that the Government's seizure of her home without pre-seizure notice and hearing was in violation of the United States Constitution. *Id.*; see U.S. CONST. amend. V (setting forth that the United States may not deprive any person of life, liberty, or property, without due process of law); U.S. CONST. amend. XIV, § 1 (providing that no State may deprive any person of their life, liberty or property without due process of law). Respondent stated that the claimant's interest in real property and the lack of exigent circumstances surrounding the seizure made the seizure unlawful. *92 Buena Vista*, 937 F.2d at 101 (citing *United States v. Property at 4492 South Livonia Rd.*, 889 F.2d 1258, 1265 (2d Cir. 1989)). The court of appeals disagreed, however, noting that *South Livonia* held that the illegal seizure of property, standing alone, does not immunize the property from forfeiture, so long as the Government used evidence which was obtained independently of the illegal forfeiture proceeding. *Id.*; see *South Livonia Rd.*, 889 F.2d at 1265 (finding that an unconstitutional seizure of land without giving notice and an opportunity for an adversarial hearing to a homeowner did not bar a drug-related forfeiture

with the district court's first conclusion and refused to limit the innocent owner defense to bona fide purchasers for value.¹⁵¹ The court stated that the plain language of the statute contains no such limitation¹⁵² and the legislative history suggests that the word "owner" should be broadly

approximately one year later and merely precluded the Government from introducing evidence gained by improper seizure); *see also* *United States v. One 1978 Mercedes Benz, Four-Door Sedan*, 711 F.2d 1297, 1302-03 (5th Cir. 1983) (holding that the unlawfulness of a seizure does not require dismissal of the forfeiture proceedings provided that probable cause to seize the premises can be supported by untainted evidence); *United States v. Parcels of Land*, 903 F.2d 36, 38-39 (1st Cir. 1990) (holding that the Government need not trace property sought to be forfeited to specific drug transactions; rather, all that is required is that the court be able to look at the "aggregate" of the facts and find reasonable grounds to believe that the property probably was derived from drug transactions). The respondent next argued that the forfeiture was barred by the statute of limitations or undue delay. *92 Buena Vista*, 937 F.2d at 104. The court, however, found that the United States commenced its forfeiture action against the respondent within the applicable statute of limitations. *Id.* at 105; *see* 19 U.S.C. § 1621 (1988) (stating that actions for forfeiture of property used in violation of customs laws must be commenced within five years after the offense is discovered). Moreover, the court noted that the only existing case law regarding undue delay applied to delay between the time of seizure and the post-seizure filing of the forfeiture action. *92 Buena Vista*, 937 F.2d at 105. Since the United States instigated the forfeiture proceeding against the respondent *before* the seizure, the district court found such case law inapplicable to respondent's situation. *Id.* The respondent then argued that the United States granted her immunity pursuant to title 18, § 6002 of the United States Code in exchange for her testimony against Brenna. *Id.* at 103. By using her immunized testimony in its complaint, respondent argued that the Government had deprived her of her Fifth Amendment rights. *Id.*; *see* 18 U.S.C. § 6002 (1988) (stating that when a witness is granted immunity, no testimony compelled under order of a federal court may be used against the witness in a criminal prosecution). The court of appeals rejected this argument. *92 Buena Vista*, 937 F.2d at 103. The court first noted that it would assume that a civil forfeiture action is a criminal case for the purposes of immunity under 18 U.S.C. § 6002 (1988). *Id.* at n.3; *see* *Boyd v. United States*, 116 U.S. 616, 634 (1886) (holding that civil forfeiture proceedings are criminal for the purposes of the Fourth Amendment and the Fifth Amendment's privilege against self-incrimination). The court also noted that, if it were to decide that a civil forfeiture action was not a criminal case, then the respondent's testimony would not be immunized and her argument could be dismissed without further analysis. *92 Buena Vista*, 937 F.2d at 103 n.3. The court continued, however, to find that the immunity which the United States granted respondent was *use* immunity, so that the respondent could still be prosecuted if the Government proved its case independent of the respondent's own testimony. *Id.* at 103; *see* *Tierney v. United States*, 409 U.S. 1232, 1232-33 (1972) (holding that immunity granted pursuant to 18 U.S.C. § 6002 (1988) is *use* immunity); *see also* *United States v. Pellon*, 475 F. Supp. 467, 479-80 (S.D.N.Y. 1979) (citing *Kastigar v. United States*, 406 U.S. 441, 448-53 (1972) (distinguishing *use* immunity from *transactional* immunity which is where the witness is protected from prosecution for any offense about which the witness testifies)). The court of appeals therefore affirmed the district court's finding that the Government had established probable cause from evidence independent from respondent's testimony. *92 Buena Vista*, 937 F.2d at 104. Finally, the respondent argued that the district court erred in holding that respondent could not invoke an innocent owner defense pursuant to § 881(a)(6) because she was a donee of the proceeds of illegal activity, not a bona fide purchaser. *Id.* at 101; *see infra* notes 163-175 and accompanying text (discussing the U.S. Supreme Court's plurality opinion regarding this issue).

151. *92 Buena Vista*, 113 S. Ct. at 1131 (plurality opinion); *92 Buena Vista*, 937 F.2d at 102.

152. *92 Buena Vista*, 113 S. Ct. at 1131; *92 Buena Vista*, 937 F.2d at 101; *see supra* note 20 and accompanying text (setting forth the text of the innocent owner defense in 21 U.S.C. § 881(a)(6) (1988)); *see also* *92 Buena Vista*, 113 S. Ct. at 1141 (Scalia, J., concurring) (discussing how Congress used "owner" in the civil forfeiture statute, but used "transferee" in the criminal forfeiture provision); *infra* notes 203-209 and accompanying text (presenting Justice Scalia's reasoning for the different text of each statute).

construed.¹⁵³ In addition, since the criminal forfeiture statute expressly limits the defense to good faith purchasers for value and the civil statute does not, the court held that Congress did not intend to limit the innocent owner defense in the civil statute to bona fide purchasers.¹⁵⁴

Moreover, the court rejected the district court's second conclusion that the statute limited the defense only to innocent persons who obtained property *before* the illegal acts occurred.¹⁵⁵ The United States had argued that when Brenna exchanged controlled substances for the funds respondent used to buy her house, the doctrine of relation back codified in 21 U.S.C. § 881(h) immediately vested title to the drug sale proceeds in the United States.¹⁵⁶ The court disagreed, finding that the relation back doctrine applied only to property which section 881(h) stated as "described in subsection (a)."¹⁵⁷ The court determined that if the owner successfully raises the innocent owner defense, the property will not be subject to forfeiture, and thus, will be outside the scope of property affected by section 881(h)'s doctrine of relation back.¹⁵⁸ The relation back doctrine would be relevant in this case only if a determination were made that respondent did not have a valid innocent owner defense.¹⁵⁹

The court remanded the case to the district court to determine whether respondent was in fact an innocent owner.¹⁶⁰ The United States appealed the Third Circuit decision, and the United States Supreme Court granted

153. *92 Buena Vista*, 113 S. Ct. at 1131 (plurality opinion); *92 Buena Vista*, 937 F.2d at 102; *see supra* notes 125-131 and accompanying text (discussing the Joint Explanatory Statement issued by Congress indicating that § 881(a)(6) protects any person with an interest in forfeitable property).

154. *92 Buena Vista*, 113 S. Ct. at 1131; *92 Buena Vista*, 937 F.2d at 102; *see supra* note 82 and accompanying text (providing the text of § 853).

155. *92 Buena Vista*, 113 S. Ct. at 1131; *92 Buena Vista*, 937 F.2d at 102.

156. *92 Buena Vista*, 113 S. Ct. at 1131; *92 Buena Vista*, 937 F.2d at 102; *see supra* note 5 and accompanying text (setting forth the text of 21 U.S.C. § 881(h) (1988)).

157. *92 Buena Vista*, 113 S. Ct. at 1131; *92 Buena Vista*, 937 F.2d at 102. By inference, the Court defined "property described in subsection (a)" as property already determined to be subject to forfeiture. *92 Buena Vista*, 113 S. Ct. at 1134.

158. *92 Buena Vista*, 113 S. Ct. at 1131; *92 Buena Vista*, 937 F.2d at 102. The court also noted that, if the United States' interpretation of § 881(h) were adopted, *no one* who obtained property *after* the illegal acts occurred would be able to raise the innocent owner defense. *92 Buena Vista*, 113 S. Ct. at 1131; *92 Buena Vista*, 937 F.2d at 102. The court rejected the Government's argument, concluding that such an interpretation would make innocent owner defense in § 881(a)(6) virtually meaningless. *92 Buena Vista*, 113 S. Ct. at 1131; *92 Buena Vista*, 937 F.2d at 102.

159. *92 Buena Vista*, 937 F.2d at 102.

160. *92 Buena Vista*, 113 S. Ct. at 1131; *92 Buena Vista*, 937 F.2d at 103.

certiorari due to a conflict between the decisions of the Fourth and Tenth Circuits on this issue.¹⁶¹

B. The Plurality Opinion

Justice Stevens, writing for the plurality, affirmed the Court of Appeals' conclusions.¹⁶² In making its decision, the plurality noted two significant additions that Congress included in section 881(a)(6) which were absent from earlier forfeiture statutes used to enforce customs laws.¹⁶³ First, section 881(a)(6) provides for the forfeiture of *proceeds* from the exchange of controlled substances.¹⁶⁴ Second, section 881(a)(6) expressly provides for an innocent owner defense, a provision generally not contained in earlier forfeiture statutes.¹⁶⁵ As a result of these differences, the plurality approached the issue of statutory construction with caution.¹⁶⁶

161. 92 *Buena Vista*, 113 S. Ct. at 1131. Compare *In re One 1985 Nissan, 300ZX*, 889 F.2d 1317, 1320 (4th Cir. 1989) (holding that no third party, including bona fide purchasers for value, can acquire a legally valid interest in property forfeited to the United States from anyone other than the government after the illegal act takes place) with *Eggleston v. Colorado*, 873 F.2d 242, 247 (10th Cir. 1992) (holding that, in an action for forfeiture under 21 U.S.C. § 881, though the United States' title to the forfeited property vests in the government as of the time of the unlawful act, such title is subject to the innocent owner defense in § 881(a)(6)).

162. 92 *Buena Vista*, 113 S. Ct. at 1131. 92 *Buena Vista* was a 4-2-3 opinion, with Justice O'Connor, Justice Souter, and Justice Blackmun joining the plurality opinion written by Justice Stevens. *Id.* at 1129. Justice Thomas joined Justice Scalia's concurring opinion. *Id.* at 1138 (Scalia, J., concurring). Justice Kennedy was joined by the Chief Justice and Justice White in his dissent. *Id.* at 1143 (Kennedy, J., dissenting).

163. *Id.* at 1134 (plurality opinion); see 21 U.S.C. § 881(a)(6) (1988) (encompassing the civil forfeiture statute); Act of July 31, 1789, ch. 5, 1 Stat. 29, 39, 47, repealed by United States REV. STAT. 2d (1878); Act of August 4, 1790, ch. 35, 1 Stat. 145, 157-58, 161, 163-64, repealed by United States REV. STAT. 2d (1878); Act of March 3, 1819, ch. 75, 3 Stat. 510, 513, codified as 33 U.S.C. §384 (1988); see also *supra* note 40 and accompanying text (providing the text of these statutes).

164. 92 *Buena Vista*, 113 S. Ct. at 1134; 21 U.S.C. § 881(a)(6) (1988). Prior statutes recognized the forfeiture of contraband and property used for illegal activity, but did not apply to personal or real property received in exchange for stolen goods. 92 *Buena Vista*, 113 S. Ct. at 1134; see *supra* notes 40-41 and accompanying text (discussing how early federal forfeiture authorized the forfeiture of contraband and the instrumentalities of illegal activity).

165. 92 *Buena Vista*, 113 S. Ct. at 1134; see 21 U.S.C. § 881(a)(6) (1988) (encompassing the civil forfeiture statute); Act of July 31, 1789, ch. 5, 1 Stat. 29, 39, 47, repealed by United States REV. STAT. 2d (1878); Act of August 4, 1790, ch. 35, 1 Stat. 145, 157-58, 161, 163-64, repealed by United States REV. STAT. 2d (1878); Act of March 3, 1819, ch. 75, 3 Stat. 510, 513, codified as 33 U.S.C. §384 (1988); *supra* notes 40-43 and accompanying text (discussing how previous statutes authorizing *in rem* proceedings did not provide for an innocent owner defense).

