CIVIL FORFEITURE AND DRUG PROCEEDS: THE NEED TO BALANCE SOCIETAL INTERESTS WITH THE RIGHTS OF INNOCENT OWNERS

I. INTRODUCTION

The drug problem in the United States has reached such epidemic proportions that nearly every segment of society has been affected in some way. Our nation’s leaders have acknowledged the problem and its detrimental effects, but have been unable to design and implement a plan to eliminate this evil. In a special address to the American people, then President George Bush unveiled his plan to rid the United States of what he called “the gravest domestic threat facing our nation today.” The President’s plan included a number of elements designed to fight the “war on drugs.” Underlying these elements was a common theme of “zero tolerance for casual drug use.”

The “zero tolerance” policy extended the Reagan Administration’s “war on drugs,” which had led to the reinterpretation and broad implementation of the civil forfeiture statute found in the Comprehensive Drug Abuse Prevention and Control Act of 1970. Under this statute, law enforcement officials could seize property used in the processing or distribution of controlled substances or property purchased with the proceeds of such activities.

1. In 1990, the estimated number of illicit drug users in the United States was 26,809,000, which accounted for approximately 13.3 percent of the total population. NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL SURVEY ON DRUG ABUSE POPULATION ESTIMATES 1990, 17 (1991). “Illicit drugs,” as used in the survey, include “marijuana, nonmedical use of psychotherapeutics, inhalants, cocaine, hallucinogens and heroin.” Id.

2. In a special address, President George Bush spoke passionately of this menace as he acknowledged:

   No one among us is out of harm’s way. When 4-year-olds play in playgrounds strewn with discarded hypodermic needles and crack vials, it breaks my heart. When cocaine, one of the most deadly and addictive illegal drugs, is available to school kids—school kids—it’s an outrage. And when hundreds of thousands of babies are born each year to mothers who use drugs—premature babies born desperately sick—then even the most defenseless among us are at risk.

Address to the Nation on the National Drug Control Strategy, 25 WEEKLY COMP. PRES. DOC. 1305 (Sept. 5, 1989).

3. Id. at 1304.

4. Id.

5. Id. at 1306; see id. at 1305-08.

The drafters of the civil forfeiture statute realized the potential for harm to innocent owners whose property was used in such illegal activities without their knowledge. This foresight led to the adoption of innocent owner defenses designed to protect individuals and institutions who stood to have their property seized without misconduct on their part.

One example of a protected group is common carriers who cannot be reasonably expected to police their passengers and cargo. Another example of protected individuals is those people whose property has been stolen or misappropriated. Without such a defense, these individuals would be victimized twice—first by the thieves and a second time by the government when their property is forfeited. A final example is landlords who rent to tenants who subsequently use the premises to conduct illegal activity. If such a defense were not available, our nation's landlords would be wary of every potential tenant. These examples are only a few instances of the many situations in which innocent parties could stand to lose their property because of another party's wrongdoing. In each of these cases, it seems obvious that innocent parties should not have their property confiscated.

There are situations in which it is more difficult to determine if the property owner should be extended the innocent owner defense. These situations have presented a challenge to Congress and the courts as both have tried to determine which parties should be extended the defense and which parties should be deprived of it. Congress and the courts have tried to balance the equities and interests of the concerned parties, but have been unable to devise a scheme that effectively addresses both sides. On one side of the equation exists the compelling interests of society in dealing effectively with the drug problem, while on the other side exists the interests of the individual who might be deprived of his or her property. Finding a solution will require a scheme that is flexible enough to accommodate the needs of innocent parties while still maintaining enough rigidity to effectively deal with the drug problem.

This Comment will examine the civil forfeiture statute as it applies to innocent donees who gain possession of tainted property after an illegal act has taken place. The discussion will begin by examining the history of civil forfeiture and will trace the Supreme Court's treatment of inno-

7. This formulation of the main issue is somewhat different from the question presented in United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126 (1993), which asks "whether an owner's lack of knowledge of the fact that her home had been purchased with the proceeds of illegal drug transactions constitutes a defense to a forfeiture proceeding under The Comprehensive Drug Abuse Prevention and Control Act of 1970." Id. at 1129 (citation omitted). The Court's question is somewhat more narrow, but the overall inquiries will follow parallel paths.
cent owners to show the lack of recognition of innocence on the owner’s part as a defense. The next section will examine the evolution of the current statutory scheme and will examine innocent owners within the general framework of that scheme.

After this background information has been presented, the focus of the Comment will shift to the case of United States v. 92 Buena Vista Avenue. This case presented the United States Supreme Court with the issue of when “innocent” donees of tainted drug proceeds can assert the innocent owner defense. In deciding Buena Vista, the Court was faced with a number of sub-issues. The first sub-issue was who qualifies as an “owner.” The second sub-issue concerned the role of the relation-back doctrine in civil forfeiture. The final sub-issue in Buena Vista was to resolve the difficulty involved in applying two of the statutory scheme’s provisions simultaneously. This Comment will examine the plurality opinion’s treatment of these issues. The Comment will conclude with a number of suggestions for changes that could solve these problems. These suggestions will attempt to balance the compelling interests involved in maintaining the effectiveness of the statutory scheme while protecting innocent owners’ property from seizure.

II. THE HISTORICAL ANTECEDENTS TO THE MODERN CIVIL FORFEITURE STATUTES

A. England and the Common Law

The historical antecedents of civil forfeiture can be traced to biblical times. The “deodand” was part of the English common law and pro-

---

9. The idea of forfeiture of the object as punishment for the object’s “conduct” can be found in the Holy Bible where it is written that “[w]hen an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten; but the owner of the ox shall be clear.” Exodus 21:28.
10. The precise origins of the deodand are somewhat uncertain. One author commented in frustration, “[W]e cannot hope successfully to penetrate the obscurity in which it is involved, or to suggest any theory which may be altogether satisfactory to the learned and inquiring reader.” Law of Deodands, 34 Law Mag. 189, 191 (1845). Other commentators of the period adopted a more positive attitude toward explaining the origins of the elusive doctrine. One such commentator was Sir Matthew Hale who wrote:

Anciently, it seems, when any person came suddenly by his death by the accidental agency of an animate or inanimate chattel, the chattel was to be given to the church for masses for the soul of the deceased. Such a law was manifestly a wise and humane one, while it was the fervent belief of the people that saying of such masses was essential to the eternal welfare of the souls of deceased persons; for in all times, persons of the poorer sort are those who are most exposed to death by accidents, and this would be particularly the case in the times of which we speak, when the higher classes of society
vided for the seizure of property that was found to have caused the death of any of the king's subjects. Sir Matthew Hale explained the concept: "By deodand, is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature; which is forfeited to the king to be applied to pious uses, and distrusted in alms by his high almoner: though formerly destined to a more religious purpose." Another commentator of the time explained the deodand in more accidental terms:

A deodand . . . must arise from a death by misadventure, and is, when any moveable thing not fixed to the freehold, or instrument inanimate or beast animate, doth, upon land or in fresh water, by mischance cause the untimely death of man above the age of fourteen years, within the year and day.

Such an explanation begins to capture the prevailing attitude of the period, which was that the objects truly were the wrongdoers and, as such, the objects should be punished. Oliver Wendell Holmes, Jr. observed that at this time "the fact of motion is adverted to as of much importance." This observation further emphasizes that it was truly the property that was being prosecuted and punished in the forfeiture proceedings because inanimate objects were held culpable when they became animated.

To fully understand the history of civil forfeiture provisions, a number of important distinctions must be realized with respect to deodands and other forms of forfeiture statutes. One of the most basic and critical distinctions is that in the case of deodands, the res, or property, was considered to be the offender and, therefore, subject to forfeiture. The deodand was a doctrine used in accidents where no human factor influenced the fatal events. The same theory of culpable property has been applied as the basis underlying the present civil forfeiture statutes because the actions are commenced against the property and are not affected by the outcome of any potential pending criminal actions.


took care, by their continual state of warfare and mutual destruction, to allow little room for accidental death among themselves, so that but for the law which devoted to the procurement of masses the thing that caused accidental death, there could have been for the poor no provision for that species of spiritual aid, which was considered, both by rich and poor, as much an essential as decent burial is at this day.


