Clearing the Smoke from the Battlefield: Understanding Congressional Intent Regarding the Innocent Owner Provision of 21 U.S.C. 881(a)(7)

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COMMENT

CLEARING THE SMOKE FROM THE BATTLEFIELD: UNDERSTANDING CONGRESSIONAL INTENT REGARDING THE INNOCENT OWNER PROVISION OF 21 U.S.C § 881(a)(7)

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I. INTRODUCTION

"The devil died in December," and thousands cheered. "A shower of gunfire, and there was Pablo Escobar, a punctured corpse on a rooftop in Medellin, leaking life just like every judge and cop and political candidate he disposed of without a blink." On Wednesday, 1 December 1993, Pablo Escobar celebrated his forty-fourth birthday. On 2 December 1993, police and soldiers raided his hideout and gunned him down as he tried to escape over the rooftops. After a lifetime of crime and twenty minutes of gunfire, the king of cocaine was dead.

The Colombian soldiers celebrated, cheering "we won." President Clinton sent President Trujillo of Colombia a telegram congratulating him on the raid. On that day, the world rejoiced and enjoyed a slight victory in the war on drugs.

Ultimately, however, United States officials recognized that Esco-

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2 Id.
3 Robert D. McFadden, Head of Medellin Cocaine Cartel is Killed by Troops in Colombia, N.Y. TIMES, Dec. 3, 1993, at A12.
4 Id.
6 Id.
bar's death was merely a symbolic victory, and would not reduce the flow of cocaine into the United States.\textsuperscript{7} Drug trafficking is a billion dollar industry.\textsuperscript{8} The tremendous potential for profit creates a large incentive to participate in the drug trade.\textsuperscript{9} And while draconian measures, such as the hunting and killing of a drug lord, are sadistically celebrated, they are not practical. As a result, Congress has determined that the best way to combat illegal trafficking is to remove the incentive by stripping the profits from the drug dealers through asset forfeiture.\textsuperscript{10}

The civil forfeiture statute\textsuperscript{11} has evolved into a powerful weapon in the government's war on drugs. That evolution has included the enactment of various provisions which have significantly expanded the reach of civil forfeiture. Among those was the enactment of § 881(a)(7), which extended the scope of civil forfeiture to include real property.\textsuperscript{12} Recognizing the potentially harsh effects of the statute, Congress provided an affirmative defense to owners of real property who are innocent of illegal activity. This "innocent owner" defense allows real property owners to avoid forfeiture by proving that the illegal activity occurred without their "knowledge or consent." This provision has caused courts to consider whether claimants must show a lack of both knowledge and consent, or merely a lack of one or the other.

This comment will examine that controversy. Part II will set the stage by exploring the history of forfeiture law, discussing the development and evolution of 21 U.S.C. § 881 to its current state, and describing the procedure outlined in the statute. Part III will then explain the promulgation of the "innocent owner" defense and describe the controversy over its interpretation. Next, Part IV will examine the language of the "innocent owner" provision, its legislative history, the legislative history of related provisions, and subsequent clarifications of the provision by Congress. A thorough analysis of these sources will show that claimants must prove a lack of both knowledge and consent to satisfy the terms of the provision. This Part will then examine equitable and constitutional considerations which strengthen that interpretation. Finally, Part V recognizes the inadequacy of the current statute, encourages Congress to address the issue, and suggests a new

\textsuperscript{7} Id.
\textsuperscript{8} Bureau of Justice Statistics, Drugs, Crime, and the Justice System 126 (1992).
\textsuperscript{10} Id.
version of the “innocent owner” provision.

II. Setting the Stage

A. History

The concept of civil forfeiture is firmly rooted in history. Its origins date back to the Old Testament.\(^\text{13}\) It was recognized in ancient Rome,\(^\text{14}\) as well as in ancient Greece.\(^\text{15}\) Initially, most societies viewed forfeiture as a way to punish property that caused injury to a person.\(^\text{16}\) Superstition led people to personify the property, place blame upon it for the injury or wrong, and believe that it suffered morally.\(^\text{17}\) In certain cases, this belief was so strong that the property was forfeited even if it belonged to the injured party.\(^\text{18}\)

Modern statutes allowing for civil *in rem* forfeiture appear to have evolved most closely from the concept of the English deodand.\(^\text{19}\) Under early English law, anything causing the death of one of the King’s subjects was forfeited to the Crown.\(^\text{20}\) The object forfeited, the deodand, was considered an “accused thing.”\(^\text{21}\) Once forfeited, the object was supposed to be put to charitable uses.\(^\text{22}\) Over time, however, the practice became corrupt, and the king used the property for his own benefit, as a source of revenue.\(^\text{23}\) As a result, the colonists did not carry the concept of the deodand with them across the Atlantic.\(^\text{24}\)

\(^\text{13}\) The book of Exodus describes the earliest known forfeiture law: “If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.” 21 *Exodus* 28:8.

\(^\text{14}\) As early as 451 B.C.E., Roman law recognized civil forfeiture: “If a quadruped causes injury to anyone, let the owner tender him the estimated amount of the damage; and if he is unwilling to accept it, the owner shall . . . surrender the animal that caused the injury.” OLIVER WENDELL HOLMES, THE COMMON LAW 8 n.6 (1945).