166. 92 *Buena Vista*, 113 S. Ct. at 1134. The plurality relied on common law in their opinion; however, since common law did not authorize the forfeiture of *proceeds* of illegal activity or for an innocent owner defense as in § 881(a)(6), the plurality was unsure about the appropriateness of common law in their analysis. *Id.*

1. *The Innocent Owner Defense is Not Limited to Innocent Bona Fide Purchasers for Value*

The plurality found that the innocent owner defense within section 881(a)(6) is not limited to bona fide purchasers for value, as the plain language of the statute contains no such limitation.¹⁶⁷ In section 881(a)(6), the term “owner” is used three times, each time without any limitation to bona fide purchasers.¹⁶⁸ The plurality found that this unambiguous language foreclosed the Government’s argument that the innocent owner defense is limited to bona fide purchasers.¹⁶⁹ To support its conclusion, the plurality then analogized a donee of proceeds of illegal activity to a land owner who sells a drug dealer real property in exchange for illegal proceeds, then buys another piece of real property with the money the land owner received from the drug dealer.¹⁷⁰ Following the second transaction, the land owner would be a bona fide purchaser for value and would have possession of real property purchased with illegal proceeds.¹⁷¹ After receiving a gift of drug money and then purchasing real property with it, a donee, like the bona fide purchaser, would have possession of real property purchased with drug money.¹⁷² Thus, the plurality reasoned that the status of the donee and the bona fide purchaser is “precisely the same,”¹⁷³ and held that section 881(a)(6) includes donees of illegal proceeds within the innocent owner defense.¹⁷⁴ After reaching this conclusion, the plurality considered the question of what point in time section 881(h) vests ownership of the illegal proceeds in the United States.¹⁷⁵

167. *92 Buena Vista*, 113 S. Ct. at 1134; *see supra* note 148 and accompanying text (describing the United States’ argument that innocent owners under § 881(a)(6) should be limited to bona fide purchasers).

168. *92 Buena Vista*, 113 S. Ct. at 1134; *see supra* notes 151-154 and accompanying text (discussing how the Third Circuit Court of Appeals rejected the Government’s argument that the term “owner” in the § 881(a)(6) innocent owner defense should be limited to bona fide purchasers).

169. *92 Buena Vista*, 113 S. Ct. at 1134. According to the plurality, such language is sufficiently unambiguous to foreclose any contention that it applies only to bona fide purchasers. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *92 Buena Vista*, 113 S. Ct. at 1134.

174. *Id.*

175. *Id.*

2. *A Property Owner May Raise the Innocent Owner Defense During the Time Period Between the Illegal Act and the United States' Judgment of Forfeiture*

The Government next argued that the respondent could not invoke the innocent owner defense in section 881(a)(6) because the statute vested ownership of the drug sale proceeds in the United States at the moment Brenna received the funds from the illegal transaction.¹⁷⁶ Thus, since the funds were government property when Brenna gave them to the respondent, the house became government property when the respondent used the drug funds to buy it.¹⁷⁷ The respondent, therefore, never became the owner of the house.¹⁷⁸

The plurality rejected the United States' argument.¹⁷⁹ The plurality explained that under common law, the vesting of the United States' interest in property used in violation of forfeiture laws was not self-executing.¹⁸⁰ Although the forfeiture took effect immediately upon the commission of

176. *Id.*

177. *92 Buena Vista*, 113 S. Ct. at 1134-35. The Government argued that title vests in the United States under 21 U.S.C. § 881(h) at the moment of the illegal act. Petitioner's Brief at 22, *United States v. 92 Buena Vista*, 113 S. Ct. 1126 (No. 91-781). Thus, a party to whom property is conveyed *after* the property becomes subject to forfeiture never possesses or acquires a valid ownership interest. *Id.* Because the drug dealer lost any right or interest in the property at the time of the illegal act, the new possessor is not an "owner" under the statute-innocent or otherwise-and cannot assert the innocent owner defense to forfeiture under § 881(a)(6). *Id.*; see *Eggleston v. Colorado*, 873 F.2d 242, 247 (10th Cir. 1989) (holding that, when the Government brings an action for forfeiture under 21 U.S.C. § 881, though the United States' title to the forfeited property vests in the government as of the time of the unlawful act, such title is subject to the innocent owner defense in § 881(a)(6)). Therefore, Congress' choice of the word "owner" to designate the category of individuals eligible to avoid forfeiture under § 881(a)(6) made the defense unavailable to parties acquiring interests in property after the event triggering forfeiture. Petitioner's Brief at 22-23, *92 Buena Vista* (No. 91-781).

178. *92 Buena Vista*, 113 S. Ct. at 1134. In its argument, the Government relied heavily on the common law relation back doctrine applied to *in rem* forfeitures. *Id.* at 1135. The plurality noted, however, that the common law forfeiture proceedings only recognized forfeiture of property *used for* illegal activity. *Id.* (emphasis added). The Government did not produce any common law authority to support the argument that *proceeds* traceable to an unlawful exchange were treated as the fictional wrongdoer and subject to forfeiture. *Id.* (emphasis added). For these reasons, the plurality noted that it was not clear that the common law doctrine was applicable on these facts. *Id.*

179. *Id.* at 1136. Before addressing the Government's specific arguments, the plurality found no difference between the common law and § 881(h), concluding that Congress merely codified the common law relation back doctrine in § 881(h). *Id.* (relying on *United States v. Grundy*, 7 U.S. (3 Cranch) 337 (1806)). The plurality stated that if a forfeiture is authorized by statute, the rules of the common law may be "dispensed with" since Congress had the opportunity to reject the common-law doctrine when it enacted § 881(h). *Id.*

180. *Id.* at 1135.

the illegal act, the United States' title did not vest until the Government obtained a judgment of forfeiture.¹⁸¹

Contrary to the Government's argument, the plurality also found that any person who obtains an interest in property during the time period between an illegal act and a judgment of forfeiture is an "owner" for the purposes of raising the innocent owner defense in section 881(a)(6).¹⁸² Although section 881(h) states that any interest in "property described in subsection (a)" vests in the United States at the moment the wrongdoer commits the illegal act,¹⁸³ the plurality determined that Congress really intended the phrase "property described in subsection (a)" to apply only to property which a district court had ordered to be subject to civil forfeiture.¹⁸⁴ Since the property of owners who *successfully* raise the innocent owner defense would *not* be subject to civil forfeiture, the plurality concluded that such property is *not* "property described in subsection (a)," and so, ownership of the property did *not* vest in the United States at the moment of the drug transaction.¹⁸⁵

According to the plurality, the commission of an illegal act does not activate the relation back doctrine codified in section 881(h) until the owner of such illegal proceeds has the opportunity to raise the innocent owner defense codified in section 881(a)(6).¹⁸⁶ The plurality stated that, under the Government's argument, *no one* who obtained an interest *after* the date of the illegal act could be an owner for purposes of the innocent owner defense,¹⁸⁷ thus rendering Congress' innocent owner defense

181. *Id.* at 1136; *see* *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 350-51 (1806) (holding that the Government must take some legal step in order to trigger the doctrine of relation back); *see also supra* note 46 and accompanying text (explaining that Congress has the discretion to determine when title to forfeited property vests in the government by its construction of the forfeiture statute).

182. *92 Buena Vista*, 113 S. Ct. at 1136.

183. *Id.*; *see supra* note 5 and accompanying text (providing the text of § 881(h)); *see also supra* notes 132-134 and accompanying text (discussing Congress' adoption of the relation back doctrine in § 881(h) in order to divest drug dealers of ownership of drug proceeds upon violation of the law).

184. *See 92 Buena Vista*, 113 S. Ct. at 1136 n.22 (citing Senate Report No. 98-225 which states that all right, title, and interest in *property which is subject to civil forfeiture under section 881(a)* vests in the United States upon the commission of the acts giving rise to the forfeiture) (emphasis in original); *see also* S. REP. No. 225, 98th Cong., 1st Sess. 215 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3398 (opining that this principle is well established in current law).

185. *92 Buena Vista*, 113 S. Ct. at 1136-1137.

186. *Id.* at 1137; *see supra* notes 158-159 and accompanying text (asserting how the Third Circuit Court of Appeals, in *United States v. 92 Buena Vista*, 937 F.2d 98 (1991), found that courts must first determine whether the owner can avoid forfeiture by invoking the innocent owner defense before applying § 881(h)).

187. *92 Buena Vista*, 113 S. Ct. at 1135. Despite the Government's contention that its interpretation of § 881(h) is consistent with common law, the plurality asserted that their decision does not deny the government of any common law rights. *Id.* at 1137. Since, the common law rule allowed owners to invoke defenses before the government's title vested, once title vested in the United States, the common law rule related title back to

meaningless.¹⁸⁸ In this case, since the respondent owned the property after Brenna's drug dealing, and since the Government had not yet received its judgment of forfeiture, respondent, as owner of the real property, had the right to raise the innocent owner defense.¹⁸⁹

After the plurality created the opportunity for more property owners to raise the innocent owner defense through its interpretation of sections 881(a)(6) and (h), at the end of the opinion, the plurality identified two issues which it declined to decide.¹⁹⁰ First, the plurality left open the issue of whether a donee of illegal proceeds must have been ignorant of the illegal source of the gift as of the time the donee received it or whether a donee of illegal proceeds could qualify as an innocent owner if the donee was unaware of the illegal transaction *when it occurred*, but then learned of the illegal source of the gift *before* accepting it.¹⁹¹ Second, the plurality declined to determine whether one illegal transaction can forever

the date of the illegal act. *Id.* Therefore, just as the government cannot profit from the statutory version of the common law relation back doctrine, neither can it benefit from the statutory version of the relation back doctrine in § 881(h) until the respondent has the chance to invoke and offer evidence to support the innocent owner defense in § 881(a)(6). *Id.*

188. *Id.* at 1135.

189. *Id.* The plurality criticized the dissent's opinion which relies on the common law doctrine of void and voidable title but ignores the need to construe the terms of § 881(a)(6) and (h). *Id.* at n.20. The plurality reasoned that the government received its interest in forfeitable property from § 881(a)(6). *Id.* at 1135 n.20. Thus, the terms of the statute define the nature and the limits to that interest. *Id.* The plurality noted that, as a matter of common law, the dissent's argument that the government's interest springs as of the moment of the illegal act without regard to the United States' receipt of a judgment is inconsistent with *United States v. Grundy*. *Id.*; see *92 Buena Vista*, 113 S. Ct. at 1139 (Scalia, J., concurring) (discussing *Grundy* and related cases); *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 350-51 (1806) (discussing how, in a civil forfeiture action, nothing vests in the government until its judgment of forfeiture is perfected); *supra* notes 45-48 and accompanying text (discussing *Grundy*). But see *92 Buena Vista*, 113 S. Ct. at 1143-45 (Kennedy, J., dissenting) (invoking the doctrine of void and voidable title to assert that Brenna, who lost all right to the drug proceeds at the moment of the drug transaction, could not create good title in the respondent because she was not a bona fide purchaser).

190. *92 Buena Vista*, 113 S. Ct. at 1137. The ramifications of these questions are outside the scope of this Note.