11. Hale, supra note 10, at 423 n.1 (emphasis omitted).
In contrast to civil forfeiture, criminal forfeiture statutes were implemented with the intent to punish the offenders and not the property. For example, a gun used in a murder would be forfeited, but it would not be considered a deodand even though it would be found to have caused the death of another. There is ample authority from 19th century England which establishes that deodands would not be found in cases of murder or manslaughter.\(^{14}\) Forfeiture was also used as punishment for felonies other than murder, such as treason.\(^{15}\) William Blackstone explained the rationale behind the forfeiture of the property of these criminals:

\[\text{[A]ll property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom which every man must sacrifice when he enters into social communities. If therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him.}\]  \(^{16}\)

Blackstone’s comments establish that the purpose of seizing the offenders’ property was to punish them and make them literally pay for violating society’s rules. His explanation also illustrates the inherent policy differences between the seizure of property as part of an individual’s punishment for a crime and the forfeiture of property because the property was considered culpable. This distinction may seem somewhat artificial and insignificant, but its impact on the formulation of future forfeiture statutes cannot be over-emphasized. This distinction between criminal and civil forfeiture is critical to this Comment because only the latter will be discussed.

\**B. Civil Forfeiture in the United States**

The deodand was never adopted as part of the common law in the United States.\(^{17}\) However, this did not mean that forfeitures of property

\[14. \text{See 1 William Blackstone, Commentaries *299; Hale, supra note 10, at 424; 1 Sir Frederick Pollock & Frederic W. Maitland, The History of English Law 351 (2nd ed. 1898).}
16. \text{1 Blackstone, supra note 14, at *299.}
17. \text{The deodand was never adopted in this country, but it was expressly rejected in Parker-Harris Co. v. Tate, 188 S.W. 54 (Tenn. 1916). The Supreme Court of Tennessee stated:}

\[\text{In this state, we have a positive denunciation of its principle firmly embedded in the fundamental law. The Constitution of 1870 provides:}\]
were not undertaken in this country. Many offenses resulted in seizure of the offending property, both before and after the ratification of the Constitution. During the colonial period, English forfeiture provisions were enforced in this country as common law courts exercised in rem jurisdiction over various property. Many forfeiture statutes were also adopted shortly after the ratification of the Constitution. One such statute provided for the seizure of property involved in customs offenses.18 Another federal statute authorized the seizure of vessels used to deliver slaves to foreign countries.19 Yet another statute provided for the seizure of any vessel used to deliver slaves to this country.20 These examples are but a few of the many statutes that mandated seizure of property if that property was found to have been implemented as part of an illegal act. "The enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise."21

C. The Innocent Owner’s Defense

The disposition of the innocent owner’s property has been debated since the inception of these statutes. It seems fair and logical to assume that the property of innocent individuals falls outside the statutory provisions authorizing such seizures. This assumption was not reflected in the statutory scheme or judicial decisions until recently, however. In its 1974 opinion of Calero-Toledo v. Pearson Yacht Leasing Co.,22 the Supreme Court summarized the general attitude toward any type of innocent owner defense: "Despite this proliferation of forfeiture enactments, the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."23

One of the earliest Supreme Court cases to present the innocent owner issue was United States v. 1960 Bags of Coffee,24 in which the gov-

No corruption of blood or forfeiture of estates: no deodands.—That no conviction shall work corruption of blood or forfeiture of estate. The estate of such persons as shall destroy their own lives shall descend or vest as in the case of natural death. If any person be killed by casualty, there shall be no forfeiture in consequence thereof. Article 1, § 12.

Id. at 55 (emphasis added).

23. Id. at 683.
ernment seized a quantity of coffee under the Non-Intercourse Act of 1809. This Act prohibited the importation of coffee and authorized its seizure. The seizure occurred after the coffee was sold to a bona fide purchaser for value who brought the action to regain title. The Court upheld the forfeiture by interpreting the statute to vest title in the United States government upon commission of the offense. The Court acknowledged the harsh results of its opinion, but justified them as follows:

It is true that cases of hardship and even absurdity may be supposed to grow out of this decision; but on the other hand, if by a sale it is put in the power of an offender to purge a forfeiture, a state of things not less absurd will certainly result from it.

Even at this early date, the Court had a firm understanding and appreciation of the difficulty involved in balancing the rights of innocent owners against the need for effective governmental policy.

The Court was presented with the same issue a short time later in The Palmrya. In this case, a vessel allegedly involved in piratical activities was seized in accordance with the Piracy Acts of 1819. In its decision, the Court reiterated the importance of the distinction between criminal proceedings, which included forfeiture as part of the punishment, and statutorily prescribed in rem proceedings in which the res, or property, was the offender. The Court stated that "no personal conviction of the offender is necessary to enforce a forfeiture in rem in cases of this nature." By reiterating the separation of the in rem proceeding from any criminal prosecution, the Court affirmed that the innocence of a party had no bearing on the right of the government to seize the property. If there was a connection between the proceedings, the govern-

25. Ch. 24, § 5, 2 Stat. 528 (1809).
27. *Id.* at 405.
28. *Id.*
30. Ch. 77, § 2, 3 Stat. 510 (1819).
32. *Id.* at 15 (emphasis omitted).
33. The Court was careful to keep the distinction and preserve the in rem proceeding as a separate entity as it declared:

In the contemplation of the common law the offender's right was not devested until the conviction. But this doctrine never was applied to seizures and forfeitures created by statute, *in rem*, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing;... [T]he practice has been, and so this court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal pro-
ment would have to wait for a criminal conviction before acting on the property. Such a delay would defeat the purpose of proceeding against the property in rem because this procedure is intended to allow the government to move swiftly.

Another case applied the same statute and forfeiture provisions about twenty years after *The Palmyra*. In *United States v. Brig Malek Adhel*, an innocent owner's vessel was seized after it was found to be armed. The Court acknowledged that the owner's innocence had been "fully established," but asserted that the innocence could have no bearing on the seizure. In his majority opinion, Justice Story declared:

[I]t may be remarked that the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner . . . .

And this is done from the necessity of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party.

The cases interpreting this statute illustrate the Court's unwavering resolve to bring congressional intent to fruition. While the Court acknowledged that innocent individuals may lose their property as a result of the civil forfeiture statute, it firmly established that innocent owner protection was not their highest priority.

ceeding *in personam*. This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments.

*Id.* at 14-15.

34. 43 U.S. (2 How.) 210 (1844).
35. *Id.* at 211-12.
36. *Id.* at 238.
37. *Id.* at 233.
38. It is important to note that the cases mentioned represent only a small cross-section of the many that dealt with innocent owners under the Piracy Act of 1819. Chief Justice Marshall seemed to summarize the court's position as he dealt with a similar statute in *United States v. The Little Charles*, 26 F. Cas. 979 (C.C.D. Va. 1818) (No. 15,612):

It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is, therefore, not unreasonable that the vessel should be affected by this report.

*Id.* at 982. Chief Justice Marshall's comments plunge through the legal fiction of an inanimate object committing the offense and offer a more realistic, if not pleasing, explanation to those innocent individuals who have had their property confiscated.
Another area that Congress deemed appropriate for civil forfeiture was revenue law violations. This area seemed to be a natural for forfeiture because the target of these activities was profit, and the seizure of property would serve to deter would-be wrongdoers from engaging in such activities. One of the first civil forfeiture cases involving a revenue statute\(^3\) was *Dobbins's Distillery v. United States*.\(^4\) This case involved a landowner who leased his property to a group of individuals that used it as a distillery.\(^41\) *Dobbins's* arose over thirty years after *Brig Malek Adhel*, but the Court still spoke with the same certainty when it held that the innocent owner could not assert his innocence as a defense to the forfeiture.\(^42\) The Court declared that the lessee who engaged in the illegal activity had the power to bind the property:

> Power to that effect the Law vests in him by virtue of his lease; and, if he abuses his trust, it is a matter to be settled between him and his lessor; but the acts of violation as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner.\(^43\)

This passage offers an excellent illustration of the Court's continuing harsh attitude toward these offenses. It further illustrates the Court's determination to carry out congressional intent by rejecting an innocent owner defense where one had not been statutorily prescribed. This case also shows that the legal fiction of treating the property as the offender served purposes beyond merely "punishing" the culpable property. It also served to deter landowners from knowingly allowing their property to be used for illegal purposes and then pleading ignorance when the lessee is caught. If landlords were allowed to assert their innocence and escape forfeiture, then the effectiveness of the statute would be drastically reduced.\(^44\)

---

40. 96 U.S. 395 (1877).
41. *Id.* at 396-97.
42. *Id.* at 403-04.
43. *Id.* at 404.
44. For an additional case dealing with forfeiture of innocent owner property under the revenue laws, see *United States v. Stowell*, 133 U.S. 1 (1890). In that case, the Court rejected construing the statutes in favor of the defendant as would be done under penal statutes. The Court explained:

> Statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature.
Another early case that involved an innocent owner is *J.W. Goldsmith, Jr.-Grant Co. v. United States.* In this case, the Court upheld the seizure of an automobile under a federal tax-fraud forfeiture statute. The Court held that the statute did not deprive the innocent owner of his property in violation of the Due Process Clause. However, it acknowledged the arguments that such a seizure could be unjust and beyond the scope of congressional intent:

It is, hence, plausibly urged that such could not have been the intention of Congress, that Congress necessarily had in mind the facts and practices of the world and that, in the conveniences of business and of life, property is often and sometimes necessarily put into the possession of another than its owner. And it follows, is the contention, that Congress only intended to condemn the interest the possessor of the property might have to punish his guilt, and not to forfeit the title of the owner who was without guilt.