\(^\text{15}\) AEchines, who lived between 389-314 B.C.E., told of civil forfeiture: “[W]e banish beyond our borders stocks and stones and steal, voiceless and mindless things, if they chance to kill a man; and if a man commits suicide, bury the hand that struck the blow, afar from the body.” *Id.* at 8.

\(^\text{16}\) Parker-Harris Co. v. Tate, 188 S.W. 54, 55 (Tenn. 1916).

\(^\text{17}\) *Id.*

\(^\text{18}\) *Id.*


\(^\text{20}\) “Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner.” HOLMES, supra note 14, at 25.

\(^\text{21}\) *Id.* at 24. According to Holmes, a desire for vengeance on the offending object was the original purpose behind the concept of the deodand. Compensation, if relevant at all, was a secondary consideration. *Id.* at 34.

\(^\text{22}\) *Schmalfeldt,* 657 F. Supp. at 388.

\(^\text{23}\) Parker-Harris Co. v. Tate, 188 S.W. 54, 55 (Tenn. 1916).

\(^\text{24}\) *Schmalfeldt,* 657 F. Supp. at 388. Although the concept of the deodand did not formally become part of American law, Judge Enslen has observed that traces of the English
They did, however, continue to utilize civil forfeiture as a means of enforcing the law.\textsuperscript{25} After the ratification of the Constitution, the Federal government began enforcing forfeiture statutes.\textsuperscript{26} Initially, the government used its forfeiture power to seize ships and cargos used in the illegal slave trade, as well as vessels involved in customs offenses.\textsuperscript{27} Congress soon expanded its use of forfeiture, and “[f]or more than two hundred years, Congress has continued to pass civil, \textit{in rem}, forfeiture statutes covering a substantial variety of property.”\textsuperscript{28} In fact, “contemporary federal and State forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.”\textsuperscript{29}

Until recently, two aspects of civil forfeiture had remained constant: its relative insignificance as a law enforcement tool\textsuperscript{30} and the irrelevance of the innocence of the owner of property seized.\textsuperscript{31} This irrelevance was “firmly fixed in the punitive and remedial jurispru-

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practice remain:

The concept of the deodand has been transformed by the historical process. A more secular society has substituted another sovereign, the government... for the Church and the Crown. Thus forfeited property is no longer "applied to pious uses, and distributed in alms by the high almoner," but rather it may, under appropriate circumstances, be either sold, destroyed, or retained for official use by the Attorney General. \textit{Id. See also} 21 U.S.C. § 881(e) (1988 & Supp. V 1992).

In Goldsmith v. United States, 254 U.S. 505, 510 (1921), Justice McKenna also recognized the influence of the deodand. He noted that Congress ascribed a degree of complicity and guilt to property associated with violations of the revenue provisions, which he saw as analogous to the law of deodand. \textit{Cf.} C.J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943). Long before the adoption of the Constitution, the colonial courts exercised \textit{in rem} jurisdiction while enforcing English and local forfeiture statutes. During the Confederation period, the state courts did the same. \textit{Id.} However, the law of forfeiture varied from colony to colony. For instance, statutes regulating forfeiture consequent to attainder were used extensively in Pennsylvania and Virginia, minimally in Massachusetts, and not at all in New York. James R. Maxeiner, \textit{Bane of American Forfeiture Law—Banished At Last?}, 62 \textit{Cornell L. Rev.} 768, 776-77 (1977). The practice of forfeiture consequent to attainder, which called for the complete forfeiture of all real and personal property of convicted felons and traitors sentenced to death, was discarded after the ratification of the Constitution, because the practice deprived innocent heirs of their rightful inheritance, it “too easily dispensed with judicial findings of guilt,” and because of a desire to “end all vestiges of the feudal era.” \textit{Id. at} 770, 779 n.68.


\textit{Calero-Toledo}, 416 U.S. at 683.


\textit{Calero-Toledo}, 416 U.S. at 683 (“[T]he innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense.”). Early British law allowed for seizure even if “no default is in the owner.” \textit{Holmes, supra} note 14, at 25.
dence of the country." In 1970, however, Congress propelled forfeiture into its present place in the front lines of the government’s war on drugs and paved the way for the battle over innocent ownership rights.

B. DEVELOPMENT OF 21 U.S.C. § 881

In an effort to strengthen law enforcement authority against drug trafficking, Congress passed The Comprehensive Drug Abuse Prevention and Control Act of 1970 as part of the Controlled Substances Act. Congress recognized that the motivation for drug trafficking was economic profit and realized that it needed something more than ordinary criminal sanctions, such as fines and imprisonment, to deter people from dealing drugs. Congress sought a means of eliminating the economic gain and thus removing the incentive to participate in the drug trade. Forfeiture became Congress’ weapon of choice.