191. *Id.* The United States argued that, without its construction of § 881, a donee who learns of the criminal transaction *after* the transaction, but *before* the transfer, could avoid forfeiture. *Id.*; see Petitioner's Brief at 24, *United States v. 92 Buena Vista*, 113 S. Ct. 1126 (1993) (No. 91-781) (arguing that the respondent's interpretation of § 881(h) allows owners to have knowledge of the proceeds' illegal source after receipt of the property and still avoid forfeiture). The plurality stated that they did not need to address this issue because on remand the respondent assumed the burden of convincing the trier of fact that she did not know of the gift's source when Brenna gave her the funds. *92 Buena Vista*, 113 S. Ct. at 1137-38. The plurality stated that if the respondent can show she was unaware of the illegal source of the funds at the time Brenna transferred them to her, the district court could infer that she was unaware that they were illegal profits at the time of the transaction itself. *Id.* at 1138 n.26; see Respondent's Brief at 37-38, *United States v. 92 Buena Vista*, 113 S. Ct. 1126 (1993) (No. 91-781) (arguing that the critical time that an owner must be unaware is when the property is transferred to the owner). The plurality limited its opinion to whether respondent's asserted defense was insufficient as a matter of law. *92 Buena Vista*, 113 S. Ct. at 1138.

taint the traceable proceeds referred to in section 881(a)(6), so that all items subsequently purchased with such proceeds would be subject to forfeiture, no matter how many times these specific proceeds changed hands.¹⁹²

C. The Concurring Opinion of Justice Scalia and Justice Thomas

Justice Scalia agreed with the plurality's interpretation that the commission of an illegal act does not activate the relation back doctrine in section 881(h) until the owner of the illegal proceeds has the opportunity to raise the innocent owner defense.¹⁹³ The concurrence disagreed, however, with the plurality's reasoning regarding the interpretation of the text of sections 881(a)(6) and (h).¹⁹⁴ The concurrence did not find it necessary to read the phrase "property described in subsection (a)" to mean "property which was subject to civil forfeiture."¹⁹⁵ The concurrence found that the Government's argument, rejected by the plurality, was the correct interpretation. According to Justices Scalia and Thomas, the correct interpretation is that "property described in subsection (a)" in

192. *92 Buena Vista*, 113 S. Ct. at 1138. The plurality questioned whether the government could elect between more than one piece of property in a situation such as where a house is received in exchange for a quantity of illegal substances and that house in turn is exchanged for another house. *Id.*; see *supra* note 18 and accompanying text (giving examples of property received in exchange for drug money which was found to be proceeds subject to seizure).

193. *92 Buena Vista*, 113 S. Ct. at 1138 (Scalia, J., concurring); see *supra* notes 179-189 and accompanying text (discussing the plurality's determination that an owner can raise the innocent owner defense after the illegal act occurs, but before the government obtains a judgment of forfeiture).

194. *92 Buena Vista*, 113 S. Ct. at 1138 (Scalia, J., concurring); see *id.* at 1139 (disagreeing with the plurality's decision that in order to establish that § 881(a)(6) must be applied before § 881(h) relates back, the word *owner* in § 881(a)(6) must be interpreted to include anyone who held title to property subject to forfeiture before the actual judgment of forfeiture). The concurrence also objected to the plurality's treatment of the issue regarding at what point in time the owner must prove lack of knowledge, by noting that it was not the question on which the Court granted certiorari and was only indirectly raised by the Government during the Government's argument. *Id.* at 1142; see Petition for Writ of Certiorari at p. I, *United States v. 92 Buena Vista*, 113 S. Ct. 1126 (1993) (No. 91-781) (setting forth the question on which the Court granted certiorari as whether a person who receives a gift of money derived from drug trafficking and who uses that money to purchase real property is entitled to assert an innocent owner defense to a United States civil forfeiture action). The Government argued that unless respondent's knowledge of the illegal source of the funds was measured at the time of the illegal act, owners who did not know of the illegal act when it was committed, but learned of the act before receiving the funds, would be entitled to raise the innocent owner defense. *92 Buena Vista*, 113 S. Ct. at 1142 (Scalia, J., concurring). Justice Scalia criticized the plurality for accepting without further analysis respondent's determination that the time at which she must prove she was ignorant was when she received the gift. *Id.*

195. *92 Buena Vista*, 113 S. Ct. at 1139 (Scalia, J., concurring); see *supra* note 184 and accompanying text (discussing the plurality's invocation of legislative history in its interpretation of the text of § 881(h)).

section 881(h) actually includes *all* proceeds of illegal activity, whether or not the proceeds are owned by guilty or innocent owners.¹⁹⁶

The concurrence next examined the Government's interpretation of the doctrine of relation back in section 881(h) and disagreed with its view that title vests immediately in the United States, precluding owners who obtain an interest after the illegal acts from raising section 881(a)(6)'s innocent owner defense.¹⁹⁷ Rejecting both the Government's and the plurality's¹⁹⁸ version of the doctrine of relation back, the concurrence advanced a third interpretation.¹⁹⁹ The concurrence stated that title actually vests "retroactively" in the United States only after the government asserts its right to the property via a forfeiture proceeding and obtains a judgment of forfeiture.²⁰⁰

Applying the concurrence's "retroactive vesting" definition of the relation back doctrine to the Government's interpretation of "property described in subsection (a)," the concurrence read the statute to mean that if the government obtains a judgment of forfeiture, all proceeds of illegal activity vest in the United States as of the date of the illegal act.²⁰¹ Any person holding legal title to such proceeds will naturally be the "owner" for the purpose of raising the innocent owner defense in section 881(a)(6),

196. 92 *Buena Vista*, 113 S. Ct. at 1139 (Scalia, J., concurring). Justice Scalia noted that the plain language of § 881(h), refers to "property described" in § 881(a)(6), not "property forfeited." *Id.* (emphasis in original); see Petitioner's Brief at 29, 92 *Buena Vista* (No. 91-781) (stating that the relation back doctrine in § 881(h), by its terms, covers all property described in subsection (a), including property so described that it is nonetheless exempted from forfeiture because of the innocent owner defense).

197. 92 *Buena Vista*, 113 S. Ct. at 1138 (Scalia, J., concurring); see *supra* notes 176-178 and accompanying text (discussing the Government's position that title vested immediately in the United States at the time of the illegal act).

198. See *supra* notes 180-181 and accompanying text (discussing the plurality's conclusion that the relation back doctrine does not take effect until the United States obtains a judgment of forfeiture).

199. 92 *Buena Vista*, 113 S. Ct. at 1138 (Scalia, J., concurring); see Petitioner's Brief at 16, 92 *Buena Vista*, (No. 91-781) (discussing the Government's argument that the term "relation back" is a misnomer, since forfeiture occurs as of the moment of the illegal act).

200. 92 *Buena Vista*, 113 S. Ct. at 1138-39 (Scalia, J., concurring). Justice Scalia stated that the name of the relation back doctrine is correct but that the Government's understanding of it was wrong. *Id.* at 1138. The concurrence stated that the doctrine is really one of "retroactive vesting of title" that operates only when the government receives its judgment of forfeiture. *Id.* (emphasis in original); see also *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44, 56 (1872) (holding that the decree of forfeiture, when entered, takes its date as of the date of the offense); *supra* notes 51-57 and accompanying text (discussing *Henderson's Distilled Spirits* and its effect on the rights of innocent owners whose property is seized by the United States).

201. 92 *Buena Vista*, 113 S. Ct. at 1140 (Scalia, J., concurring).

since title will not vest in the United States until the government receives a decree of forfeiture.²⁰²

In conclusion, the concurrence addressed the United States' reliance on the textual differences between the criminal and civil forfeiture statutes to establish that owners under section 881(a)(6) are limited to owners who obtained their interest before the illegal acts.²⁰³ The concurrence explained that Congress chose different language in the criminal statute because of the different manner in which claimants must raise the defense under the criminal forfeiture statute.²⁰⁴ The criminal statute uses "transferees," not "owners," to describe who may invoke the innocent owner defense.²⁰⁵ Moreover, the criminal statute expressly states that transferees cannot assert their property rights until after the government obtains a judgment of forfeiture.²⁰⁶ By the time third party interests are being adjudicated under the criminal forfeiture statute, the relation back doctrine already had operated to carry back the title of the United States to the time of the act giving rise to forfeiture, so that third parties are already divested

202. *Id.* The concurrence noted that some textual difficulties exist in its interpretation of § 881(a)(6) and (h). *Id.* The concurrence asserted, however, that only its interpretation conforms with the procedures the government must use to obtain a judgment of forfeiture. *Id.*; see 21 U.S.C. § 881(d) (1988) (stating that forfeitures under § 881 are governed by the procedures for condemnation of property under the customs laws set forth in 19 U.S.C. § 1595-1612) (1988); see also 19 U.S.C. § 1604 (1988) (stating that the United States Attorney General must begin forfeiture proceedings where such proceedings are necessary for the recovery of property). The concurrence opined that judicial forfeiture proceedings would never be necessary under § 1604 if property actually vested in the United States without the government obtaining a judgment of forfeiture. 92 *Buena Vista*, 113 S. Ct. at 1140 (Scalia, J., concurring).

203. 92 *Buena Vista*, 113 S. Ct. at 1141 (Scalia, J., concurring); see *supra* note 20 and accompanying text (setting forth the innocent owner provision of 21 U.S.C. § 881(a)(6)); *supra* note 82 and accompanying text (providing the innocent owner provision of 21 U.S.C. § 853); see also Petitioner's Brief at 31-35, 92 *Buena Vista* (No. 91-781) (arguing that since Congress protected innocent transferees who obtained an interest in forfeitable assets after the illegal act in § 853, but protected only owners in § 881(a)(6), Congress intended to protect a more narrow category of innocent owners in § 881).

204. 92 *Buena Vista*, 113 S. Ct. at 1141 (Scalia, J., concurring); see 21 U.S.C. § 853(a) (1988) (stating that any person convicted of a violation of § 853 must forfeit to the United States any property used by the defendant to violate § 853 and any proceeds received from the criminal act); *Id.* § 853(c) (1993) (stating that all right, title, and interest in property described in § 853(a) vests in the United States upon commission of the act giving rise to forfeiture, and that, if the forfeited property is subsequently transferred to a person other than the defendant, the property may be forfeited to the United States, unless the transferee is a bona fide purchaser for value who, at the time of purchase, was reasonably without cause to believe that the property was subject to forfeiture under this section).

205. 92 *Buena Vista*, 113 S. Ct. at 1141 (Scalia, J., concurring); 21 U.S.C. § 853(c) (1988); see *supra* note 82 and accompanying text (providing the text of 21 U.S.C. § 853(c)).

206. 92 *Buena Vista*, 113 S. Ct. at 1141 (Scalia, J., concurring); see 21 U.S.C. § 853(n)(1)-(2) (1988) (stating that following the entry of an order of criminal forfeiture, the government must post a notice of sale so any person other than the defendant may assert an interest in the forfeited property within thirty days of final publication of the notice).

of their property interests at the time of making their claim.²⁰⁷ The concurrence asserted that Congress used the term “transferee” in the criminal statute in order to provide specific protection from the effects of the relation back doctrine for persons who are no longer “owners.”²⁰⁸ Since Congress did not intend to provide the identical protection in the civil forfeiture provision, because those claimants would be the current owners of the property, Congress’ use of different language in the two forfeiture provisions is appropriate.²⁰⁹

D. The Dissenting Opinion of Justice Kennedy, Chief Justice Rehnquist, and Justice White

Justice Kennedy, joined by the Chief Justice and Justice White, dissented.²¹⁰ The dissent felt that the plurality addressed the wrong issue when they analyzed whether the respondent, as a donee, could qualify as an innocent owner under section 881(a)(6).²¹¹ The issue that the plurality should have addressed was whether Brenna, a wrongdoer holding an asset forfeitable to the United States under section 881(a)(6), could defeat the United States’ claim by a transfer of the asset for no value.²¹²

Addressing this issue, the dissent reasoned that the controlling law was the centuries old principle of voidable title.²¹³ Under this doctrine, one who purchases property in good faith and for value from the holder of

207. *92 Buena Vista*, 113 S. Ct. at 1141 (Scalia, J., concurring); see 21 U.S.C. § 853(n)(6) (1988) (stating that, if the court finds that a transferee has a valid claim under § 853, the court must amend the order of forfeiture).

208. *92 Buena Vista*, 113 S. Ct. at 1141 (Scalia, J., concurring). The concurrence noted that Congress incorporated the owner/transferee distinction throughout other forfeiture provisions. *Id.*; see 15 U.S.C. § 715f(a) (1988); 16 U.S.C. § 2409(c) (1988); *Id.* § 2439(c) (1988); 18 U.S.C. § 512(a) (1988) (providing for the protection of owners). *But see* 18 U.S.C. § 1467(b) (1988); *Id.* § 1963(c) (1988); *Id.* § 2253(b) (1988) (protecting transferees in criminal forfeiture statutes that follow procedures in § 853).