After acknowledging that Congress probably had not intended to seize the innocent owner's property, the Court reiterated that the property was culpable. This culpability was based on the theory that in the case of property used to accomplish certain wrongs, "Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong." The rejection of Due Process arguments in this case emphasized the continued reliance on statutory construction and congressional intent as the determining factors in the Court's decisions about innocent owners.

Prohibition brought with it a number of state forfeiture statutes. One such statute was at issue in *Van Oster v. Kansas.* In this case, an auto-

---

*Id.* at 12. The Court's express rejection of construing the forfeiture statute as penal further emphasizes the nature of the proceedings as against the culpable property and not as against the property owners. The issue of whether the forfeiture proceedings should afford the same constitutional safeguards to the property-defendant as to the person-defendant still remains unresolved.

45. 254 U.S. 505 (1921).
46. Act of July 13, 1866, ch. 184, 14 Stat. 98 (1866).
47. *Goldsmith-Grant,* 254 U.S. at 511.
48. *Id.* at 510.
49. *Id.* at 510-11.
50. *Id.* at 510.
52. 272 U.S. 465 (1926).
mobile was seized after it was illegally used to transport liquor. The Court rejected arguments that the car's owner was without knowledge of the intended use of the vehicle and that he would not have consented had he known of its intended use. The Court found it sufficient that the owner had entrusted it to the offender. In so finding, the Court compared forfeiture to other areas of law:

Much of the jurisdiction in admiralty, so much of the statute and common law of liens as enables a mere bailee to subject the bailed property to a lien, the power of a vendor of chattels in possession to sell and convey good title to a stranger, are familiar examples.

By analogizing to these other well-settled areas of law and by upholding the forfeiture against a Fourteenth Amendment attack, the Court solidified the notion that the innocence of the property owners would have no bearing on forfeitures.

After Van Oster, the Supreme Court was not again directly confronted with the innocent owner issue until the case of Calero-Toledo v. Pearson Yacht Leasing Co. This case involved a leased pleasure yacht seized in accordance with a Puerto Rican statute. The statute authorized the seizure of property used to transport controlled substances. The lessors attempted to intervene as innocent owners. The Court upheld the forfeiture action but indicated that innocent owners might warrant some protection. It stated, in dictum, that "it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent." The acknowledgment that innocent owners might be protected in certain limited situations marked a major turning point in forfeiture law as the Court began to re-evaluate a doctrine that had existed since the days of the deodand. The Court did not establish a limited innocent owner exception, but only stated:

Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be ex-

53. Id. at 465-66.
54. Id. at 467.
55. Id. at 467.
56. Id. at 468-69.
59. Calero-Toledo, 416 U.S. at 668.
60. Id. at 689 (footnotes omitted).
61. See supra notes 10-17 and accompanying text.
pected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.\textsuperscript{62} Calero-Toledo's significance cannot be over-emphasized, however. The Court seemed to be wavering in its resolve to adhere to congressional intent as being above all other factors in making its decisions. The Court's language in Calero-Toledo contains some reluctance, failing to enunciate definitive statements or exceptions.

This line of cases illustrates the Court's reluctance to find a constitutionally mandated innocent owner defense in cases in which Congress has failed to legislate such a defense.\textsuperscript{63} The Court relied almost exclusively on congressional intent, which was designed to provide a disincentive to potential wrongdoers and to punish those individuals who undertook the illegal activities by holding their property responsible as an accomplice. Finally, the Court's decision in Calero-Toledo signaled a change in attitude that Congress was quick to address when it amended the statutory scheme.

III. The Current Statutory Scheme

The Comprehensive Drug Abuse Prevention and Control Act of 1970\textsuperscript{64} was enacted "to deal in a comprehensive fashion with the growing menace of drug abuse in the United States."\textsuperscript{65} The Act was intended to address the many facets of the drug problem as evidenced by its statement of purpose:

"To amend the Public Health Service Act and other laws to provide increased research into, and prevention of, drug abuse and drug dependence; to provide for treatment and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse."\textsuperscript{66}

\textsuperscript{62} Calero-Toledo, 416 U.S. at 689-90 (footnote omitted).
\textsuperscript{63} See also Logan v. United States, 260 F. 746 (5th Cir. 1919); United States v. One Saxon Automobile, 257 F. 251 (4th Cir. 1919); United States v. Mincey, 254 F. 287 (5th Cir. 1918); United States v. 246 1/2 Pounds of Tobacco, 103 F. 791 (N.D. Wash. 1900).
\textsuperscript{65} H. R. REP. No. 1444, 91st Cong., 2d Sess., pt. 1, at 1 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4567. This initial scheme had a number of intended goals to deal with the drug problem:

(1) through providing authority for increased efforts in drug abuse prevention and rehabilitation of users, (2) through providing more effective means for law enforcement aspects of drug abuse prevention and control, and (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs.

\textit{Id.}

One of the Act's main tools to confront the drug problem was authorization to law enforcement to seize property used in any aspect of the drug trade.\textsuperscript{67} Forfeiture seemed to be the perfect way to combat the proliferation of illegal drugs because it provided a way to reach the driving force behind the drug industry.\textsuperscript{68} Other criminal penalties, such as imprisonment and fines, appeared futile in comparison to forfeiture. The logic was simple; if the ability to make profits could be removed or seriously curtailed, there would be less incentive to traffic in illegal drugs. The chances for success under these new forfeiture provisions seemed great; however, the results painted a dismal picture. After it became apparent that the scheme had failed to achieve its intended purposes, Congress decided to make certain additions to the statute.

In 1978, Congress undertook a seemingly elementary step to render the statute more effective. It added a provision (section 881) authorizing the seizure of proceeds from these illegal activities in addition to seizure of property.\textsuperscript{69} This additional provision was designed to eliminate profit as a motivating factor in the drug trade. The addition of this section was

\textsuperscript{67} The original statute was limited in the areas of property that were subject to forfeiture. Only the following property was within the reach of the statute:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2).

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.


\textsuperscript{68} The intended goal of removing the economic rewards from the drug industry is clear, as evidenced by the comments of Senator Joseph R. Biden regarding the implementation of the original forfeiture scheme:

Since 1970, the Federal Government has had the statutory authority to punish a convicted criminal for distributing drugs illegally not only by incarceration but also by forfeiture; that is, the surrender of assets generated by illicit trading in drugs to the Government by court order. It was hoped that taking away the enormous sums of money involved would eliminate the drug network by not only seizing illicit drugs and incarcerating traffickers but also by confiscating the enormous profits that sustain the elaborate trafficking networks.

\textsuperscript{69} The subsection provided:
significant because it included an innocent owner provision that protected owners whose property had been used without their "knowledge or consent." 70

This second attempt at implementing a forfeiture scheme led to similarly disappointing results. 71 Congress recognized the ineffectiveness of the amended statute and further modified the scheme in 1984. The forfeiture statutes were deficient in multiple areas; however, two areas presented the most serious problems and were given priority in the subsequent amendment process.