Originally, § 881 authorized the forfeiture of controlled substances, raw materials, containers, and conveyances used or intended for use in drug related activities. However, by 1978, Congress real-

32 Goldsmith v. United States, 254 U.S. 505, 511 (1921). Several cases effectively illustrate this point. In United States v. The Little Charles, 26 F. Cas. 979 (C.C.D. Va. 1818) (No. 15,612), the Court upheld the forfeiture of a schooner seized for a violation of the embargo laws. Chief Justice Marshall, writing for the majority, stated that the “proceeding [was one] against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture because it was committed without the authority and against the will of the owner.” In United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398 (1814), the Court upheld the forfeiture of coffee sold in violation of the Non-Intercourse Act of 1809. Although the purchaser was innocent, the Court reasoned that “[i]n the eternal struggle that exists between the avarice, enterprize and combinations of individuals on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measure of policy adopted by the legislature.” Id. at 405. In 1877, the Court upheld the forfeiture of an innocent owner’s property which housed a distillery in violation of the revenue laws (15 Stat. 132), declaring that the offense was “attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner.” Dobbins’s Distillery v. United States, 96 U.S. 395, 401 (1877).


36 Id.


38 “Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.” S. Rep. No. 225, supra note 9, reprinted in 1984 U.S.C.C.A.N. at 3374.

39 21 U.S.C. § 881(a): The following shall be subject to forfeiture to the United States and no property right shall exist in them:
ized that the forfeiture laws were not producing the desired results.\textsuperscript{40} Therefore, in 1978, Congress amended the Comprehensive Drug Abuse Prevention and Control Act and increased the effectiveness of forfeiture by expanding the scope of the forfeiture provision to allow the forfeiture of all proceeds derived from drug transactions.\textsuperscript{41} In this manner, Congress hoped to strike directly at the heart of the problem—the potential to realize incredible profits through drug dealing.\textsuperscript{42} By 1984, however, Congress remained unsatisfied with the impact of the expanded forfeiture laws. Drug profits were not being undercut.\textsuperscript{43} Apparently the scope of property subject to forfeiture was still too limited for Congress' taste, because the statute did not provide for the forfeiture of real property, even if that property was instrumental to the performance of illicit activities.\textsuperscript{44} As a result, in

\begin{itemize}
  \item (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.
  \item (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.
  \item (3) All property which is used or intended for use, as a container for property described in paragraph (1), (2), or (9).
  \item (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), (2), or (9)....
\end{itemize}

\textsuperscript{40} Senator Nunn realized that "[w]e were losing the battle as well as the war" against drugs. 124 CONG. REC. 23,055 (1978).

\textsuperscript{41} 21 U.S.C. § 881(a)(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...." \textit{Id.}

\textsuperscript{42} According to Senator Nunn, "profit, astronomical profit, is the base motivation of drug traffickers. The amendment I propose here today is intended to enhance the efforts to reduce the flow of illicit drugs in the United States by striking out against the profits from illicit drug trafficking." 124 CONG. REC. 23,055 (1978). Senator John Culver also calculated that this expansion of the forfeiture laws would "disrupt drug trafficking by greatly raising the risk of such trafficking, reducing the profits involved and immobilizing certain drug rings by seizing large amounts of their assets." \textit{Id.} at 23,056.

\textsuperscript{43} A study released in 1981 by the General Accounting Office (GAO), entitled \textit{Asset Forfeiture—A Seldom Used Tool in Combating Drug Trafficking}, reported two major reasons why the forfeiture statutes had failed to meet Congress' expectations: federal law enforcement agencies had not aggressively pursued forfeiture, and current forfeiture statutes had too many limitations and ambiguities, which prevented forfeiture's full potential from being realized. S. REP. No. 225, \textit{supra} note 9, \textit{reprinted in} 1984 U.S.C.C.A.N. at 3374.

William Anderson, the director of the GAO, noted that in 1979, drug trafficking produced an estimated $54 billion worth of income for drug dealers, but forfeitures amounted to less than $35 million. In other words, the drug dealers were able to retain almost 99% of their profits—a clear indication that forfeiture had not succeeded in depriving dealers of their economic base. \textit{Id.}

\textsuperscript{44} According to the Senate report accompanying the 1984 amendments:

\begin{itemize}
  \item 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
1984, Congress added § 881(a)(7) to 21 U.S.C., expanding the class of property subject to forfeiture to include all real property used in any manner to facilitate a violation of drug laws.

C. PROCEDURE UNDER 21 U.S.C. § 881

A civil forfeiture occurs when the government takes illegally used or acquired property without compensating its owner. A forfeiture action, an in rem procedure, commences when the government seizes property believed to be connected with illegal drug activity. Ownership of the property vests in the government at the time the property is used for an illegal purpose. But once the government has seized the property, it must begin a formal forfeiture action within five years of the discovery of the alleged offense.

Initially, the burden of proof is on the government to show probable cause that the seized property was connected with illegal drug activity. Courts have defined probable cause as "a reasonable ground for belief of guilt, supported by less than prima facie proof, 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.


45 21 U.S.C. § 881(a)(7) (1988) reads in pertinent part: "All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter . . . ." Id.


47 An in rem procedure is a procedure "against the thing." Action is taken against the property rather than the person, and the purpose is to affect the person's interest in that property. See BLACK'S LAW DICTIONARY 793 (6th ed. 1991).