209. *92 Buena Vista*, 113 S. Ct. at 1141 (Scalia, J., concurring); see *id.* (explaining that the real reason Congress used transferee and not owner in the criminal statute is that third parties are not allowed to intervene in a criminal forfeiture action and thus, must wait until a judgment against the property exists); see also *supra* note 82 and accompanying text (setting forth the text of 21 U.S.C. § 853(c) which describes the relief from criminal forfeiture available to third parties).

210. *92 Buena Vista*, 113 S. Ct. at 1143 (Kennedy, J., dissenting).

211. *Id.*

212. *Id.*

213. *Id.* at 1144. The dissent noted that this ancient concept is now codified in forty-nine states as part of the Uniform Commercial Code. *Id.*; see U.C.C. § 2-403(1) (1993). See generally J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 1, at 171-75 (3d ed. 1988) (discussing the application of the doctrine of void and voidable title to bona fide purchasers).

voidable title obtains good title.²¹⁴ The dissent asserted that a donee, however, who acquires property from a holder of voidable title, obtains only the property interest that the donor held.²¹⁵ Applying these common law principles to section 881(a)(6) and (h), the dissent asserted that money received by a drug dealer as a result of an illegal act would be subject to forfeiture to the United States.²¹⁶ Thus, any interest the wrongdoer attempted to transfer to a donee would be subject to the government's superior right to the property.²¹⁷ In this case, the proceeds that Brenna received from the drug deal were subject to forfeiture under section 881(a)(6).²¹⁸ Since respondent was a donee, not a bona fide purchaser, Brenna could not eliminate the United States' right to the proceeds by transferring the funds to the respondent.²¹⁹ Therefore, the dissent concluded that the respondent obtained no interest in the funds from Brenna and was not an "owner" for the purposes of section 881(a)(6)'s innocent owner defense.²²⁰

214. *92 Buena Vista*, 113 S. Ct. at 1144 (Kennedy, J., dissenting); *Independent Coal & Coke Co. v. United States*, 274 U.S. 640, 647 (1927); see RESTATEMENT (SECOND) OF TRUSTS § 284 (1959) (stating that where a trustee transfers trust property to a person who takes for value and without notice of the breach of trust, the transferee holds the interest free of the trust and is under no liability to the beneficiary of the trust); AUSTIN SCOTT & WILLIAM FRATCHER, LAW OF TRUSTS § 284 (4th ed. 1989) (noting that, cases holding that a bona fide purchaser of trust property takes the property free of the trust are so numerous, and the principle is so firmly established, that it is unnecessary to cite cases to support it); see also U.C.C. § 2-403(1) (1993) (asserting that a person with voidable title has the power to transfer good title to a good faith purchaser for value).

215. *92 Buena Vista*, 113 S. Ct. at 1144 (Kennedy, J., dissenting); see RESTATEMENT (SECOND) OF TRUSTS § 289 (1959) (setting forth the principle that if a trustee in breach of trust transfers trust property and the transferee does not give value for the property, the transferee holds the property subject to the trust, even if the transferee had no notice of the trust); SCOTT & FRATCHER, *supra* note 214, § 289 (discussing how property received by an innocent donee from a trustee is subject to the trust; otherwise, the donee would be unjustly enriched as a result of the trustee's breach of duty); see also U.C.C. § 2-403(1) (1993) (stating that a purchaser of goods acquires all title which his transferor had).

216. *92 Buena Vista*, 113 S. Ct. at 1143 (Kennedy, J., dissenting).

217. *Id.*

218. See *id.* at 1143 (Kennedy, J., dissenting). Article 2 of the Uniform Commercial Code applies to transactions in goods. U.C.C. § 2-102 (1993). Section 2-105 defines goods as anything movable at the time of identification to the contract of sale except the money used to pay the price, investment securities and things in action. *Id.* § 2-105 (1993). Though proceeds of illegal activity which consist of currency and real property would not be covered under Article 2, Justice Kennedy's use of the Uniform Commercial Code provides a clear illustration of the common law doctrine of void and voidable title. See *id.* § 2-403(1) (1993) (asserting that a person with voidable title has the power to transfer good title to a good faith purchaser for value).

219. *92 Buena Vista*, 113 S. Ct. at 1143 (Kennedy, J., dissenting); see *supra* notes 214-215 and accompanying text (discussing how a transferor can give good title to a transferee only if the transferee gives value for the property).

220. *92 Buena Vista*, 113 S. Ct. at 1144 (Kennedy, J., dissenting). The dissent noted that when the United States seeks forfeiture of an asset from a donee, its claim rests on defects in the donor's title. *Id.* Since the donee has no ownership interest superior to the donor's, the donee's knowledge of the illegal transaction is irrelevant. *Id.* at 1143.

The dissent concluded that the plurality's interpretation of section 881(a)(6) conflicts with Congress' principal purpose for the civil forfeiture statute which is the lessening of the economic power of drug enterprises.²²¹ In the dissent's view, by expanding the innocent owner defense to donees, the plurality denied the government the right to assert ownership claims that, under traditional principles of law, any other rightful owner could assert against a possessor who took for no value and who has no title greater than that of the transferor.²²² The plurality's expansion of the innocent owner defense greatly limits the government's power to seize drug proceeds and, in the dissent's opinion, significantly impedes the most effective federal enforcement provision which the United States has to fight its war on illegal drugs.²²³

III. LEGAL RAMIFICATIONS

The United States Supreme Court's decision in *United States v. 92 Buena Vista* was the second case in a string of United States Supreme Court decisions since December 1992 which limited the federal government's power to seize property believed to be used for or derived from illegal drug trafficking.²²⁴ *92 Buena Vista* expanded the protection

221. *Id.* at 1145; see *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989) (asserting that the major purpose behind civil forfeiture is to lessen the economic power of drug enterprises). Justice Kennedy stated that drug dealers transfer drug proceeds to a good faith purchaser for value in order to receive property in exchange for the proceeds or to launder the proceeds. *92 Buena Vista*, 113 S. Ct. at 1145 (Kennedy, J., dissenting). If the government seizes whatever the drug dealer received in exchange from the good faith purchaser, the drug dealer's economic power is diminished. *Id.* When a drug dealer transfers illegal proceeds for no value, the drug dealer does so to benefit an associate or to shelter the proceeds from forfeiture. *Id.* In this situation, the government can diminish the drug dealer's economic power only if it can recapture property given to donees. *Id.* The dissent also opined that another possible result of the plurality's opinion is that the property of a donee who knew of the illegal transaction *before* receiving the proceeds would be subject to forfeiture, but the property of a donee who learns of the illegal transaction *immediately after* receiving the proceeds would not be forfeited. *Id.* at 1145. The dissent suggests that both donees are equally culpable since the only difference between a donee who learns of the illegal source of the gift after receiving the proceeds and a donee who knew of the illegal source all along, was that the donee who learned after receiving the proceeds might have had a brief expectation that the proceeds were from a legitimate source. *Id.*

222. *92 Buena Vista*, 113 S. Ct. at 1145.

223. *Id.* at 1146.

224. See *United States v. Good*, 114 S. Ct. 492, 508-09 (1993) (Kennedy, J., for a unanimous Court for parts I and III, with Blackmun, Stevens, Souter, and Ginsburg, JJ. joining for parts II and IV) (ruling in favor of a Hawaiian man whose home was seized after his conviction for drug dealing, holding that unless exigent circumstances exist, such as an immediate threat of destruction to the real property, the Due Process Clause requires that the government provide notice and an opportunity to be heard to owners before seizing real property subject to civil forfeiture); *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993) (holding that where the autobody shop and mobile home of a South Dakota man were seized by the government while he was serving a one year sentence for selling less than two grams of cocaine, civil forfeiture was found to be

for innocent owners of property subject to forfeiture, first recognized in *United States v. Stowell*, by establishing that donees of illegal proceeds are owners for the purpose of invoking the section 881(a)(6) innocent owner defense.²²⁵ Both the plurality and the concurrence determined that Congress' repeated use of the word "owner" without any qualification indicates Congress' rejection of any limitation of innocent owner status to bona fide purchasers.²²⁶ Moreover, both the plurality and the concurrence agreed that the doctrine of relation back does not preclude owners who obtained an interest in drug proceeds after the date of the illegal act from asserting the innocent owner defense.²²⁷ The widely dissimilar reasoning which the plurality and the concurrence used to interpret section 881(a)(6) and (h), however, indicates a marked difference of opinion among the Justices.²²⁸

punishment and therefore, subject to Eighth Amendment excessive fine restrictions); *Republic Nat'l Bank of Miami v. United States*, 113 S. Ct. 554, 559-60 (1992) (Blackmun, J. for parts I, II, and IV, with Rehnquist, C.J. and White, Stevens, O'Connor, Scalia, Kennedy, and Souter, JJ. joining) (finding in favor of a Florida bank that held an \$800,000 mortgage on a home the government claimed a drug dealer built with narcotics proceeds). By relying on "common sense and fairness," the Court found that the court of appeals did not lose jurisdiction over the *res* simply because the Government had already transferred the money from the forfeiture sale out of the district. *Id.*; see also Moshe Heching, *Civil Forfeiture and the Innocent Owner Defense*: *United States v. 92 Buena Vista Ave.*, 16 HARV. J.L. & PUB. POL'Y 835, 838 (1993) (finding that *92 Buena Vista* sends the unequivocal message to both the federal government and the courts that the Supreme Court will no longer tolerate the "take no prisoners" philosophy that has pervaded the drug enforcement program). *But see Alexander v. United States*, 113 S. Ct. 2766, 2773 (1993) (ruling against a Minnesota man convicted on racketeering charges by finding that the seizure of his business assets and real estate used in the production of sexually explicit materials did not violate the First Amendment).

225. *92 Buena Vista*, 113 S. Ct. at 1134; see *supra* notes 163-175 and accompanying text (presenting the plurality's discussion of this issue in *92 Buena Vista*); *supra* notes 193-196 and accompanying text (presenting the concurrence's view of this issue in *92 Buena Vista*); see also Heching, *supra* note 224 at 846 (the plurality and concurrence recognized that the goal of civil forfeiture is to provide a deterrent for drug crimes, while judiciously excluding all innocent parties, whether they tender value or not).

226. *92 Buena Vista*, 113 S. Ct. at 1134 (1993) (plurality opinion); see *id.* at 1141 (Scalia, J., concurring) (setting forth the concurrence's discussion of the textual difference between § 881(a)(6), which offers protection to innocent owners, and the parallel criminal forfeiture statute, § 853, which offers protection to innocent transferees who are bona fide purchasers for value).

227. *Id.* at 1137 (plurality opinion); *id.* at 1138 (Scalia, J., concurring). Both the plurality and the concurrence drew this conclusion by finding that the innocent owner defense in § 881(a)(6) must be applied to the owner's claim before § 881(h) relates back to vest ownership of the forfeitable property in the United States. *Id.* at 1137 (plurality opinion); *id.* at 1138 (Scalia, J., concurring); see *supra* notes 179-189 and accompanying text (setting forth the plurality's discussion of this issue in *United States v. 92 Buena Vista*, 113 S. Ct. 1126 (1993)); see also *supra* notes 197-202 and accompanying text (explaining the concurrence's view that § 881(a)(6) and (h) produce the same result as would an innocent owner exception to traditional common law forfeiture).

228. *92 Buena Vista*, 113 S. Ct. at 1136-37 (plurality and concurring opinions). The plurality asserted that the phrase in § 881(h), "property described in subsection (a)," must be read as meaning property already adjudged to be subject to forfeiture; therefore, a claimant can invoke the innocent owner defense in § 881(a)(6) before § 881(h) is applied. *Id.* (plurality opinion). On the other hand, the concurrence asserted that no reason exists to change the meaning of the phrase "property described in subsection (a)." *Id.* at 1139. Since nothing

Since neither the plurality nor the concurrence produced authority which makes their conclusions incontrovertible, *92 Buena Vista* may not provide the expansion of innocent owner protection that the plurality and concurrence intended.²²⁹ Unless future courts adopt a broad interpretation of *92 Buena Vista*, certain categories of owners, such as innocent mortgagees and lienholders, still risk losing their interests obtained in property which is later determined to be subject to forfeiture.²³⁰ In addition, courts which grant security interest holders innocent owner standing have disagreed on the exact meaning of innocence.²³¹ While the plurality's opinion could be read broadly enough to give mortgagees and lienholders innocent owner protection, these owners may be confronted with establishing a higher standard of innocence than other section 881(a)(6) owners.²³²

A. *Non-Culpable Post-Illegal Act Security Interest Holders Qualify as Owners for the Purposes of the Innocent Owner Defense Under 92 Buena Vista*

When lending money, commercial lending institutions regularly acquire security interests in property such as mortgages on real estate and liens on automobiles and boats as collateral for loans made.²³³ In cases decided prior to *92 Buena Vista*, only mortgage lenders and lienholders who held property interests *before* the acts giving rise to forfeiture occurred generally received section 881(a)(6) innocent owner standing from the

vests in the government until it receives its judgment, an owner can raise the defense any time before that judgment. *Id.* at 1139-40 (Scalia, J., concurring).