The first deficiency was the limited scope of the property subject to forfeiture. 72 Real property was not subject to forfeiture. Without seizing the real property on which these operations were run, the government allowed drug traffickers to retain a key economic possession in addition to an essential part of their enterprise. 73

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

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


71. The government recognized that forfeiture had not lived up to its great expectations and goals as illustrated by the following comments:

In April 1981 the General Accounting Office released a report entitled Asset Forfeiture—A Seldom Used Tool in Combatting Drug Trafficking . . . . The GAO concluded that the [two] major reasons for the failure of forfeiture Statutes—which in 1970 were proclaimed to be the ideal weapon for breaking the backs of sophisticated narcotics operations—were (1) that Federal law enforcement agencies had not aggressively pursued forfeiture, and (2) that the current forfeiture statutes contain numerous limitations and ambiguities that have significantly impeded the full realization of forfeiture's potential as a powerful law enforcement weapon.

S. Rep. No. 225, 98th Cong., 2nd Sess. 191 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3374 [hereinafter S. Rep. No. 225]. These comments are an excellent illustration of the general confidence in forfeiture as an effective weapon. The comments also illustrate the recognition that the statutory scheme needed to be revised if it was to be effective.


73. The inconsistency of the statute in the lack of such a provision was recognized in the Senate Report, which stated:
The other major deficiency in the statutory scheme was the "phenomenon of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction." Any delay in the forfeiture proceeding could give offending individuals time to dispose of their assets and defeat forfeiture. A Senate report evidenced a clear recognition of this problem by stating, "Changes are necessary both to preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot as a result avoid the economic impact of forfeiture." Thus, congressional intent was clearly directed to devise a statutory scheme devoid of loopholes, which offered an opportunity to avoid forfeiture penalties.

When Congress began to rectify the problems that had prevented the full implementation and effectiveness of the forfeiture provisions, it devised amendments "intended to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies." There were a number of changes and additions to the statutory scheme; however, two changes proved to be the most useful because they directly confronted the weaknesses discussed above.

The first change was a provision enabling authorities to seize any real property used to facilitate drug-related activities, a strong addition to

Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marihuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, even though its use was indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent.


74. S. Rep. No. 225, supra note 71, at 195, reprinted in 1984 U.S.C.C.A.N. at 3378. Although the focus of this Comment is the civil forfeiture aspects of the statute, this deficiency and subsequent remedial provisions are extremely significant as they had great implications for civil forfeiture.


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

(7) All real property, including any right, title, and interest... which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment,
the government's arsenal. This provision was a powerful deterrent to illegal activities because the statutory scheme now included all of the drug trafficker's property within the scope of forfeiture. This subsection also included an innocent owner provision that protected owners in situations in which the activities undertaken were done "without the knowledge or consent" of the owner. 78

The second important addition to the statutory scheme was a provision that codified the common law relation-back theory 79 that first appeared in United States v. Stowell. 80 This provision was originally enacted to mirror the criminal forfeiture statute that was designed to prevent criminals from concealing assets prior to trial.

After the 1984 amendments, the forfeiture scheme of section 881 was basically complete, and it was enforced extensively to combat the drug problem in the United States. Some subsequent changes were made, but they were primarily administrative in nature and were not of great consequence to the statute's implementation. As the statute was implemented on a broader scale, however, inherent problems began to surface.

IV. THE BUENA VISTA CASE

As previously discussed, the Supreme Court had rejected the innocent owner defense in civil forfeiture by deferring to congressional intent. 81 This Comment also has shown that Congress recognized the need to protect innocent owners while still maintaining the effectiveness of the statutory scheme. 82 United States v. 92 Buena Vista Avenue 83 was the first case to question the extent to which innocent donees would be protected under federal forfeiture statutes containing innocent owner provisions.

---

80. 133 U.S. 1 (1890).
81. See supra notes 22-63 and accompanying text.
82. See supra notes 64-80 and accompanying text.
83. 113 S. Ct. 1126 (1993).
The facts of *Buena Vista* are as follows: Joseph Anthony Brenna and Beth Ann Goodwin lived together in a close personal relationship from the late 1970s until 1987. In November 1982, Mr. Brenna transferred $216,000 by wire to Ms. Goodwin’s attorneys in New Jersey. Ms. Goodwin then used the money to purchase the property at 92 Buena Vista Avenue, Rumson, New Jersey, where she had lived since 1982.

The government seized this property in 1989 with a forfeiture action under 21 U.S.C. § 881 after Mr. Brenna was indicted on a number of offenses related to the importation of marijuana. The complaint seeking forfeiture was filed on April 3, 1989, and shortly thereafter, “the United States District Court for the District of New Jersey reviewed the verified complaint and determined that there was probable cause to believe that the premises were subject to forfeiture.” A Summons and Warrant for Arrest were issued and the United States Marshall seized the property.

Ms. Goodwin moved for dismissal, but the district court denied the motion and granted the “government’s request for a stay of [the] civil proceeding pending trial of the criminal proceeding in the Southern District of Florida.” The district court refused to allow Ms. Goodwin to assert the innocent owner defense of section 881(a)(6) after she admitted that the funds she used to purchase the house were a gift from Mr. Brenna. The court stated, “[T]he innocent owner defense may only be invoked by those who can demonstrate that they are bona fide purchasers for value.”

84. 937 F.2d 98, 100 (3d Cir. 1991), aff’d, 113 S. Ct. 1126 (1993).
85. Id.
86. Id.
87. Id.
89. Id.
90. Id. Ms. Goodwin was allowed to remain in possession of the property in accordance with an Occupancy/Tenant Agreement with the United States Marshals Service. Id.
92. Id. at 860.
93. Id.
On July 13, 1990, the district court issued an order certifying four questions for appeal. The central question was "[w]hether an innocent owner defense may be asserted by a person who is not a bona fide purchaser for value concerning a parcel of land where the government has established probable cause to believe that the parcel of land was purchased with monies traceable to drug proceeds." The United States Court of Appeals for the Third Circuit rejected the district court's contention that Ms. Goodwin must be a bona fide purchaser for value to assert the innocent owner defense. The case was remanded to the district court so it could be determined if she was in fact an innocent owner.

The facts of this case seem to raise straightforward issues; however, in rendering its decision, the United States Supreme Court was forced to decide a number of sub-issues that had the potential to dramatically alter the forfeiture scheme in its application and effectiveness. One of the most basic issues was how the term "owner" was to be defined. Another important issue was to determine what role the relation-back theory should play in the overall statutory scheme. The final, and most difficult, issue was to resolve the inherent conflict between sections 881(a)(6) and 881(h). These issues were closely related as evidenced by the difficulty the lower courts had in applying the provisions simultaneously. The following sections of this Comment attempt to frame these issues in their historical context in an effort to understand their significance in the current forfeiture scheme.

94. The district court issued the order pursuant to 28 U.S.C. § 1292(b) (1988), which provides that:

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, [t]hat application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id.

95. Buena Vista, 937 F.2d at 100.

96. Id. at 101-02.

97. Id. at 103.
A. Defining Who Is an "Owner"

*United States v. 92 Buena Vista Ave.*\(^98\) considered who should be an owner under the forfeiture statute. It is logical that non-owners should not be allowed to assert a defense intended for owners. Substantial evidence suggests that the term "owner" should be construed in a broad sense to include both bona fide purchasers for value and individuals who came into possession through other means.

The statute's language clearly indicates that "owner" is intended to encompass more than bona fide purchasers for value. If a narrow construction was desired, Congress could have expressly stated that only bona fide purchasers were protected, as it did in the criminal forfeiture statute.\(^99\) In addition, the statute makes no explicit reference to the means by which property is procured, which leads to the logical conclusion that Congress was not concerned with the issue. The Joint Explanatory Statement\(^100\) that accompanied the amendment of section 881(a)(6) outlined congressional intent with respect to the definition by stating that "'owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized."\(^101\) This statement indicates that Congress did not intend to limit the construction in any way. The courts have followed congressional intent by construing owner with a broad interpretation.\(^102\)

\(^{98}\) 113 S. Ct. 1126 (1993).