48 Basically, the government can institute civil forfeiture proceedings by following the process set forth in the Supplemental Rules for Certain Admiralty and Maritime claims, obtaining a seizure warrant in the manner provided for in the Federal Rules of Criminal Procedure, or seizing property without judicial process if the Attorney General has probable cause. For an in depth discussion of the government's various procedural options for seizing property, see Marc. B. Stahl, Asset Forfeiture, Burdens of Proof and the War on Drugs, 83 J. CRIM. L. & CRIMINOLOGY 274, 279-81 (1992).

49 21 U.S.C. § 881(b) ("All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.").


51 21 U.S.C. § 881(d) (1988) states that the customs laws govern the procedure for forfeiture under § 881. The relevant provision is 19 U.S.C. § 1615, which states that "in all suits or actions . . . where the property is claimed by any person, the burden of proof shall lie upon such claimant . . . [p]rovided, that probable cause shall be first shown for the institution of such suit or action, to be judged by the court . . . ." 19 U.S.C. § 1615 (1988) (emphasis added).
but more than reasonable suspicion."\textsuperscript{52} Once the government shows probable cause, the burden shifts to claimants to prove, by a preponderance of the evidence, either that the property was not connected in any way with the illicit activity, or that they qualify for "innocent owner" exemption under the relevant statutory provision.\textsuperscript{53}

### III. Preparing For Battle

#### A. Innocent Ownership Provisions in § 881(a)

Historically, the only remedy for an innocent owner with an interest in forfeited property was to petition the United States Attorney General for remission or mitigation.\textsuperscript{54} Property owners could not prevent forfeiture of their ownership rights by arguing that they were innocent of drug activity; they could merely request that the Attorney General return all or part of the property.\textsuperscript{55} In 1978, however, Congress amended § 881(a)(6) and provided protection for owners who had no "knowledge or consent" of the illegal activity in which their property was involved.\textsuperscript{56} When real property became forfeitable under § 881, Congress added another "innocent owner" provision to protect property owners whose property had been used in violation of the law without their "knowledge or consent."\textsuperscript{57} In 1988, an amendment to 21 U.S.C. § 881(a)(4) added a requirement that claimants prove the illegal activity occurred without their "knowledge, consent, 

\textsuperscript{52} United States v. 4,657 Acres, 730 F. Supp. 423, 425 (S.D. Fla. 1989). \textit{See also} United States v. One 1950 Buick Sedan, 231 F.2d 219, 221-22, (3d Cir. 1956) (defining probable cause as "a reasonable ground for belief of guilt," existing where "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed"). To establish probable cause, the government may rely on circumstantial evidence or hearsay.


\textsuperscript{54} \textit{See Drug Guide, supra} note 28, at 228.

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} The "innocent owner" defense states 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." 21 U.S.C. § 881(a)(6) (1988).

\textsuperscript{57} "[N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881 (a)(7) (1988). The fact that (a)(6) refers to "the interest of an owner," and (a)(7) refers to "an interest of an owner," appears to be an irrelevant distinction.
or willful blindness." Congress added "willful blindness" to ensure that the owner of a conveyance would not purposefully avoid gaining knowledge of illegal activity.

B. THE BIG QUESTION

When Congress amended § 881 in 1984, its announced purpose was to "eliminate the statutory limitations and ambiguities that [had] frustrated active pursuit of forfeiture by Federal law enforcement agencies." The inclusion of (a) (7) may have increased the government's ability to subject property to forfeiture, but the language Congress chose—"without the knowledge or consent of that owner"—has caused confusion in the courts.

The big question is whether courts should read the phrase "without knowledge or consent" in the conjunctive or in the disjunctive: does it mean "without knowledge and without consent," or "without knowledge or without consent?" For example, a landlord claims to be the "innocent owner" of an apartment building in a drug case. He can establish that he never gave his consent to use his building during drug deals. The question is whether the statute also requires him to prove that he had no knowledge that dealers were using his building to traffic drugs.

Four circuits have addressed this issue. Both the Ninth and the Eleventh Circuits have interpreted the "innocent owner" provision in the conjunctive and would require the landlord to prove lack of consent and knowledge. In contrast, the Second and Third Circuits in-

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58 For a time, innocent owners enjoyed a bit more protection from forfeiture of conveyed property. Until 1988, a conveyance could not be forfeited if it was used as a common carrier in a business transaction and the illegal activity occurred without the owner's consent, or if the illegal act occurred while the conveyance was in the unlawful possession of the person who violated the law. See 21 U.S.C. § 881(a)(4)(A) & (B). However, Congress added § 881(a)(4)(C) which states that "no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner." 21 U.S.C. § 881(a)(4)(C) (1988).


62 United States v. 6960 Miraflores Ave., 995 F.2d 1558 (11th Cir. 1993); United States v. Lot 111-B, 902 F.2d 1443 (9th Cir. 1990); United States v. 15621 S.W. 209th Ave., 894 F.2d 1511 (11th Cir. 1990). Actually, the Eleventh Circuit has not firmly committed itself. In both 1990 and 1991 it endorsed a conjunctive interpretation. See, e.g., United States v. 15603 85th Ave. N., 993 F.2d 976 (11th Cir. 1991); 15621 S.W. 209th Ave., 894 F.2d at 1511. But in 1992, it favored a disjunctive interpretation. See, e.g., United States v. 1012 Germantown Rd., 963 F.2d 1496, 1503 (11th Cir. 1992). Ultimately, however, it reverted back to a conjunctive reading. See, e.g., 6960 Miraflores Ave., 995 F.2d at 1558.
interpret the phrase in the disjunctive. The Sixth Circuit has suggested that courts read the statute in the disjunctive, but it has not directly decided the issue.