229. *Id.* at 1135. The plurality was uncertain about the appropriateness of applying common law principles to § 881, since common law forfeiture laws did not provide for the seizure of the proceeds of illegal activity. *Id.* at 1134. The plurality was also concerned about using caselaw which interpreted statutes that did not authorize innocence as a defense. *Id.* The plurality relied on a 1984 Senate Report for its conclusion that the language in § 881(h), "property described in subsection (a)," really means "property subject to forfeiture," even though Congress rejected the report's language in the final text of the statute. *Id.* at 1136-37. On the other hand, the concurrence based its interpretation of § 881 on a comparison of the express language of a plethora of federal forfeiture statutes unrelated to the Comprehensive Drug Abuse Prevention and Control Act of 1970. *Id.* at 1139-42.

230. *See infra* notes 239-241 and accompanying text (discussing *United States v. Real Property Located at 12921 Treeline Ave.*, 837 F. Supp. 1168 (M.D. Fla. 1993). This case held that tax lienholders are not owners for the purposes of § 881(a)(6)'s innocent owner defense. *12921 Treeline Ave.*, 837 F. Supp. at 1173.

231. *See infra* notes 262-266 and accompanying text (discussing the various standards lower courts have applied to determine the innocence of an owner).

232. *See infra* notes 268-280 and accompanying text (arguing that lower courts should define an innocent owner as one who had no actual knowledge of the illegal source of the drug proceeds).

233. Brief for the American Bankers Association at 2, *92 Buena Vista* (No. 91-781).

lower courts.²³⁴ Thus, when lenders made loans secured by property which was subsequently used for illegal activity and then forfeited to the United States, the government took the property subject to these liens.²³⁵ Before *92 Buena Vista*, however, some circuit courts had held that owners who obtained property interests in drug proceeds *after* the illegal acts occurred could not raise the innocent owner defense in section 881(a)(6).²³⁶ Therefore, commercial lenders in those circuits risked losing property taken as security for loans if the property was found to be the proceeds of illegal activity.

Though the plurality and concurrence in *92 Buena Vista* attempted to expand innocent owner protection to all owners who obtained a property interest in drug proceeds, since the facts of *92 Buena Vista* did not specifically address the rights of innocent lienholders, the issue is still open regarding whether innocent lienholders and mortgagees, who obtain their property interest *after* the illegal acts, can qualify as innocent owners under section 881(a)(6).²³⁷ For instance, one district court found that a bank could invoke section 881(a)(6)'s innocent owner defense when the bank obtained a mortgage on a residence *after* the owner purchased the house

234. See *In re Newport Sav. & Loan Ass'n*, 928 F.2d 472, 476 (1st Cir. 1991); *United States v. Federal Nat'l Mortgage Ass'n*, 946 F.2d 264, 266 (4th Cir. 1991); *United States v. Six Parcels of Real Property*, 920 F.2d 798, 799 (11th Cir. 1991); *United States v. One Urban Lot*, 865 F.2d 427, 430 (4th Cir. 1989); *In re Metmor Fin., Inc.*, 819 F.2d 446, 448 n.2 (4th Cir. 1987) (holding that mortgages and liens qualify as an interest under § 881(a)(6) and that holders of these interests qualify as innocent owners). One court even characterized a mortgagee's defense as a matter of right, not grace. *In re Newport Sav. & Loan Ass'n*, 928 F.2d at 476; see *id.* (finding that mortgages are included in the interests that Congress intended to protect under section 881(a)(6)).

235. See *Metmor Fin., Inc.*, 819 F.2d at 448-49 (finding that forfeiture cannot change the nature of the rights of a mortgagee who obtained a lien on a ranch subject to forfeiture before it was used in drug dealing, and so, the government received title to the ranch subject to the mortgagee's interest); see also *United States v. Stowell*, 133 U.S. 1, 20 (1890) (determining that since the government can succeed to no greater interest in the property than that which belonged to the wrongdoer, the government obtained only the wrongdoer's equity of redemption).

236. See *In re One 1985 Nissan, 300ZX*, 889 F.2d 1317, 1320 (4th Cir. 1989) (holding that no third party, including bona fide purchasers for value, can acquire a legally valid interest in the property forfeited from anyone other than the United States *after* the illegal act takes place). *But see Eggleston v. Colorado*, 873 F.2d 242, 247 (10th Cir. 1989) (holding that when the Government brings an action for forfeiture under 21 U.S.C. § 881, the Government's interest in the forfeited property vests as of the moment of the illegal act, subject to the innocent owners exception in § 881(a)(6)).

237. See *supra* note 225 and accompanying text (discussing how both the plurality and the concurrence adopted a broad interpretation of owner as applied to the § 881(a)(6) innocent owner defense); see also *infra* notes 238-239 and accompanying text (describing district court cases which split regarding whether lienholders who obtain post-illegal act proceeds qualify as owners under § 881(a)(6)).

with money made from drug dealing.²³⁸ In *United States v. Real Property Located at 12921 Treeline Avenue*, however, an opinion decided after *92 Buena Vista*, another district court refused to extend innocent owner status to a tax lienholder who filed a tax lien on a residence after the home was purchased with drug proceeds.²³⁹ In *12921 Treeline Ave.*, the United States District Court for the Middle District of Florida found that a local government was merely a “holder” of a lien, not an owner of the property, and so the local government could not invoke the innocent owner defense.²⁴⁰

In order to insure that innocent lenders are adequately protected from civil forfeiture, several reasons exist why the *12921 Treeline Ave.* “lienholder” versus “owner” distinction should not be applied to commercial security interest holders. First, because property of the United States is immune from taxation by state, city and county governments, local governments are unable to enforce tax liens against the United States, even if courts extend innocent owner status to tax lienholders.²⁴¹ Therefore, extending innocent owner status to tax lienholders would serve no real purpose. The federal government’s immunity from taxation, however, which prevents the enforcement of tax liens against the United States, does not apply to liens held by private parties. The reasoning that the *12921 Treeline Ave.* Court adopted, that lienholders are not “owners” under section 881(a)(6), but are merely “holders” of liens and, therefore, do not qualify for innocent owner status, should be limited to cases involving

238. *United States v. One Single Family Residence Located at 6960 Miraflores*, 731 F. Supp. 1563, 1569 (S.D. Fla. 1990). In a subsequent case, the same court extended similar protection to a bail agent. *United States v. One Single Family Residence Located at 2901 S.W. 118th Ct.*, 683 F. Supp. 783, 788 (S.D. Fla. 1988); see *id.* (holding that the bail agent had the right to raise an innocent owner defense to recover his lien in his client’s real property as long as he was without actual or constructive knowledge of the real property’s tainted history).

239. *United States v. Real Property Located 12921 Treeline Ave.*, 837 F. Supp. 1168 (M.D. Fla. Nov. 12, 1993); see *id.* at 1172 (holding that properties forfeited to the United States are not subject to state and local taxes arising after the date of the illegal activity, or in the case of properties acquired with proceeds of illegal activity, after the date such properties are acquired). The United States indicted the owner of the defendant real property in June 1992 and filed a complaint for forfeiture in July 1994. *Id.* at 1171. In January 1993, the Tax Collector of Lee County, Florida attempted to assess the United States for past due ad valorem taxes by filing a lien on the defendant real property. *Id.* The United States had not yet received its judgment of forfeiture. *Id.* The court held that Lee County’s tax lien never attached to the property being forfeited, since the property belonged to the United States as of the date of the first offense giving rise to forfeiture, and therefore, was not subject to taxation. *Id.* at 1172.

240. *12921 Treeline Ave.*, 837 F. Supp. at 1173.

241. *Id.*; see *id.* (asserting that *92 Buena Vista* does not alter the fundamental principal that local taxes cannot be assessed against property in which the United States maintains a title or possessory interest); *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (holding that states have no power to tax the operations of the laws enacted by Congress).

local government tax liens. Future courts should not find that commercial lienholders are mere “holders” of liens and should conclude definitively that commercial lenders are “owners” for the purposes of the innocent owners defense in section 881(a)(6).

Second, if the government can seize collateral after a lender has made a business decision that the borrower is a good credit risk, lenders stand to lose unlimited amounts of property held as collateral later found to be subject to forfeiture.²⁴² The impact on the United States’ credit market would be significant because loans worth hundreds of billions of dollars are secured by mortgages on residential and commercial real estate in the United States.²⁴³ If innocent lenders continue to suffer large losses on loans secured by property later seized by the government, the commercial lending industry will respond by passing on their forfeiture losses to borrowers in the form of higher interest rates, higher points requirements, and other fees in order to compensate for the increased risk of lending.²⁴⁴ Creditors may also require greater collateral and more credit references.²⁴⁵ The result could be that completely innocent individuals will be denied credit if the lender has even the slightest suspicion of illegal activity, no matter how unfounded. Because of these disruptive consequences to the commercial lending industry, future courts should apply *92 Buena Vista* to mortgagees and lienholders who obtained their property interest after the illegal acts occurred.

Third, the *92 Buena Vista* holding will provide commercial lenders with much greater protection than they can otherwise receive through administrative remission and mitigation procedures.²⁴⁶ Under these pro-

242. See Brief for the American Bankers Association at 2, *92 Buena Vista* (No. 91-781); see also *id.* at 6 (opining that fairness requires that innocent lenders be allowed to invoke the innocent owner defense before the government is allowed to seize collateral).

243. Brief for the American Land Title Association at 3, *92 Buena Vista* (No. 91-781); see *id.* (declaring that placing home mortgage lenders’ collateral at risk of forfeiture would have serious adverse effects on the nationwide residential mortgage market); see also *id.* (stating that protection of mortgages is particularly important, since mortgages constitute an integral part of the process by which most real estate in the United States is bought and sold).

244. See Saltzburg, *supra* note 32, at 236 n.112 (asserting that a lender’s increased costs include not only losses from losing property interests, but also expenses of heightened credit investigation of borrowers); see also Brief for the American Land Title Association at 3, *92 Buena Vista* (No. 91-781) (opining that secured transactions enable borrowers to obtain loans on more favorable terms and conditions than would be the case in the absence of enforceable liens).

245. Saltzburg, *supra* note 32, at 236.

246. See 21 U.S.C. § 881(d) (1988) (stating that procedures for the remission and mitigation of property seized under federal customs laws apply to forfeitures which occur under § 881); 28 C.F.R. §§ 9.1-9.7 (1993) (setting forth the procedures for remission and mitigation of customs forfeitures); see also *supra* note 119 and accompanying text (describing the Department of Justice remission and mitigation procedures in 28 C.F.R. §§

cedures, the decision whether to grant remission or mitigation is entirely a matter of discretion on the part of the Director of the Office of Asset Forfeiture, so that an innocent lienholder does not have an absolute right to remission or mitigation.²⁴⁷ The decision to refuse remission is not subject to judicial review.²⁴⁸ Also, innocent mortgagees usually receive a smaller recovery under the remission and mitigation regulations than under the statutory innocent owner defense, since the regulations allow recovery of unpaid interest only through the last full month prior to the granting of the remission petition and do not permit innocent lenders to recover reasonable attorney's fees and costs.²⁴⁹ By contrast, the innocent owner defense would provide commercial lenders with the right to a jury trial and appellate review of the district court findings.²⁵⁰ Moreover, various cases have established that a lender who qualifies as an innocent owner under section 881(a)(6) is entitled to recover its outstanding principal balance of the loan, any unpaid interest that accrues up to the date the principal is repaid, and reasonable costs and attorney's fees incurred in protecting its interest in the forfeited property.²⁵¹ Because of the increased recovery that lenders can receive under section 881(a)(6), 92 *Buena Vista* must be applied to innocent post-illegal act creditors.