\(^{99}\) Section 853(c) provides:

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


\(^{102}\) See, e.g., United States v. 6109 Grubb Road, 886 F.2d 618 (3d Cir. 1989) (co-tenant considered owner); United States v. $10,694.00 U.S. Currency, 828 F.2d 233 (4th Cir. 1987) (attorney considered owner); *In re Metmor Fin., Inc.*, 819 F.2d 446 (4th Cir. 1987) (mortgagee considered owner). See also United States v. One 1987 Volkswagen Jetta, 760 F. Supp. 772, 775 (W.D. Mo. 1991) (citation omitted) (defining ownership as "having a possessory interest in the res, with its attendant characteristics of dominion and control").
B. The Relation-Back Doctrine

The relation-back doctrine is a well-established rule in our legal system that vests ownership of statutorily forfeitable property in the government at the precise moment of the commission of the offense giving rise to the forfeiture. Its origins can be traced to the first civil forfeitures in our nation’s history.103 The Supreme Court outlined the basic doctrine in its 1818 opinion of Gelston v. Hoyt.104 The Court stated that “the forfeiture must be deemed to attach at the moment of the commission of the offence, and, consequently, from that moment, the title of the plaintiff would be completely devested, so that he could maintain no action for the subsequent seizure.”105

The doctrine was consistently applied as an essential element in civil forfeiture cases because the owners had no recourse once the offense was committed. The Court offered an excellent summation of the doctrine and its role in civil forfeiture in Caldwell v. United States:106

In the first, the forfeiture is, the statutory transfer of right to the goods at the time the offence is committed. If this was not so, the transgressor, against whom, of course, the penalty is directed, would often escape punishment, and triumph in the cleverness of his contrivance, by which he has violated the law. The title of the United States to the goods forfeited, is not consummated until after judicial condemnation; but the right to them relates backwards to the time the offence was committed, so as to avoid all intermediate sales of them between the commission of the offence and condemnation.107

These early civil forfeiture cases assist in understanding the relation-back doctrine; however, more importantly, they place the doctrine in its proper context as an essential element to any forfeiture scheme. Its necessity becomes apparent when practical considerations are realized. If property did not vest in the government at the time the offense was committed, there would be ample opportunity for property to be concealed, which would defeat the entire purpose of an in rem proceeding.

The doctrine was reiterated in United States v. Stowell,108 where the Court explained, “[T]he forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United

104. 16 U.S. (3 Wheat.) 246 (1818).
105. Id. at 311.
107. Id. at 381-82.
108. 133 U.S. 1 (1890).
States, although their title is not perfected until judicial condemnation.” The cases above are only a sampling of the many cases that have restated this well-established doctrine. The doctrine was eventually codified and incorporated into both the criminal and civil forfeiture statutory schemes.

C. Attempting to Reconcile Sections 881(a)(6) and 881(h)

The amendments to the civil forfeiture statute have resulted in a scheme that is more comprehensive and more effective in fulfilling the statute’s intended purposes. Unfortunately, however, the amendments have also developed a scheme of inherent inconsistency that threatens to keep the statute and the courts in turmoil until it is successfully resolved. The conflict exists between the innocent owner defense of section 881(a)(6) and the relation-back provision of section 881(h). The basic issue is which of these two subsections should be applied first.

If the innocent owner defense of section 881(a)(6) is applied first, it negates section 881(h), which vests title in the United States government upon commission of the offense. This application of the statute would allow owners to stay in possession while they are asserting the defense and would offer them the opportunity to conceal the property that was subject to forfeiture. There would be no limit to the transactions that could take place if the offender attempts to hide the bounty of the illegal activity. The effectiveness of section 881(h) and the common-law doctrine upon which it is based would be nullified.

Conversely, if section 881(h) is applied first, a new range of difficulties ensues because the innocent owner defense of section 881(a)(6) is diminished to a nonfactor. The situation would be particularly problematic for individuals acquiring the property after the offense has been committed because they have acquired property to which the government holds title and which they have never owned. Thus, it would be an attempt to assert an innocent owner defense on property to which the government has always held good title.

109. Id. at 16-17.
110. For additional cases interpreting the relation back doctrine, see Thacher’s Distilled Spirits, 103 U.S. 679 (1880); Henderson’s Distilled Spirits, 81 U.S. (14 Wall.) 44 (1871); United States v. 1960 Bags of Coffee, 12 U.S. (3 Cranch) 398 (1814); United States v. Grundy & Thornburgh, 7 U.S. (3 Cranch) 338 (1806).
112. See supra notes 79-80 and accompanying text.
113. It should be noted that title vests in the United States at the time of the commission of the offense, but is not perfected until judicial condemnation is decreed.
This inherent conflict between the statutory provisions has created great difficulties for courts attempting to apply the statute. These courts have been unable to compromise in their application and have gone to opposing extremes described above.

_In re One 1985 Nissan_114 addressed section 881(a)(6) and its innocent owner defense. In _Nissan_, the police discovered the bodies of Dennis White, a drug trafficker, and his daughter in White’s house.115 They apparently had been the victims of murder.116 While in the house, the police discovered “cash, checks, jewelry and electronic equipment.”117 The government began a forfeiture action against the property,118 alleging that it was drug proceeds and thus subject to forfeiture under section 881(a)(6).119 Summary judgment was granted to the government by the district court, which upheld the forfeiture.120 The representative of White’s estate claimed that White’s heirs should be able to assert the innocent owner defense.121 This contention was rejected by the United States Court of Appeals for the Fourth Circuit, which relied heavily on the relation-back doctrine in making its decision.122 The court explained:

>[N]o third party can acquire a legally valid interest in the property forfeited from anyone other than the government after the illegal act takes place. The fair implication of this language is that unless a claimant has a claim to the property forfeited which existed prior to the time the acts take place which bring on forfeiture, then the innocent owner provision of the statute has no application.123

The court’s decision in _Nissan_ illustrates the significance of the order in which the statutory provisions are applied and how the order can lead to drastic and harsh results. The court acknowledged these results, but insisted that the relation-back doctrine be given precedence over the innocent owner’s rights.124

---

114. 889 F.2d 1317 (4th Cir. 1989).
115. _Id._ at 1318.
116. _Id._
117. _Id._
118. The property involved had a value of over $1.5 million as it included: “$1,002,219.48 in cash, $37,086 in checks, two pieces of real estate, 42 pieces of jewelry, 30 pieces of electronic equipment, and five automobiles.” _Id._
119. _Id._
121. _Nissan_, 889 F.2d at 1319.
122. _Id._ at 1321.
123. _Id._ at 1320 (emphasis omitted).
124. _Id._ at 1320-21.
The same issue was presented to the United States Court of Appeals for the Tenth Circuit and that court reached opposite results. In *Eggleston v. Colorado*,\(^\text{125}\) the court held that the innocent owner defense could be asserted by owners who obtained title to the property after the illegal act had been committed. One fact that differentiates *Eggleston* from other section 881(a)(6) cases is that the entities attempting to assert the defense in *Eggleston* were government agencies.\(^\text{126}\) The court held that the relation-back doctrine did apply and that it cut off ownership at the time the offense was committed; however, the court indicated that the doctrine should be applied "subject to the so-called innocent owners exception in section 881(a)(6)."\(^\text{127}\) Although the court's decision in *Eggleston* is couched in terms of a middle of the road approach to applying the conflicting provisions, the latent effect is still that section 881(h) is rendered void.

The Third Circuit reiterated and strengthened the language of *Eggleston* in *Buena Vista*. The court held that the innocent owner provision of section 881(a)(6) must be applied prior to the application of section 881(h) because to apply the provisions in reverse order "would essentially serve to emasculate the innocent owner defense."\(^\text{128}\) The court made no attempt to find a position that would allow both statutes to retain complete effectiveness, but rather relied on statutory construction in holding that section 881(a)(6) should be applied first.\(^\text{129}\) The court stated:

Logically then one must first ascertain whether the property at issue is not forfeitable because of an innocent owner defense before applying section 881(h). If the property is exempted from forfeiture pursuant to an innocent owner defense and therefore is


\(^{126}\) In this case, the "police seized twelve one-ounce gold bars and approximately $1.5 million in cash," which were the "proceeds of illegal drug transactions." *Id.* at 243. After the seizure, a number of parties attempted to establish priority for their claims. *Id.* The Colorado Department of Revenue, the IRS, and the DEA were the most pertinent to the action. *Id.* at 243-44. The Colorado Department of Revenue attempted to establish itself as an innocent owner, but the court rejected this contention and allowed the DEA to seize the assets. *Id.* at 247-48.

\(^{127}\) *Id.* at 247.


\(^{129}\) The court stated, "we must read the plain language of the statute as Congress must have intended it by the words and structure it carefully chose." *Id.*
CIVIL FORFEITURE AND DRUG PROCEEDS

not forfeitable property under subsection (a), then section 881(h) does not apply to such property that is not subject to forfeiture.\textsuperscript{130} The Third Circuit's reliance on statutory construction seemed to be an effective solution to the conflicting statutory provisions, yet the final effect was the same to the extent that section 881(h) was rendered ineffective. This was not Congress's intent.