IV. THE BOTTOM LINE

Those who argue that courts must read the phrase "without knowledge or consent" in the disjunctive claim that canons of statutory construction, the statute's legislative history, and general fairness require that interpretation. This comment will demonstrate that none of these grounds is ultimately persuasive. Instead, the "innocent owner" provision of § 881(a)(7), as promulgated by Congress, unambiguously requires that claimants prove both a lack of consent and a lack of knowledge to prevent forfeiture of their property.

A. STATUTORY INTERPRETATION

As a general rule, the established canons of statutory construction require that "terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." Certain courts have held that this rule entitles claimants to prove either a lack of knowledge or a lack of consent. In their view, Congress' use of the word "or" is conclusive evidence that claimants have the option of proving either fact.

For example, in United States v. 171-02 Liberty Ave., the United States District Court for the Eastern District of New York allowed a

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63 United States v. 19 and 25 Castle St., 31 F.3d 35, 39 (2d Cir. 1994); United States v. 717 S. Woodward St., 2 F.3d 529 (3d Cir. 1993); United States v. 755 Forest Rd., 985 F.2d 70 (2d Cir. 1993); United States v. 141st St. Corp., 911 F.2d 870 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991); United States v. 6109 Grubb Rd., 886 F.2d 618 (3d Cir. 1989).

64 United States v. 14307 Four Lakes Drive, 1 F.3d 1242 (6th Cir. 1993) ("Several of this Court's (unpublished) opinions make clear that either ignorance or non-consent will suffice to make out an innocent owner defense.").

65 Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) (considering § 4 of the Clayton Act, 15 U.S.C. § 15 (1989), which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States" and finding that a conjunctive reading would "rob the term 'property' of its independent and ordinary significance.").

66 United States v. 171-02 Liberty Ave., 710 F. Supp. 46 (E.D.N.Y. 1989). See also 6109 Grubb Rd., 886 F.2d at 618; United States v. 710 Main St., 744 F. Supp. 510, 523 (S.D.N.Y. 1990) ("By reading 'knowledge or consent' in accordance with the canons of statutory construction, we agree with the courts in 171-02 Liberty Ave., 6109 Grubb Rd., and Sixty (60) Acres."); United States v. Sixty (60) Acres, 727 F. Supp. 1414 (N.D. Ala. 1990); United States v. 19026 Oakmont S. Drive, 715 F. Supp. 233, 237 (N.D. Ind. 1989) ("knowledge or consent" as that term is used in the statute is to be read disjunctively under normal canons of statutory construction) (quoting 171-02 Liberty Ave., 710 F. Supp. at 46).

67 171-02 Liberty Ave., 710 F. Supp. at 50. ("If Congress had meant to require a showing of lack of knowledge in all cases, . . . it could have done so by replacing 'or' with 'and'.").

68 Id. at 46.
claimant to attempt to prove his lack of consent to illegal drug activity on his property after he conceded his knowledge of the same activity.\textsuperscript{69} The claimant owned a building in a drug infested area.\textsuperscript{70} The police believed that most of the drug activity occurred in a second floor apartment and asked the claimant to file trespassing charges against any non-tenants arrested on his property.\textsuperscript{71} After initially refusing, the claimant cooperated for a while, but soon stopped.\textsuperscript{72} The government seized the building.\textsuperscript{73} Afterwards, the claimant admitted that he knew about the illegal activity in his building, but argued that he only needed to prove a lack of consent to that activity to avoid forfeiture.\textsuperscript{74} The court agreed, reasoning that under the canons of statutory construction, it was obliged to "give effect to Congress' use of the word 'or' by reading the terms 'knowledge' and 'consent' disjunctively."\textsuperscript{75}

The court's adherence to a rule which places such blind faith in Congress' use of language is probably misplaced. In many cases courts have recognized that the word "or" simply does not mean "or."\textsuperscript{76} In \textit{De Sylva v. Ballentine},\textsuperscript{77} the United States Supreme Court held that courts should not conclude that a statute must be read in the disjunctive simply because it contains the word "or."\textsuperscript{78} In \textit{De Sylva}, a composer died before renewing the copyrights on some of his musical compositions.\textsuperscript{79} Under the Copyright Act, "the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living... shall be entitled to a renewal."\textsuperscript{80} The mother of the deceased composer's illegitimate son sued to insure the boy's interest in the copyrights.\textsuperscript{81} She argued that because the statute used the word "or" in the conjunctive, her son had a present interest