9.1-9.7).

247. 28 C.F.R. § 9.3(d) (1993). Petitioners for remission and mitigation do not receive the benefits of due process since remission is considered more like an executive pardon. *The Laura*, 114 U.S. 411, 413-14 (1884). Moreover, the decision to refuse remission is not subject to judicial review. *See United States v. One 1973 Buick Riviera Auto.*, 560 F.2d 897, 900 (8th Cir. 1977) (holding that the overwhelming weight of authority provides that denial of a petition for remission is not subject to judicial review).

248. *See United States v. One 1973 Buick Riviera Auto.*, 560 F.2d 897, 900 (8th Cir. 1977) (holding that the overwhelming weight of authority provides that denial of a petition for remission is not subject to judicial review).

249. 28 C.F.R. § 9.2(h) (1993).

250. *See United States v. One 1976 Mercedes Benz*, 618 F.2d 453, 458 (7th Cir. 1980) (examining how Congress created a new statutory right in § 881 without including special statutory proceedings for its enforcement; therefore, claimants should look to common law remedies which include a jury trial); *United States v. 92 Buena Vista*, 113 S. Ct. 1126, 1131 (1993) (plurality opinion) (noting how respondent appealed the lower court's finding that innocent owners were limited to bona fide purchasers for value under 28 U.S.C. § 1292(b)); *see also* 28 U.S.C. § 1292(b) (1988) (providing the right to appeal an order in a civil action which involves a controlling question of law and where immediate appeal from the order may materially advance the ultimate termination of the litigation).

251. *See United States v. Federal Nat'l Mortgage Ass'n*, 946 F.2d 264, 266-67 (4th Cir. 1991) (finding that the scope of a mortgagee's interest in a house which was forfeited to the government consisted of attorney's fees and costs described in the mortgage documents, the outstanding principal, and any unpaid interest which accrued before or after the seizure); *see also United States v. Six Parcels of Real Property*, 920 F.2d 798, 799 (11th Cir. 1991) (holding that the legislative history of § 881(a)(6) strongly supports awarding innocent lienholders interest which accrued on the loan until the principal is paid); *In re Metmor Fin., Inc.*, 819 F.2d 446, 450 (4th Cir. 1987) (finding that the United States' interest in property which it seized includes an obligation to make continuing interest payments on a pre-existing mortgage).

Finally, courts should confer innocent owner status on commercial lenders who unknowingly obtain property interests in the proceeds of illegal activity by adopting the broad interpretation of “owner” provided in *92 Buena Vista*. Expansion of the definition of “owner” to include lienholders and mortgagees is consistent with the expansion of section 881(a)(6)’s innocent owner defense intended by seven Justices.²⁵² By focusing on Congress’ unqualified use of the word “owner” in the statute, the plurality and the concurrence in *92 Buena Vista* found in this language a Congressional purpose to protect anyone with an interest in the forfeitable property, no matter when the interest was obtained.²⁵³ The plurality, by reviewing the harshness of early civil forfeiture statutes, indirectly illustrated the need for an innocent owner defense.²⁵⁴ The plurality’s reasoning addressed this need by showing an unwillingness to foreclose the innocent owner defense to persons who obtained their property interest after the commission of the acts giving rise to forfeiture, even though a literal reading of the statute limited the defense to persons who acquired their interest before the property was put to illegal use.²⁵⁵ Although the concurrence criticized the plurality’s interpretation of the language of section 881(a)(6),²⁵⁶ the concurrence’s agreement with the plurality’s result,²⁵⁷ as well as the concurrence’s own rejection of the

252. See *supra* note 225 and accompanying text (discussing the plurality and concurring opinions in *92 Buena Vista* which advocate a broad interpretation of the owner under § 881(a)(6)).

253. *92 Buena Vista*, 113 S. Ct. at 1134; *id.* at 1142 (Scalia, J., concurring); see 124 CONG. REC. 23,055-57 (1978) (setting forth Congress’ intention that the civil forfeiture innocent owner provision should apply to innocent owners who acquired their interests in the property subsequent to the occurrence of the illegal activity giving rise to forfeiture, notwithstanding the relation back doctrine); see also Joint Explanatory Statement of Titles II & III of the Psychotropic Substances Act of 1978, 124 CONG. REC. S17,647 (1978), reprinted in 1978 U.S.C.C.A.N. 9496, 9522-23 (stating that no property would be forfeited under the Senate amendment to the extent of the interest of any innocent owner of such property and that the term “owner” should be broadly construed to include any person with a recognizable legal or equitable interest in the property seized); Heching, *supra* note 224, at 848 (noting how by construing the statute in consonance with § 881(a)(6) and (h)’s legislative history, the plurality and the concurrence reaffirm the Congressional intent of tempering pursuit of drug offenders with an equally zealous protection of personal rights).

254. See *92 Buena Vista*, 113 S. Ct. at 1131-34 (reviewing the history of civil forfeiture in the United States which began with the British authorities’ misuse of general searches and arbitrary confiscations of the colonists’ property).

255. *Id.* at 1136-37 (plurality opinion); see Heching, *supra* note 224, at 847 (discussing how the *92 Buena Vista* plurality aimed at effectuating the statute’s underlying policy of balancing the need to prevent illegal drug dealing with the desire to protect innocent third parties from the brunt of the drug enforcement laws).

256. *92 Buena Vista*, 113 S. Ct. at 1139 (Scalia, J., concurring); see *supra* notes 194-196 and accompanying text (discussing how the concurrence disagreed with the plurality’s interpretation that the phrase “property described in subsection (a)” in § 881(h) really means “property subject to forfeiture”).

257. See *92 Buena Vista*, 113 S. Ct. at 1138 (Scalia, J., concurring) (explaining how § 881(a)(6)’s innocent owner defense produces the same result as would an innocent owner defense to common law forfeiture, thus allowing an owner to raise the defense before the government received its judgment of forfeiture).

harsh results which occur when section 881(a)(6) and (h) are read together,²⁵⁸ reflected a similar willingness to expand the innocent owner protection.²⁵⁹ Since the plurality and concurring opinions in *92 Buena Vista* furthered Congress' overall intention that no property of a truly innocent owner should be forfeited under section 881(a)(6), *92 Buena Vista* should be applied to include innocent security interest holders who obtained their property interests after the illegal acts occurred.²⁶⁰ Even if courts adopt a broad interpretation of *92 Buena Vista* and find that the innocent owner defense in section 881(a)(6) applies to commercial lenders, the requirements which lenders must prove to establish innocence are far from clear.²⁶¹ Thus, in future cases, security interest holders may still have difficulty determining exactly what procedures to follow to make sure they do not unwittingly obtain interests in forfeitable property.

B. The Standard of Innocence Which Must Be Established by Innocent Owners is Still Undecided

Even if lienholders who obtain a property interest after the act giving rise to forfeiture can raise section 881(a)(6)'s innocent owner defense, another unanswered question following *92 Buena Vista* is how innocence will be defined under section 881(a)(6).²⁶² The two federal appellate courts which have addressed the specific issue of what standard of innocence to apply to owners who obtain post-illegal act interests have produced conflicting results. The Eleventh Circuit adopted a standard which requires owners to show that they did not have actual knowledge of

258. See *id.* at 1139 (rejecting the United States' contention that §§ 881(a)(6) and 881(h) should be read together to prevent anyone obtaining post-illegal act property interest from invoking the section's innocent owner defense); *supra* notes 197-200 and accompanying text (discussing Justice Scalia's rejection of the Government's interpretation of the relation back doctrine).

259. See Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form of Commercial Law?*, 62 *FORDHAM L. REVIEW* 287, 298 (1993) (discussing how the concurrence reasoned on semantic grounds that the government could not forfeit property that it owned retroactively after a judgment because the government could not forfeit its own property).

260. See *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971) (asserting that forfeiture statutes are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise).

261. See *infra* notes 263-266 and accompanying text (discussing how several different levels of culpability have been applied to the innocent owner defense in § 881(a)(6)).

262. *92 Buena Vista*, 113 S. Ct. at 1137-38 (plurality opinion). The plurality made only one brief reference to the question of what exactly a claimant must prove to successfully invoke the defense. *Id.*; see *id.* (asserting that, on remand, respondent must convince the district court that she had no knowledge of the alleged source of Brenna's gift).

the illegal source of the property.²⁶³ The Ninth Circuit, however, adopted a negligence standard.²⁶⁴ In addition, various district courts have read an additional requirement into section 881(a)(6), requiring claimants to show that they did not willfully blind themselves to the illegal source of the proceeds.²⁶⁵ Still other courts have imposed an affirmative duty on security interest holders to investigate as to the source of their collateral.²⁶⁶ In order to determine which standard of innocence should be applied to owners invoking the innocent owner defense included in section

263. *United States v. One Single Family Residence Located at 15603 85th Ave. N.*, 933 F.2d 976, 982 (11th Cir. 1991). Since the owner of the house knew that his brother used proceeds of illegal drug dealing to buy half of the house which they owned together, the court ruled that the owner's interest in the house as well as his brother's was subject to forfeiture. *Id.* The court relied on the express language of the statute, determining that if the owner had knowledge of the illegal source of the property at any time prior to the initiation of the forfeiture proceeding, his property interest would be subject to forfeiture. *Id.* The court also addressed the situation where owners have no knowledge of the property's illegal source at the time they receive the property, but find out about their property's illegal proceeds before the government obtains its judgment. *Id.* In this situation, the court adopted the dicta in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) and found that claimants could avoid forfeiture by showing that, once they knew of their property's illegal origins, they did everything reasonably possible to dispose of it. *Id.*; see *Calero-Toledo*, 416 U.S. at 689 (stating that in certain circumstances, innocent owners may avoid forfeiture by proving that they did all that they reasonably could to prevent the property from being used for illegal purposes); *supra* notes 111-113 and accompanying text (discussing the effect of the *Calero-Toledo* dicta on the rights of innocent owners in forfeiture actions).

264. See *United States v. \$215,300 United States Currency*, 882 F.2d 417, 420 (9th Cir. 1989) (holding that failure to exercise due care precludes reliance upon the innocent owner defense when a claimant who took no precautions to guard against the illegal use of his money claimed that his entrustment of his money to a drug dealer was an honest mistake); see also *United States v. Real Property Located at 10936 Oak Run Circle*, 9 F.3d 74, 76 (9th Cir. 1993) (finding that if owners have knowledge which puts them on notice to make further inquiries, and they fail to make such inquiries, innocence has not been established).

265. *United States v. All Funds Presently on Deposit or Attempted to be Deposited in Any Accounts Maintained at Am. Express Bank*, 832 F. Supp. 542, 564 (E.D.N.Y. 1993); see *United States v. All Monies (\$477,048.62) in Account No. 90-3617-3, Israel Discount Bank*, 754 F. Supp. 1467, 1477-78 (D. Ha. 1991) (holding that, to establish innocence, claimants must prove that they had no knowledge of the illegal activity, were not willfully blind to the illegal activity, and did all that reasonably could be expected to prevent the illegal use of the proceeds).

266. See *New Jersey v. American Banking Ins. Co.*, 622 A.2d 261, 269 (N.J. Super. Ct. App. Div. 1993) (imposing a duty on a bail agent to make reasonable inquiries to determine whether the real property which the agent accepted as collateral for a bail bond was the proceeds of illegal activity). The Court concluded that a bail agent who did not determine the nature of his client's charge before posting bond, did not make the reasonable inquiries required under the standard of conduct for innocent third parties outlined in *Calero-Toledo* and thus, could not establish that he was an innocent owner under § 881(a)(6). *Id.* Another court adopted a standard of "willful blindness" from § 881(a)(4)(C) and interpreted "willful blindness" to include a duty to investigate into the source of the property received. *United States v. 1977 Porsche Carrera 911*, 748 F. Supp. 1180, 1187 (W.D. Tex. 1990); *id.* at 1187 (concluding that an attorney, who accepted an expensive automobile as payment for his legal fees from a 19-year-old college student charged with serious drug crimes, had a duty to investigate further into the source of the property in order to establish that he was not willfully blind to the illegal nature of the car); see also 21 U.S.C. § 881(a)(4)(C) (1988) (authorizing the forfeiture of vehicles used in drug dealing, but providing an innocent owner defense for any owner who was not willfully blind to the vehicle's illegal use and for owners whose property was used illegally without their knowledge or consent).