These cases illustrate the difficulty encountered by the courts in reconciling the two statutory provisions. Each court interpreted the statutes in a slightly different way, but the final effect in each case was that either section 881(a)(6) or section 881(h) was at least partially disabled. This was the historical and legislative context in which the Supreme Court was presented with \textit{Buena Vista}. With such a backdrop, a compromise decision was impossible.

V. THE SUPREME COURT OPINION

The Supreme Court's plurality opinion in \textit{United States v. 92 Buena Vista Avenue}\textsuperscript{131} provides an excellent illustration of the inherent difficulties involved in applying the current federal forfeiture scheme. The plurality opinion was written by Justice Stevens and was joined by Justices Blackmun, O'Connor, and Souter. Justice Scalia wrote a concurring opinion and was joined by Justice Thomas. In dissent, Justice Kennedy was joined by Chief Justice Rehnquist.

A. The Plurality Opinion

The plurality concluded that the innocent owner exception applied to innocent donees as well as to bona fide purchasers for value.\textsuperscript{132} To support this broad interpretation, the Court relied solely on statutory language. The Court stated, "The term 'owner' is used three times and each time it is unqualified. Such language is sufficiently unambiguous to foreclose any contention that it applies only to bona fide purchasers."\textsuperscript{133} The Court summarized the effects of its ruling on the present case by stating that "[u]nder the terms of the statute, her status would be precisely the same if, instead of having received a gift of $240,000 from Brenna, she had sold him a house for that price and used the proceeds to buy the property at issue."\textsuperscript{134}

\begin{itemize}
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} 113 S. Ct. 1126 (1993).
  \item \textsuperscript{132} Id. at 1134 (plurality opinion).
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Id.
\end{itemize}
After establishing a broad definition of the term "owner," the plurality addressed the problem of applying the innocent owner provision of section 881(a)(6) in conjunction with the relation-back provision of section 881(h). The Court asserted that the relation-back provision cannot be applied until forfeiture has been decreed and that forfeiture cannot be rightfully decreed until the owner has had an opportunity to prove his or her innocence under the innocent owner provision. The plurality expressly rejected the contention that the Government would have good title to the property at any point before forfeiture had been decreed by pointing out that if such a construction were implemented, it "would effectively eliminate the innocent owner defense in almost every imaginable case in which proceeds could be forfeited."  

The plurality noted that the relation-back provision found in section 881(h) was not law in 1982 when the respondent acquired the property. As a result, the Court analyzed the relation-back theory under common law. The common law vested title in the government from the time illegal acts occurred but was not "self-executing." The Court noted that the requirement that forfeiture be decreed was not a new concept, but rather was one that was well established in the common law. The end result of the Court's application of the relation-back theory was that "until the Government does win such a judgment, . . . someone else owns the property." It is then up to the person who owns the property to raise any defense to the forfeiture they may have before its condemnation.

The plurality discussed the statutory relation-back provision in an effort to clarify how it should be applied when proceeds are the target of the forfeiture. Section 881(h) states, "All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section." The

135. Id. at 1135.
137. The plurality proceeds somewhat reluctantly under the common law theory as it states that "because we are not aware of any common-law precedent for treating proceeds traceable to an unlawful exchange as a fictional wrongdoer subject to forfeiture, it is not entirely clear that the common-law relation back doctrine is applicable." Buena Vista, 113 S. Ct. at 1135.
138. Id.
139. Id. at 1136.
140. Id. at 1136. The Court also noted that the codification of the relation back doctrine did not disturb the rights of either the government or the innocent owners but rather left them in the same state as before the provision's enactment. Id. at 1137.
141. 21 U.S.C. § 881(h).
Court rejected the government’s contention that because proceeds were part of the “‘property described in subsection (a),’” they should be prevented “from becoming the property of anyone other than the United States.” The Court reasoned that the proceeds were part of the “property described in subsection (a),” but were exempt from forfeiture because they fall under the exception for those without knowledge of the tainted proceeds. By using such reasoning, the Court clearly established that the innocent owner determination must be made before the relation-back doctrine could even be considered.

The plurality concluded by examining two peripheral issues that were related to the case, but which the Court felt “need not be decided.” First, the Court addressed the issue of knowledge and posed the question of when the transferee must have knowledge to qualify as an innocent owner under the statute. After a short discussion of the various positions, the plurality stated that “we need not resolve this issue in this case; respondent has assumed the burden of convincing the trier of fact that she had no knowledge of the alleged source of Brenna’s gift in 1982, when she received it.” The final issue discussed by the plurality was the definition of the term “proceeds” as used in the statute, and just as with the knowledge issue, the Court offered no opinion.

B. Justice Scalia’s Concurrence

Justice Scalia wrote a concurring opinion, disagreeing with the plurality on two points. First, he claimed that the plurality’s construction of the statutory relation-back provision was incorrect because the phrase, “property described in subsection (a)” was construed “as not encompassing any property that is protected from forfeiture by the ‘innocent owner’ provision of § 881(a)(6).” Justice Scalia noted the plurality’s
reasoning that "since, therefore, the application of (a)(6) must be determined before (h) can be fully applied, respondent must be considered an 'owner' under that provision—just as she would have been considered an 'owner' (prior to decree of forfeiture) at common law."148 He further explained his disagreement with the plurality's reading of the statute by stating, "The fact that application of (a)(6) must be determined before (h) can be fully applied simply does not establish that the word 'owner' in (a)(6) must be deemed to include (as it would at common law) anyone who held title prior to the actual decree of forfeiture. To assume that is simply to beg the question."149 Instead of the plurality's construction, Justice Scalia argued that section 881(h) "covers 'all property described in subsection (a),' including property so described that is nonetheless exempted from forfeiture because of the innocent owner defense."150 He construed the relation-back provision to vest title in the Government from the date forfeiture is decreed, "effective as of commission of the act giving rise to forfeiture."151 Under such a theory, "the person holding legal title is genuinely the 'owner' at the time (prior to the decree of forfeiture) that the court applies § 881(a)(6)'s innocent-owner provision."152 Title would vest in the government only "if forfeiture is decreed."153

According to Scalia, the interpretation of section 881(h) described above "is the only one that makes sense within the structure of the statutory forfeiture procedures."154 Under the established procedures,155 the government does not gain title to the property until a judicial proceeding is held and forfeiture is decreed. He pointed out that "[i]f, however,
legal title to the property actually vested in the United States at the time of the illegal act, judicial forfeiture proceedings would never be ‘necessary.’ ”\textsuperscript{156} To contrast procedures that require a judicially administered forfeiture procedure, Justice Scalia referred to the customs forfeiture provisions, where “the United States can, in certain limited circumstances, obtain title to property by an executive declaration of forfeiture.”\textsuperscript{157}

Justice Scalia’s second disagreement was that the Court claimed the respondent had “assumed the burden of proving that ‘she had no knowledge of the alleged source of Brenna’s gift in 1982 when she received it.’ ”\textsuperscript{158} He asserted that no basis for this conclusion existed because the issue was “not fairly included within the question on which the Court granted certiorari.”\textsuperscript{159}

Justice Scalia addressed this issue by asserting that it “was not a separate issue in the case, but arose indirectly, by way of argumentation on the relation-back point.”\textsuperscript{160} He summarized his opinion regarding the issue by parenthetically stating:

I do not find inconceivable the possibility that post-illegal-act transferees with post-illegal-act knowledge of the earlier illegality are provided a defense against forfeiture. The Government would still be entitled to the property held by the drug dealer and by close friends and relatives who are unable to meet their burden of proof as to ignorance of the illegal act when it occurred.\textsuperscript{161}

Justice Scalia’s comments regarding this final issue, like those of the plurality, seem to cast doubt upon this important question.