\textsuperscript{69} Id. at 50.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 46.
\textsuperscript{73} Id. at 50.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} De Sylva v. Ballentine, 351 U.S. 570 (1956). See also Unification Church v. Immigration and Naturalization Serv., 762 F.2d 1077 (D.C. Cir. 1985) (construing relationship between two provisions of the Equal Access to Justice Act connected with an "or" as being conjunctive); United States v. Smith, 785 F. Supp. 52 (S.D.N.Y. 1992) (interpreting the phrase punishment by "imprisonment, or a fine, or both," as requiring mandatory imprisonment for persons convicted of distributing drugs within one thousand feet of a school).
\textsuperscript{77} 351 U.S. 570 (1956).
\textsuperscript{78} Id. at 573.
\textsuperscript{79} Id. at 572.
\textsuperscript{81} De Sylva, 351 U.S. at 572.
in the property. The composer's widow, however, claimed that the statute employed the word "or" in the disjunctive, and therefore she had an exclusive right to the copyrights until her death. After reviewing prior copyright acts, the Court determined that it should read the statute in the conjunctive, and the phrase "or the widow, widower, or children," meant "or the widow, widower, and children." The Court recognized that "the word 'or' is often used as a careless substitute for the word 'and'; that is, it is often used in phrases where 'and' would express the thought with greater clarity.

Even assuming that Congress was not careless, but intentionally selected the word "or," a conjunctive interpretation is still correct under these circumstances. This is one of those cases where the word "or" creates a multiple rather than an alternative obligation. In fact, logic compels that conclusion. A principal of logic known as De Morgan's theorem establishes that "[t]he negation of [a] disjunction of two statements is logically equivalent to the conjunction of their negations." The phrase "knowledge or consent" is ordinarily a disjunction: the existence of one of two alternatives—knowledge or consent—satisfies its terms. If § 881(a)(7) required claimants to prove their "knowledge or consent," they would only have to prove one or the other. However, Congress worded § 881(a)(7) in the negative; claimants must prove they were "without knowledge or consent." According to De Morgan's theorem, the use of the word "without" is the negation of the disjunction which follows, and is equivalent to the phrase "without knowledge and without consent." Therefore, claimants must prove both a lack of knowledge and a lack of consent.

Judge Greenberg of the Third Circuit, without mentioning any

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82 Id. at 572.
83 Id. at 573.
84 Id. at 580.
85 Id. at 573. See also Unification Church, 762 F.2d at 1084 ("'or' must sometimes be read as a conjunctive."); C. Dallas Sands, Statutes and Statutory Construction 127 (4th ed. 1985) ("There has been, however, so great laxity in the use of [the terms 'and' and 'or'] that courts have generally said that the words are interchangeable and that one may be substituted for the other, if consistent with the legislative intent.").
86 Irving M. Copi, Symbolic Logic 29 (5th ed. 1979). For example, in the phrase "you can play outside if it is not raining or sleeting," "or" creates the multiple obligation that it be neither raining nor sleeting outside.
87 Id. Stated symbolically, the negation of a disjunction is [not (K or C)], and the conjunction of its negation is [(not K and not C)].
88 Id.
89 Id.
90 Id. See also Lalit K. Loomba, Note, The Innocent Owner Defense To Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984, 58 Fordham L. Rev. 471, 480 (1989) (concluding that De Morgan's theorem indicates that courts should read the innocent owner provision of § 881(a)(7) in the conjunctive).
applicable theory of formal logic, advanced this argument as a canon of statutory construction. He suggested that Congress may have used "or" to create a conjunctive, requiring claimants to prove both a lack of knowledge and a lack of consent. Judge Greenberg focused on the general rule that each term connected by a disjunctive must be given a separate meaning. He reasoned that the words "knowledge" and "consent" each relate back to the offense, so if the government had the burden of proving claimants' "knowledge or consent," the prosecutor could satisfy the statute by proving either one. He concluded that substituting the term "with" for "without" makes that point clear, and therefore claimants must prove both.

The government has also relied upon De Morgan's theorem. In United States v. 890 Noyac Rd., the government cited De Morgan's theorem in support of its argument that courts should read the "innocent owner" provision of § 881(a)(7) in the conjunctive. The government pointed out that reading the clause in the disjunctive is "painfully inconsistent with one of the most fundamental rules of grammar and syntax." Although the court ultimately agreed, and found that the clause should be read in the conjunctive, it based its holding on canons of statutory construction, legislative history, and subsequent indications of Congressional intent. The court was hesitant to rest its decision upon De Morgan's theorem, because, as Judge Wexler stated, "logic and syntax do not exist in a vacuum."

Judge Wexler's concern echoes that of Justice Holmes, who once noted that the scope of a specific clause within a statute should not be limited to its particular subject matter, and that a statute's "general