881(a)(6), the policies behind the different levels of culpability must be examined.²⁶⁷

1. *Courts Should Reject a Standard of Innocence Which Requires Claimants to Prove They Did Everything Reasonable to Avoid Obtaining an Interest in Property Which Is the Proceeds of Drug Dealing*

The United States Supreme Court has determined that federal civil forfeiture constitutes punishment under the United States Constitution.²⁶⁸ Though punishment of conduct committed without subjective awareness is highly controversial, society punishes negligent conduct in order to deter similar conduct in the future.²⁶⁹ Since Congress has expressed a strong desire to use civil forfeiture to deter drug dealers from continuing their illegal activities, application of a negligence standard is consistent with traditional concepts of civil punishment.²⁷⁰ Courts which have applied a negligence standard have based their reasoning on the United States

267. See Jankowski, *supra* note 120, at 191 (asserting that courts which have not addressed the standard-of-knowledge issue have received little guidance as to whether to follow the strict letter of the statute and use an actual knowledge standard or to follow the dicta of the United States Supreme Court and demand that innocent owners take reasonable precautions).

268. See *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993) (ruling that civil forfeiture was punishment and therefore, subject to Eighth Amendment excessive fine restrictions); *id.* at 2809 (declaring that if the Supreme Court had rejected the concept of civil forfeiture as punishment, the Court would not have considered the issue of whether forfeiture of the property of truly innocent owners was constitutional); see also *United States v. Halper*, 490 U.S. 435, 447-48 (1989) (explaining that since civil proceedings may advance punitive, as well as remedial goals, the notion of punishment cuts across the division between civil and criminal law); *Calero-Toledo*, 416 U.S. at 689-90 (noting that the forfeiture of a truly innocent owner's property would raise serious constitutional questions); *supra* notes 111-114 and accompanying text (discussing two situations suggested by the *Calero-Toledo* Court where forfeiture of innocent owner property might violate substantive due process).

269. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 102 (1987) (explaining that since negligent actors fail to comprehend the dangerousness of their acts, they must likewise fail to comprehend the potential for sanctions); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 225 (5th ed. 1988) (distinguishing negligence from acting purposefully, knowingly, or recklessly in that negligence does not involve a state of awareness of the risk of harm); see also DRESSLER, at 97 (asserting that punishing negligent conduct, at the very least, may cause those punished to change their lifestyles and avoid activities which may result in injury to others).

270. See *Austin*, 113 S. Ct. at 2812 n.14 (describing how forfeiture statutes historically were understood to serve the goals of punishment and deterrence); *supra* note 120 and accompanying text (describing Congress' goal of deterring drugs and eliminating the huge profits received from drug dealing by seizing property purchased with drug proceeds); see also *supra* note 264 and accompanying text (discussing the Ninth Circuit's adoption of the *Calero-Toledo* negligence standard).

Supreme Court's treatment of the rights of innocent owners in civil forfeiture proceedings in *Calero-Toledo v. Pearson Yacht Leasing Co.*²⁷¹ The standard of conduct discussed in the dicta of *Calero-Toledo* should not be applied to civil forfeiture under section 881(a)(6), however, for several reasons.

First, the dicta in *Calero-Toledo* was based on a constitutional challenge to a civil forfeiture statute which did not include an innocent owner defense.²⁷² While *Calero-Toledo* might be interpreted as establishing the minimum protection for innocent owners required by Due Process, where Congress has expressly provided an innocent owner defense, the constitutional rights of innocent owners are not necessarily identical to the rights provided under the statute.²⁷³ Courts must attempt to determine what Congress meant when it used the term "innocent" in section 881(a)(6), and by including such a defense in the statute, Congress may have intended to provide claimants with more protection than what the Constitution requires.²⁷⁴ Congress was certainly aware of the *Calero-Toledo* decision when it enacted section 881(a)(6) in 1978, and since the text of the statute does not include the *Calero-Toledo* negligence standard, Congress seems to have rejected this definition of innocence for section 881.²⁷⁵ Moreover, *Calero-Toledo* is more appropriately applied in situations where the owner obtained a property interest before the illegal

271. *Calero-Toledo*, 416 U.S. at 663; *see supra* notes 111-114 and accompanying text (discussing *Calero-Toledo's* suggestion that the Due Process Clause may require allowing owners to invoke innocence as a defense in two limited situations); *see also supra* notes 264-265 accompanying text (discussing how the Ninth Circuit, the Eastern District of New York and the District of Hawaii have found that owners can lose their property to forfeiture for failure to do all that reasonably could be expected to prevent receiving property which consists of drug proceeds).

272. *See Calero-Toledo*, 416 U.S. at 663 (presenting that claimant's argument that seizing a yacht without regard to the culpability of the owner violates procedural due process); P.R. LAWS ANN. tit. 24 § 2512(a)(4), (b) (1973); *supra* note 96 and accompanying text (setting forth the text of the statute).

273. *See United States v. One Urban Lot Located at 1 St. A-1, Valparaiso*, 865 F.2d 427, 430 (1st Cir. 1989) (explaining that when the Supreme Court considered the constitutionality of the statute in *Calero-Toledo*, it was setting out the limits of the forfeiture powers of the state).

274. *United States v. Premises Known as 2639 Meetinghouse Rd.*, 633 F. Supp. 979, 992-93 (E.D. Pa. 1986).

275. *See One Urban Lot Located at 1 St. A-1*, 865 F.2d at 430 (stating that § 881(a)(6) does not limit the innocent owner defense to persons who did all that reasonable persons would expect them to do to prevent the proscribed use of the property, since the statute specifically refers to the knowledge and consent of the owner as the appropriate considerations to use in determining who is innocent); *see also Goldsmith & Linderman, supra* note 19, at 1276 (noting that *Calero-Toledo* was decided in 1974, and § 881(a)(6) was added in 1978); *see also supra* note 20 and accompanying text (setting for the text of 21 U.S.C. § 881(a)(6)).

acts.²⁷⁶ In a situation where the claimant already owns the property, it is reasonable to require the owner to take steps to prevent the property from being used illegally.²⁷⁷ On the other hand, the additional burdens imposed on innocent owners by requiring them to do everything reasonable to avoid *taking possession* of illegal proceeds contradicts *92 Buena Vista's* underlying aim to expand innocent owner protection.²⁷⁸ Although a valid concern exists that criminals will attempt to use innocent owner provisions to shield property from forfeiture, imposing a duty to investigate on owners who obtain their interest after the illegal act would place a burden on all owners to inquire as to whether the property was ever in any way connected to illegal drug activity.²⁷⁹ Placing such a burden to make additional inquiries on all persons who acquire property by either purchase or gift also would prevent property from being freely marketable.²⁸⁰ Although the burdens of imposing a duty on commercial lenders may not be as great as on private citizens, since lenders usually conduct investigations for the purposes of extending credit, innocent lenders who have property interests in post-illegal act proceeds should not have the added burden of making additional inquiries into the source of their collateral. Therefore, courts should reject the *Calero-Toledo* negligence standard of innocent conduct in federal civil forfeiture actions.

276. See *United States v. One Single Family Residence Located at 2901 S.W. 118th Ct.*, 683 F. Supp. 783, 786 (S.D. Fla. 1988) (explaining that the language in *Calero-Toledo* is commonly applied to situations where owners allow a third party to use their cars, boats or real property, only to discover that the third party has used the property for drug dealing); *1977 Porsche Carrera 911*, 748 F. Supp. at 1186-87 (finding that the additional burden of the standard which requires that owners show that they did everything reasonably possible to avoid being involved in illegal activity is best suited to a situation in which the claimant obtained an ownership interest in the forfeitable property before the illegal acts).

277. See *supra* note 113 and accompanying text (providing various interpretations of what conduct is reasonable under the *Calero-Toledo* standard).

278. See *supra* notes 179-189, 197-202 and accompanying text (discussing how the *92 Buena Vista* plurality and concurring opinions' rejection of the government's interpretation of § 881(a)(6) and (h) which would preclude any owner who obtained a property interest in drug deal proceeds after the drug transaction occurred expanded the scope of persons who can raise the innocent owner defense).

279. See *Heching*, *supra* note 224, at 846 (reasoning that unwitting, innocent parties by definition are unaware of the prior illegal activity and have no grounds upon which to suspect the legitimacy of the transfer); see also *supra* note 266 and accompanying text (describing how a bail agent and attorneys have been found to have the duty to make reasonable inquiries into the source of property they take as security for their fees).

280. See *AMERICAN LAW OF PROPERTY*, § 26.1 (1952) (stating that throughout early common law it has been considered socially and economically desirable that property be freely alienable).

2. *Courts Should Adopt a Standard of Innocence Which Requires Claimants to Prove They Did Not Have Actual Knowledge of and Were Not Willfully Blind to the Illegal Source of Their Property*

Since civil forfeiture is considered punishment, owners of illegal proceeds should not forfeit their property without some subjective awareness that the property in which they are obtaining an interest is the proceeds of drug dealing. Although some courts have held that owners can avoid forfeiture by showing that they did not have actual knowledge that their property consisted of drug proceeds, several courts have expanded the definition of “knowledge” under section 881(a)(6) to include “willful blindness.”²⁸¹ Persons are “willfully blind” when they do not actually believe that a fact exists, but suspect that a fact exists, then purposely avoid learning that their suspicions are accurate.²⁸² Equating “willful blindness” with “knowledge” is controversial because it is inaccurate to say that a person who *suspects* that the proceeds are a result of illegal activity thereby *knows* that the property is from drug dealing.²⁸³ “Willful blindness” and “actual knowledge,” however, have been interpreted as indicating equal culpability,²⁸⁴ and should be applied to civil forfeiture under section 881(a)(6) for several reasons.

The requirement that owners prove that they did not have knowledge of their property’s illegal source should be interpreted to include a requirement that the owners were not deliberately blind to suspicious

281. See *supra* note 265 and accompanying text (setting forth the federal district court decisions which applied willful blindness to the § 881(a)(6) innocent owner defense).

282. DRESSLER, *supra* note 269, at 102; see *United States v. Jewel*, 532 F.2d 697, 698-99 (9th Cir. 1976) (finding that a jury could infer that the defendant had knowledge of the presence of marijuana when the contraband was found in a compartment in the car he was driving). While in a Mexican bar, the defendant met a stranger who asked the defendant if he wanted to buy marijuana. *Id.* When the defendant declined, the stranger paid the defendant \$100 to drive the stranger’s car alone north across the United States border. *Id.*

283. See DRESSLER, *supra* note 269, at 106 (describing the controversial nature of including willful blindness in the meaning of knowledge).

284. *Jewel*, 532 F.2d at 700; see *id.* (asserting that committing an act with knowledge of a fact can also mean acting with an awareness of a high probability of the existence of that fact). When such awareness is present, actual knowledge is not required. *Id.* The concept of willful blindness is included in the Model Penal Code’s definition of knowledge. MODEL PENAL CODE § 2.02(7) (1985) (stating that when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of the high probability of its existence, unless the person actually believes that the fact does not exist); see also *id.* cmt. 9 (noting how Model Penal Code § 2.02(7) deals with willful blindness); cf. *Jewel*, 532 F.2d at 707 (Kennedy, J., dissenting) (asserting that juries must be instructed that no culpability exists without an awareness of a high probability of the truth, since true ignorance, no matter how unreasonable, cannot provide a basis for criminal liability).

circumstances surrounding the receipt of the property, although such an interpretation is contrary to the express language of the provision.²⁸⁵ If owners must prove they were not willfully blind, owners will not be able to avoid forfeiture merely by claiming that they did not actually know of their property's illegal source when the surrounding circumstances indicate that their true ignorance is highly unlikely.²⁸⁶ This expanded interpretation of knowledge also will help Congress to achieve its goal of reducing the illegal drug trade in the United States by preventing drug dealers from hiding assets with friends and relatives.²⁸⁷ Although lowering the standard of knowledge which claimants must prove in order to use innocence as a defense is contrary to the expansion of section 881(a)(6)'s innocent owner defense asserted by *92 Buena Vista*, requiring owners to prove they were not willfully blind when they received property is consistent with Congress' intention that no property of truly innocent owners be forfeited.²⁸⁸ Owners who voluntarily look the other way when receiving property under suspicious circumstances are not truly innocent and thus, should not be protected by section 881(a)(6). Therefore, courts should adopt a standard of innocence which requires claimants to prove they had no knowledge of and were not willfully blind to their property's illegal source.