\textbf{C. The Dissent}

In his dissent, Justice Kennedy shifted the focus of the discussion from what he called the “wrong issue” to “the threshold and dispositive

\begin{footnotes}
\item[156]\textit{Id.}
\item[157]\textit{Id.} \textsuperscript{19} U.S.C. § 1609(b) (1988) states in pertinent part:
\begin{quote}
[A] declaration of forfeiture . . . shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States. Title shall be deemed to vest in the United States . . . from the date of the act for which the forfeiture was incurred.
\end{quote}
\item[158]\textit{Id.} \textsuperscript{Buena Vista}, 113 S. Ct. at 1142 (citation omitted).
\item[159]\textit{Id.} at 1142. He pointed out, parenthetically, that the proper question was “[w]hether a person who receives a gift of money derived from drug trafficking and uses that money to purchase real property is entitled to assert an ‘innocent owner’ defense in an action seeking civil forfeiture of the real property.” \textit{Id.}
\item[160]\textit{Id.}
\item[161]\textit{Id.}
\end{footnotes}
inquiry . . . [of] whether the donee had any ownership rights that required a separate forfeiture, given that her title was defective and subject to the Government's claim from the outset." 162 He asked whether an individual who holds an asset to which the Government has superior title should be able to transfer title to another person for no value and defeat the Government's claim.

The dissent pointed out that when the dealer held what he certainly knew to be proceeds of illegal drug transactions, "it was subject to forfeiture and to the claim of the United States, which had a superior interest in the property." 163 Justice Kennedy then asserted that the defective title cannot be cured by any type of transfer, except for that to a bona fide purchaser for value at which point title "would become unassailable in the purchaser, subject to any heightened rules of innocence the Government might lawfully impose under the forfeiture laws." 164 The dissent then discussed the well-established concept of voidable title, which would aid in deciding whether property that was once subject to forfeiture retained this status after subsequent transfers. 165 After applying the rules of voidable title, it became apparent that the bona fide purchaser for value gained good title to the property, 166 while the donee of drug trafficking proceeds held voidable title because she could not gain superior title to that held by the donor. 167

162. Id. at 1143 (Kennedy, J., dissenting).
163. Id.
164. Id.
165. The dissent explained:
The primary rules of voidable title are manageable and few in number. The first is that one who purchases property in good faith and for value from the holder of voidable title obtains good title. The second rule, reciprocal to the first, is that one who acquires property from a holder of voidable title other than by a good faith purchase for value obtains nothing beyond what the transferor held. The third rule is that a transferee who acquires property from a good faith purchaser for value or one of his lawful successors obtains good title, even if the transferee did not pay value or act in good faith. Id. at 1144.
166. The dissent explained the outcome in these situations in no uncertain terms as it stated, "[T]he outcome, that one who had defective title can create good title in the new holder by transfer for value, is not to be condemned as some bizarre surprise. This is not alchemy. It is the common law." Id.
167. Justice Kennedy stated:
When the Government seeks forfeiture of an asset in the hands of a donee, its forfeiture claim rests on defects in the title of the asset in the hands of the donor. The transferee has no ownership superior to the transferor's which must be forfeited, so her knowledge of the drug transaction, or lack thereof, is quite irrelevant, as are the arcane questions concerning the textual application of § 881(a) to someone in a donee's position.
Id. at 1144-45.
The dissent continued by discussing two practical difficulties created by the plurality's construction of section 881. First, the purpose of the statutory scheme was raised, and Justice Kennedy explained how the plurality had undermined the statutory scheme in its decision. He explained that the Government must be able to circumvent donative transfers if it is to effectively eliminate the economic incentive to traffic and deal in illegal drugs.\footnote{168} Second, the dissent raised the issue of timing and knowledge and of how the plurality's decision seemed somewhat illogical from a practical perspective.\footnote{169}

Finally, the dissent reiterated the notion that the wrong inquiry had been undertaken by explaining that the plurality's opinion "rips out the most effective enforcement provisions in all of the drug forfeiture laws."\footnote{170}

V. IMPACT OF THE COURT'S DECISION

*United States v. 92 Buena Vista Ave.* revealed many of the inherent conflicts and problems associated with the current civil forfeiture scheme of 21 U.S.C. § 881. The Supreme Court was forced to decide between competing schemes of statutory construction—neither of which would completely solve the problems underlying the forfeiture statute.

The plurality chose the respondent's construction of the statute, holding that the broad meaning of the term "owner" should be used and that the innocent owner defense should be asserted prior to application of the relation-back provision. The effect of the Court's decision was to allow the innocent donee in the case to retain the home that was purchased with the illegally obtained funds. Under such a construction, drug dealers and traffickers will be able to defeat the forfeiture of drug proceeds by giving them to "innocent" third parties and allowing them to assert the innocent owner defense. The same effect occurs under the concurring opinion's technical reading of the statutory provisions.

The dissent refocused the entire inquiry from the "wrong issue" to a completely different question.\footnote{171} The effect of this approach was the application of the relation-back doctrine before the owner was allowed to present the innocent owner defense. This construction would have allowed the government to be more effective in preventing drug dealers...
and traffickers from concealing assets by transferring them to innocent third parties as gifts.

VI. POTENTIAL SOLUTIONS TO THE PROBLEMS

The Supreme Court's decision in Buena Vista and its accompanying practical effects illustrate the need for legislative clarification so that this statutory scheme can achieve its intended goals. The following suggestions represent potential changes that would balance the compelling governmental interest in controlling the proliferation of drugs in our society against the interests of innocent property owners.

A. Adoption of Narrow Construction of "Owner"

One of the first changes that must be made is to replace the word "owner" in section 881(a)(6) with "bona fide purchaser for value," as is currently found in the criminal forfeiture equivalent to this section.\textsuperscript{172} Congressional intent has clearly indicated that the term "owner" is to be interpreted in the broad sense;\textsuperscript{173} however, this interpretation has led to problems in determining how far this broad interpretation should extend. Changing the language will limit the scope of individuals invoking the innocent owner defense. Under the current language, courts have been forced to make artificial distinctions to determine who is an owner. Such ambiguous language leaves the interested, non-owner parties in a state of uncertainty and will inhibit effective application of the statute. Congress must adopt the narrow "bona fide purchasers for value" language or the all-inclusive "interested party" language because the present language only adds to the confusion of who may assert the defense. The narrow language will make it more difficult for offenders to distribute their illegal proceeds as gifts to innocent individuals with the intended purpose of circumventing forfeiture. It will also prevent donees from benefitting from the fruits of illegal activities.

United States v. 92 Buena Vista Ave.\textsuperscript{174} presents an excellent example of why the provision must be modified to include only bona fide purchasers for value. As a result of the Supreme Court's decision, Ms. Goodwin will be allowed to assert the defense as an "innocent owner," and thus, the proceeds of Mr. Brenna's illegal activity will not be tainted. When Mr. Brenna is released from prison, he will be able to live in the

\textsuperscript{173} See supra notes 98-101 and accompanying text. The Court reiterated this interpretation in Buena Vista. See supra notes 132-33 and accompanying text.
\textsuperscript{174} 113 S. Ct. 1126 (1993).
house and continue to reap the fruits of his illegal activity. This is precisely what the statute sought to prevent. It also must be acknowledged that Mr. Brenna chose Ms. Goodwin to be the recipient of the gift. A donee situation is different than a situation involving a bona fide purchaser for value, who enters into an arm's length transaction for the purchase of property. To include innocent donees within the defense would place offenders, like Mr. Brenna, in a position to dictate how the illegally obtained property should be distributed.

B. Application of Section 881(h) Before Section 881(a)(6)

It is apparent that both statutory provisions cannot be applied simultaneously because one of the provisions will lose its effectiveness. In deciding which of the two provisions should predominate, it is necessary to consider congressional intent and the ultimate consequences of the decision.

Section 881(h) should be allowed to take precedence so that the entire statutory scheme can retain its effectiveness. If this section were to be rendered invalid in situations in which an innocent owner defense was being asserted, the owner would be able to retain possession and conceal assets that are subject to forfeiture. This opportunity would deprive the entire statutory scheme of its effect.

This interpretation comports with the long history of civil forfeiture and fulfills its purpose. The action is undertaken against the property because the property has been found to be culpable in some way. This culpability is separate and distinct from any pending criminal action against the offender, which is the reason that no conviction is required for the seizure to take place. The immediacy with which a civil forfeiture action can proceed is one of its most important advantages. To prevent the immediate seizure and divestiture of title would disable one of civil forfeiture's most important features.