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91 "In as much as the words 'knowledge' and 'consent' are separated by an 'or' they are disjunctive and each relates back to the offense. Accordingly, unless the owner demonstrates that the offenses were committed without either her knowledge or consent she loses. It is that simple." United States v. 6109 Grubb Rd., 890 F.2d 659, 661 (3d Cir. 1989), sur petition for reh'g (Greenberg, J., dissenting).
92 Id.; see also Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). This analysis is further supported by Francis McCaffrey who notes that "it is a rule in the construction of statutes that, in the first instance, the grammatical sense of the words is to be adhered to." FRANCIS J. MCCAFFREY, STATUTORY CONSTRUCTION 53 (1953).
93 6109 Grubb Rd., 890 F.2d at 662 (Greenberg, J., dissenting).
94 Id.
95 Id. This argument is also supported by the legislative history of 21 U.S.C. § 881(a)(6), the relevance of which will be thoroughly discussed. See infra notes 119 to 132 and accompanying text.
96 6109 Grubb Rd., 890 F.2d at 662 (Greenberg, J., dissenting).
98 Id. at 113.
99 Id.
100 Id. at 114.
101 Id. at 114-15.
102 Id. at 113.
purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.” Many courts agree and attempt to use a statute’s general purpose to determine Congressional intent when a statute’s grammar appears to lead to a result that is contrary to its stated purpose. Courts interpreting the “innocent owner” provision of § 881(a)(7) should adhere to Justice Holmes’ suggestion, because a conjunctive reading of the “innocent owner” clause is not only grammatically and logically correct, but it also comports with Congress’ announced purpose in § 881(a)(7): to “enhance the use of forfeiture . . . as a law enforcement tool in combating one of the most serious crime problems facing the country.” By contrast, reading § 881(a)(7) in the disjunctive would make it easier for property owners to resist forfeiture—including owners who know about the illegal activity on their property and implicitly condone it. Given the otherwise sweeping scope of Congress’ action in this area, it seems highly unlikely that Congress intended such a result, when its primary concern was to remove the profit motive from drug trafficking.

Using a similar canon of construction, several courts insist that the “innocent owner” provision of § 881(a)(7) must allow claimants to prove either a lack of knowledge or a lack of consent, because any other reading would render the “consent” prong of the clause superfluous. Since, under a conjunctive interpretation, knowledge of an illegal activity is sufficient for the government to take a claimant’s property, courts would not permit claimants who fail to prove a lack of

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105 See Copi, supra note 86, at 29.
107 See United States v. 890 Noyac Rd., 739 F. Supp. 111, 114 (E.D.N.Y. 1990), rev’d 945 F.2d 1252 (2d Cir. 1991) (“[I]n the context of § 881, the phrase ‘know or consent’ would lead to absurd results if it were read as giving claimant the option of proving either one or the other. For then it would be possible for an owner to know about, and perhaps even tacitly condone illegal drug activity, and yet still be able to claim that she did not ‘know or consent’ to the activity.”).
knowledge to offer proof that they did not consent to the illegal activity. In addition, these courts apparently assume that knowledge is a prerequisite to consent. They posit that under a conjunctive interpretation, courts will not consider the issue of consent until the claimant proves a lack of knowledge. They reason that since a claimant must know about illegal drug activity to consent to it, requiring claimants to prove a lack of both knowledge and consent requires deserving claimants to do the impossible.

Both of these arguments are defective. The idea that courts must read § 881(a)(7) in the disjunctive to give appropriate weight to the "consent" prong fails, because even under a disjunctive interpretation the issue of "consent" is not raised. Once claimants demonstrate their lack of knowledge, they do not need to show a lack of consent, because they have satisfied the terms of the statute—even if they were willfully blind (i.e., suspected drug activity, but condoned it by doing nothing).

Also, the premise upon which these courts rely—that it is impossible to consent to something without first having knowledge of it—is erroneous. The manner in which the courts have defined the terms "knowledge" and "consent" makes it possible for claimants to consent to illegal drug activity on their property without having knowledge of that activity. The "innocent owner" provision of § 881(a)(7) does not define either of these words. As a result, the courts have had to develop and apply their own definitions.

A majority of courts, whether they follow a conjunctive or disjunctive interpretation, have found that by "knowledge," Congress meant "actual" knowledge, rather than "constructive" knowledge. The dif-

109 141st St. Corp., 911 F.2d at 878.
110 Forfeiture, Stop Six Ctr., 781 F. Supp. at 1208.
111 141st St. Corp., 911 F.2d at 878 ("In order to [consent to] something, it is only common sense that one must have knowledge of it. Thus . . . to consent to drug activity, one must know of it."); 5.935 Acres, 752 F. Supp. at 362 ("[O]bviously proof of no knowledge will automatically prove no consent, since one cannot consent to something about which one does not know.").
114 See, e.g., United States v. 6960 Miraflares Ave., 995 F.2d 1558, 1561 (11th Cir. 1993); United States v. 7326 Highway 45 N., 965 F.2d 311, 315 (7th Cir. 1992); United States v. $10,694.00 U.S. Currency, 828 F.2d 233, 234-35 (4th Cir. 1987); United States v. Four Million, Two Hundred Fifty-Five Thousand, 762 F.2d 895 (11th Cir. 1985); United States v. 8848 S. Commercial St., 757 F. Supp. 871, 906 (N.D. Ill. 1990).

A minority of courts have required claimants to show a lack of both "actual" and "constructive" knowledge. See, e.g., United States v. 121 Nostrand Ave., Apartment 1-C, 760 F. Supp. 1015, 1020 (E.D.N.Y. 1991); United States v. 2901 S.W. 118th Ct., 683 F. Supp. 783,
ference is significant. A standard requiring "constructive" knowledge forces claimants to prove that they had no knowledge of illegal activity and that they had no reason to know about it. Under an "actual" knowledge standard, however, claimants need to show only that they had no personal knowledge of illicit drug activity on their property. Similarly, although some courts have defined "consent" to include implicit as well as explicit approval by requiring claimants to take all reasonable steps to prevent the illegal use of their property, most courts and commentators define "consent" solely as an express approval of illegal activity.