285. See *supra* note 20 and accompanying text (setting forth the text of 21 U.S.C. § 881(a)(6) (1988)).

286. See Goldsmith & Linderman, *supra* note 19, at 1297 (opining that willful blindness makes sense in situations involving the forfeiture of conveyances under § 881(a)(4)(C) because situations involving vehicles lent to third parties often involve familial or personal relationships in which owners ignore the criminal activity of their friends or relations); see also *supra* note 266, and accompanying text (providing the text of 21 U.S.C. § 881(a)(4)(C) (1988)).

287. See *Jewel*, 532 F.2d at 703 (discussing Congress' goal of dealing more effectively with the growing menace of drug abuse in the United States); *supra* note 120 and accompanying text (explaining Congress' use of forfeiture as a way to remove drug dealers from positions of ownership and financial power); *1977 Porsche Carrera 911*, 748 F. Supp. at 1188 (discussing the need to deter criminal defense attorneys from ignoring the source of their fees in order to prevent drug dealers from using their illegal profits to acquire the best defense money can buy); see also *supra* note 134 and accompanying text (discussing Congress' purpose behind including the doctrine of relation back in § 881(h) is in order to prevent drug dealers from stashing their profits with friends and relatives using phoney sales and gifts).

288. See also Joint Explanatory Statement of Titles II & III of the Psychotropic Substances Act of 1978, 124 CONG. REC. S17,647 (1978), reprinted in 1978 U.S.C.A.N. 9496, 9522-23 (stating that no property would be forfeited under the Senate amendment to the extent of the interest of any innocent owner of such property).

C. *Congress Will Not Limit the Innocent Owner Defense to Bona Fide Purchasers*

In response to *92 Buena Vista*, Congress may reconsider the issue of whether the innocent owner defense should be limited to bona fide purchasers. Congress could reverse *92 Buena Vista*'s conclusion that innocent donees are owners for the purposes of the innocent owner defense in section 881(a)(6). Eliminating the opportunity for all donees to avoid forfeiture by proving innocence would prevent drug dealers from sheltering funds with friends and relatives.²⁸⁹ Public policy may also support abolishing the innocent owner defense for donees because the associates, relatives, and significant others of drug dealers should not benefit from gifts of illegal proceeds, even if they were entirely innocent.²⁹⁰ Moreover, limiting the innocent owner defense to bona fide purchasers would be more consistent with the traditional principle that only purchasers who give value in exchange for value should obtain property free of superior interests of which they are unaware.²⁹¹

Limiting the innocent owner defense to bona fide purchasers, however, would produce some harsh consequences. Friends and family members who receive gifts from persons only suspected of drug dealing also could lose their property, since the government can seize property merely by establishing probable cause that the property consists of drug proceeds and does not have to prove that anyone involved with the property seized

289. See *supra* note 134 and accompanying text (setting forth Congress' desire to prevent drug dealers from transferring drug proceeds to family and friends using fraudulent transactions).

290. See Petitioner's Brief at 43, *92 Buena Vista* (No. 91-781) (arguing that the innocent owner defense should be limited to bona fide purchasers since it is easy for associates of drug dealers to contend that they were unknowing recipients of drug proceeds and because it is difficult to assemble evidence to rebut their claim of innocence).

291. See RESTATEMENT (SECOND) OF TRUSTS § 284 (1959) (stating that where a trustee transfers trust property to a person who takes for value and without notice of the breach of trust, the transferee holds the interest free of the trust and is under no liability to the beneficiary of the trust); SCOTT & FRATCHER, *supra* note 214, § 284 (noting that cases holding that a bona fide purchaser of trust property takes the property free of the trust are so numerous, and the principle is so firmly established, that it is unnecessary to cite cases to support it); see also U.C.C. § 2-403(1) (1993) (asserting that a person with voidable title has the power to transfer good title to a good faith purchaser for value). Including donees, however, in § 881(a)(6)'s innocent owner defense is inconsistent with the principal that donees who take property free of superior interests are unjustly enriched at the expense of superior interest holders. *United States v. 92 Buena Vista*, 113 S. Ct. 1126, 1144 (1993) (Kennedy, J., dissenting); see RESTATEMENT (SECOND) OF TRUSTS § 289 (1959) (setting forth the rule that if a trustee in breach of trust transfers trust property and the transferee does not give value for the property, the transferee holds the property subject to the trust, otherwise, the donee would be unjustly enriched as a result of the trustee's breach of duty).

actually committed a crime.²⁹² Moreover, subjecting potentially innocent donees to confiscation of their property years after the purported illegal acts and allowing them no opportunity to establish their innocence conflicts with Congress' goal that no property of truly innocent owners should be forfeited under section 881.²⁹³ Finally, Congress is currently reexamining civil forfeiture in response to the numerous instances of abuse by law enforcement authorities in order to limit further the federal government's civil forfeiture power.²⁹⁴ In light of the arguments against limiting the defense to bona fide purchasers and because of Congress' recent concern with the effects of civil forfeiture on all innocent owners, it seems unlikely that Congress will prevent innocent donees from raising innocence as a defense to civil forfeiture in the future.

CONCLUSION

United States v. 92 Buena Vista confers upon commercial lenders who obtained property interests in drug deal proceeds the right to raise the innocent owner defense contained in section 881(a)(6) of the Comprehensive Drug Abuse Prevention and Control Act.²⁹⁵ So long as future courts do not limit *92 Buena Vista* by finding that lienholders do not

292. See *United States v. Premises Known as 2639 Meetinghouse Rd.*, 633 F. Supp. 979, 992 (E.D. Pa. 1986) (discussing how the claimant bears the burden of proving the absence of knowledge of illegal activity and that the government need not prove the existence of knowledge); *supra* note 122 and accompanying text (describing how § 881 requires that once the government establishes probable cause, the burden shifts to the owner to prove by a preponderance of the evidence that the owner did not have knowledge of the property's illegal source).

293. See Joint Explanatory Statement of Titles II & III of the Psychotropic Substances Act of 1978, 124 CONG. REC. S17,647 (1978), reprinted in 1978 U.S.C.C.A.N. 9496, 9522-23 (explaining that the innocent owner defense should be construed to include any person with a recognizable legal or equitable interest in the property seized); *92 Buena Vista*, 113 S. Ct. at 1134 (interpreting Congress' use of owner in § 881(a)(6) three times with no modification as indicating a desire on behalf of Congress to protect all innocent owners).

294. See Jerry Seper, *Bill Aims to Reform Asset-Seizure Laws to Protect Innocent Owners*, WASH. TIMES, June 16, 1993, at A5 (describing how a retired man had to pay \$12,500 to recover his farm seized by the government after finding five marijuana plants, even though he had been acquitted of all criminal charges); John Enders, *Forfeiture Law Casts a Shadow on Presumption of Innocence*, L.A. TIMES, Apr. 18, 1993, at B3 (recounting how innocent mortgagees recovered their interest in a home only after waging a ten year court battle to prove that they knew nothing of the owner's drug activities). See also *infra* note 299 and accompanying text (discussing the Civil Asset Forfeiture Reform Act of 1993 proposed to limit the government's power to seize property under § 881).

295. See *supra* notes 163-175, 193-196 and accompanying text (explaining how the *92 Buena Vista* plurality and concurring opinions agreed that the term *owner* in § 881(a)(6) meant any owner who obtained an interest in property subject to forfeiture which would include interests obtained by commercial lienholders); see also *supra* notes 120-137 and accompanying text (describing the Comprehensive Drug Abuse Prevention and Control Act in general); *supra* note 20 and accompanying text (setting forth the text of 21 U.S.C. § 881(a)(6) (1988)).

qualify as owners for the purposes of the innocent owner defense, innocent lenders will have the opportunity to challenge federal civil forfeiture actions brought against collateral which is later traced to drug dealing.²⁹⁶ Innocent lenders will be able to protect security interests unwittingly taken in drug proceeds which, before *92 Buena Vista*, were automatically eliminated in some circuits by forfeiture to the government.²⁹⁷

Nevertheless, since the standard of innocence which owners are required to prove still remains undecided, commercial lenders risk the possibility that future courts will impose a duty to make inquiries into the source of any property which lenders take as collateral.²⁹⁸ Though lenders traditionally inquire as to the credit worthiness of the borrower, a duty to determine that all collateral is not the proceeds of drug dealing could create significant additional burdens on lenders, the effects of which are unknown. How deep an inquiry into the history of the property which will be required by future decisions remains to be seen. One predictable effect of a duty to make expanded inquiries most certainly will be that the cost of credit will increase for many borrowers, especially individuals, in order for lending institutions to maintain their financial integrity. On the other hand, if future courts reject such a duty and allow forfeiture of collateral to the United States only if lenders had actual knowledge of the property's illegal source or were not willfully blind to suspicious circumstances when the lenders received it, the result of such a requirement will most likely not affect significantly the outcome of many forfeiture cases. The United States still has a significant advantage in civil forfeiture actions, since the government merely has to establish probable cause that a violation has occurred, after which the burden of proof is on the owners to prove their innocence.²⁹⁹ A definition of innocence which requires that

296. *United States v. Real Property Located at 12921 Treeline Ave.*, 837 F. Supp. 1168, 1173 (M.D. Fla. 1993); *see supra* notes 239-240 and accompanying text (discussing *12921 Treeline Ave.*'s determination that a tax lienholder is merely a holder of a lien, not an owner under § 881(a)(6)).

297. *See In re One 1985 Nissan, 300ZX*, 889 F.2d 1317, 1320 (4th. Cir. 1989) (holding that no third party can acquire a legally valid interest in the property from anyone other than the United States after the illegal activity takes place); *see also supra* note 137 and accompanying text (discussing the split in the federal appellate courts which caused the United States Supreme Court to grant certiorari on the issue of whether the relation back doctrine codified in § 881(h) prevents owners who obtain property interests in drug proceeds from raising the innocent owner defense in § 881(a)(6)).

298. *See supra* note 266 and accompanying text (discussing how several courts have imposed a duty on commercial lenders to determine that collateral they accept as security for loans is not drug proceeds).

299. *See supra* note 292 and accompanying text (discussing how the United States does not have to wait for a conviction of the owner before seizing property suspected of being used for drug dealing or thought to be traceable to illegal activity); *see also* Respondent's Brief at 44, *92 Buena Vista* (No. 91-781) (describing how the owners had the burden of proving a negative, e.g., that the proceeds given by a third party were *not* traceable

owners prove that they did not actually know of or were not willfully blind to the illegal source of their property will not create a significant additional impediment to Congress' war on drugs and will provide adequate protection for the truly innocent persons which Congress intended to protect with its inclusion of the innocent owner defense in section 881(a)(6).³⁰⁰

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to a drug transaction). *But see* The Civil Asset Forfeiture Reform Act of 1993, H.R. 2417, 103rd Cong., 1st Sess. (1993) (Rep. Hyde R-Ill.) (reforming federal asset seizure laws). The Act shifts the burden of proof to the Government to show by clear and convincing evidence that the property was subject to forfeiture. *Id.* The bill also mandates that property owners who take reasonable steps to prevent others from using their property for drug deals can get their property back. *Id.* The bill was still pending in Congress as of this publication.

300. *See* Respondent's Brief at 44, 92 *Buena Vista* (No. 91-781) (noting that when a seizure occurs years after the illegal transaction, the burden of proving that the owner did not have knowledge of the proceeds' illegal source is virtually impossible to meet); *see supra* notes 120, 128 and accompanying text (discussing Congress' goals in enacting 21 U.S.C. § 881(a)(6) of dealing more effectively with the illegal drug trade while providing protection for innocent persons who unknowingly obtain an interest in drug proceeds).