The application of the relation-back doctrine of section 881(h) prior to section 881(a)(6) still leaves the innocent owner defense of section 881(a)(6) somewhat disabled. Any harsh results of this application of the statutory provisions are somewhat mitigated by the fact that not all innocent owners would be left without the ability to assert the section 881(a)(6) defense. The innocent owner defense would only be invalid with respect to property acquired after the illegal act has occurred. Owners who held title to the property at the time of the illegal act would

175. See supra notes 9-63 and accompanying text.
still be able to assert the defense because they held good title until the point at which the illegal act was undertaken. This distinction is critical because it delineates a comparatively small class of interested parties who will be left without the opportunity to assert the innocent owner defense of section 881(a)(6).

The decision of what should be done to accommodate the interests of individuals who are left without the ability to assert the innocent owner defense can be made by a simple balancing of the equities. Their interests must be balanced against the compelling societal interest of dealing effectively with the drug problem. This class of innocent owners does need protection, but it seems that the cost of their protection is substantially outweighed by the benefits that the statutory scheme provides to society. If drug traffickers have the opportunity to conceal their assets as a result of the undue time given to them under the statute, then the purpose of civil forfeiture is defeated. However, these owners should not be left completely without protection or recourse once their property has been seized. They should still be able to pursue the administrative remedies available under section 881(d).

The concept of providing administrative remedies for innocent owners whose property has been subjected to forfeiture is not a new or novel idea. "Since 1790 the Federal Government has applied the ameliorative policy . . . of providing administrative remissions and mitigations of statutory forfeitures in most cases where the violations are incurred 'without willful negligence' or an intent to commit the offense."176 Section 881(d)177 authorizes the Attorney General to remit or mitigate civil forfeitures of drug-related assets by using the procedures outlined for cus-

177. Section 881(d) provides:

   The provisions of law relating to the seizure, summary and judicial forfeiture, and
   condemnation of property for violation of the customs laws; the disposition of such
   property or the proceeds from the sale thereof; the remission or mitigation of such
   forfeitures; and the compromise of claims shall apply to seizures and forfeitures in-
   curred, or alleged to have been incurred, under any of the provisions of this title, inso-
   far as applicable and not inconsistent with the provisions hereof; except that such
   duties as are imposed upon the customs officer or any other person with respect to the
   seizure and forfeiture of property under the customs laws shall be performed with re-
   spect to seizures and forfeitures of property under this title by such officers, agents, or
   other persons as may be authorized or designated for that purpose by the Attorney
   General, except that such duties arise from seizures and forfeitures effected by any
   customs officer.

toms offenses under 19 U.S.C. § 1618. The administrative procedure can occur simultaneously with a judicial action under the statute's innocent owners defense, or it can be used as a replacement for the judicial procedure. In addition, the procedure can be invoked before or after the judgment of forfeiture has been entered. The statute offers this administrative alternative to "any person interested" in the property that has been seized. The statute's broad language encompasses more parties than the innocent owner defenses contained in section 881(a). This broad construction helps fill the gaps in the innocent owner defense framework.

The regulations enacted to effectuate section 1618 delegate the implementation duties to the Director of the Asset Forfeiture Office of the Criminal Division of the Department of Justice. These regulations offer a complete framework of criteria to be used by the Attorney General in rendering decisions under the administrative alternative. The criteria governing proceedings regarding remission provide:

(b) The Determining Official shall not remit a forfeiture unless the petitioner establishes:

(1) That petitioner has a valid, good faith interest in the seized property as owner or otherwise; and

(2) That petitioner had no knowledge that the property in which petitioner claims an interest was or would be involved in any violation of the law; and

Whenever, any person interested in any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of this act, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws, and with the Commandant of the Coast Guard or the Commissioner of Customs, as the case may be, if under the navigation laws, before the sale of such vessel, vehicle, aircraft, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, the Commandant of the Coast Guard, or the Commissioner of Customs, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs officer to take testimony upon such petition: Provided, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition.

180. 28 C.F.R. § 9.3(c).
(3) That petitioner had no knowledge of the particular violation which subjected the property to seizure and forfeiture; and
(4) That petitioner had no knowledge that the user of the property had any record for violating laws of the U.S. or of any State for a related crime; and
(5) That petitioner had taken all reasonable steps to prevent the illegal use of the property.\textsuperscript{181}

In addition to establishing the criteria for remission, the regulations also provide the criteria for mitigation.\textsuperscript{182} Remission and mitigation offer an alternative for individuals who do not fall within the boundaries of the statutorily prescribed innocent owner defense under section 881(a), but who have an interest in the seized property. The regulations seem to be particularly concerned with protecting the interests of business and financial institutions; special provisions protect general creditors,\textsuperscript{183} lienholders,\textsuperscript{184} lessors,\textsuperscript{185} and voluntary bailors.\textsuperscript{186} These protections ensure that forfeitures do not interfere with the normal course of business activity. Finally, the regulations provide for the denial of remission and mitigation in situations in which it appears that a straw purchase transaction designed to avoid forfeiture has occurred.\textsuperscript{187}

Administrative remedies would appear to offer a remedy to interested parties who do not fall within any of the specified innocent owner defenses of section 881(a). The language used in the regulation criteria appears to utilize the dictum of \textit{Calero-Toledo v. Pearson Yacht Leasing Co.} \textsuperscript{188} By using the Supreme Court's comments\textsuperscript{189} to craft the regula-

\begin{itemize}
\item 181. 28 C.F.R. § 9.5(b).
\item 182. 28 C.F.R. § 9.5(c) outlines the general criteria of when mitigation should be invoked as it provides in pertinent part:
This authority may be exercised in those cases where the petitioner has not met the minimum conditions precedent to remission but where there are present other extenuating circumstances indicating that some relief should be granted to avoid extreme hardship. Mitigation may also be granted where the minimum standards for remission have been satisfied but the overall circumstances are such that, in the opinion of the determining official, complete relief is not warranted. Mitigation shall take the form of a money penalty imposed upon the petitioner in addition to any other sums chargeable as a condition to remission.
\textit{Id.}
\item 183. 28 C.F.R. § 9.6(a).
\item 184. 28 C.F.R. § 9.7(b).
\item 185. 28 C.F.R. 9.6(d).
\item 186. 28 C.F.R. § 9.6(e).
\item 187. 28 C.F.R. § 9.6(f).
\item 188. 416 U.S. 663 (1974).
\item 189. In \textit{Calero-Toledo}, the Court stated that "it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him
tions, innocent owners likely will not be deprived of their Due Process rights because they would have the administrative remedies available to them. The only problem with this analysis is that the administrative remedy is available only through the same branch of the government that is charged with initially bringing the forfeiture actions. Such a system offends the separation of powers that is one of the most fundamental ideals of our system of justice.

C. Judicially Administered Equitable Hearing

The final change that must be made to the statutory scheme of section 881 is to insert a provision that will provide for remission of innocent owner property on an equitable basis using a member of the judicial branch as the decision maker. In this way, the inherent problems of the “fox guarding the hen house” could be avoided. The standards used could be the same standards presently employed through the administrative remedy; it has already been established that the criteria enumerated in the present administrative regulations meet the constitutional requirements discussed by the Court in Calero-Toledo. Such an additional provision would not mean that the present administrative remedies would be abolished. These remedies should remain available to those institutions that invoke the defense during the normal course of business. This new remedy would be available to interested individuals who clearly cannot invoke any of the other innocent owner provisions. The new provision would assure that innocent owners are allowed to set forth their equitable claims to an impartial, disinterested third party.

VII. CONCLUSION

Civil forfeiture statutes were first enacted to address crimes that were motivated by profit and which could best be punished by treating the profit and the property used in implementing the illegal act as wrongdoers. Congress has employed this tool as an effective weapon to fight the scourge of illicit drugs in our society; however, Congress has tempered the statute by trying to protect innocent owners from having their prop-

190. See supra notes 57-62 and accompanying text.
erty seized. This attempt at balancing both of these highly regarded social interests has proven frustrating for the courts and those involved in these cases.

The changes this Comment has suggested are an attempt at maintaining the effectiveness of the statute while still providing effective solutions for those innocent owners whose property has become subject to forfeiture. These changes, like any effective solution, will require the cooperation of both Congress and the Supreme Court. If this cooperation can be secured, an effective balance will be achieved and congressional intent can finally be realized. If the changes outlined above were placed into effect, Ms. Goodwin would not be able to assert the innocent owner defense under section 881(a)(6) because she was not a bona fide purchaser for value. She would, however, be able to present her case to an impartial judicial official, and she would not have to plead with the same branch that brought the forfeiture action originally.

GEORGE T. PAPPAS