This combination of actual knowledge and explicit consent allows claimants to consent to something without first having knowledge of it. For instance, consider a homeowner who takes a vacation and asks a friend to house-sit. The homeowner, aware that the friend sells drugs, tells the friend to make himself at home. The friend moves in and begins selling drugs. The homeowner has no actual knowledge of his friend’s drug dealing in the house and has not given express consent to use the house for such purposes. Consider also an absentee landlord who rents to a suspected drug dealer, but remains indifferent to the use of his property. These examples illustrate that it is possible to impliedly consent to something without having actual knowledge of it. Courts which afford claimants this luxury encourage the type of "willful blindness" that allows those with some level of culpability to avoid an otherwise proper forfeiture.

Although principles of logic and canons of construction compel a conjunctive reading of the "innocent owner" provision of § 881(a)(7), the fact that many courts have read this provision in the disjunctive

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115 See 141st St. Corp., 911 F.2d at 870. That court adopted the ordinary meaning of “consent,” found in Webster’s Third New International Dictionary 482 (1971), defined as “compliance or approval especially of what is done or proposed by another.” Id. at 878. The court in 141st St. Corp. defined a “lack of consent” as doing “all that reasonably could be expected to prevent the illegal activity once [the owner] learned of it.” Id. at 879. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974). See infra notes 161 to 166 and accompanying text.


117 See Judge Greenberg’s dissent in 6109 Grubb Rd., 890 F.2d at 662, which relies on the “actual knowledge” standard adhered to by most courts. Here, the hypothetical landlord was clearly on notice that illegal activity could occur on his property, yet he chose to ignore the possibility. This state of mind, referred to as “willful blindness,” and its place in the “innocent owner” clause of § 881(a)(7), is discussed infra at notes 157 to 160 and accompanying text.
suggests that it is hopelessly abstruse.\textsuperscript{118} And those charged with interpreting this provision must go beyond mere examination of its plain meaning in order to discern congressional intent.

B. LEGISLATIVE HISTORY

1. (a)(6) as Evidence of the Proper Interpretation of (a)(7)

When it is impossible to determine Congressional intent by examining a statute's language, it is necessary to turn to legislative history.\textsuperscript{119} However, in enacting § 881(a)(7), Congress focused more on improving criminal forfeiture than on expanding the types of property subject to civil forfeiture. As a result, the legislative history of § 881(a)(7) is extremely sparse. The only mention of the "innocent owner" provision was the announcement that § 881(a)(7) "would also include an 'innocent owner' exception like that now included in" § (a)(6).\textsuperscript{120} Thus, many courts have turned to the legislative history of § 881(a)(6) in interpreting § 881(a)(7).\textsuperscript{121}

For example, in United States v. 6109 Grubb Road, the government seized the property of a suspected drug trafficker.\textsuperscript{122} After the defendant was convicted of drug trafficking, the government initiated the forfeiture of the property under § 881(a)(7).\textsuperscript{123} The defendant's wife raised the innocent owner defense, claiming that she neither knew of nor consented to the illicit activity.\textsuperscript{124} When she failed to prove a lack of knowledge, the court considered whether she could still attempt to prove a lack of consent. The court noted that the legislative history of § 881(a)(7) was insufficient\textsuperscript{125} and stated that because the legislative history of § 881(a)(7) refers to § 881(a)(6), the court "must also look to the legislative history of that section. . . ."\textsuperscript{126} The portion deemed relevant was a joint congressional committee report which stated that the property encompassed by § 881(a)(6) "would

\textsuperscript{118} The Second Circuit recognized that "the plain language of section 881(a)(7) is, at best, confusing." 141st St. Corp., 911 F.2d at 878.

\textsuperscript{119} "We resort to legislative materials . . . when the congressional mandate is unclear on its face." City of Rome v. United States, 446 U.S. 156, 199 (Powell, J., dissenting), reh'g denied, 447 U.S. 916 (1980).


\textsuperscript{121} The legislative history has been cited by courts arguing for a disjunctive interpretation, and those arguing for a conjunctive one. United States v. Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990); United States v. 15621 S.W. 209th Ave., 894 F.2d 1511, 1514 (11th Cir. 1990); 6109 Grubb Rd., 886 F.2d at 625; United States v. 890 Noyac Rd., 739 F. Supp. 111, 114 (E.D.N.Y. 1990), rev'd, 945 F.2d 1252 (2d Cir. 1991).

\textsuperscript{122} 886 F.2d at 618.

\textsuperscript{123} Id.

\textsuperscript{124} Id. at 620.

\textsuperscript{125} Id. at 624.

\textsuperscript{126} Id. at 625.
not be subject to forfeiture unless the owner of such property knew or consented to the use of the property for illegal drug activity. Although principles of logic would require courts to consider Congress’ use of a negative as a requisite that claimants prove both elements, the court concluded that it should read § 881(a)(7) in the disjunctive and allowed the wife to offer proof of lack of consent.  

The court in 6109 Grubb Road reached this conclusion by neglecting the very piece of legislative history it had cited. After stating the necessity of referring to the legislative history of § 881(a)(6), and pointing to the specific passage from the committee report, the court simply ignored the statement’s implications that claimants must prove a lack of both knowledge and consent. Instead, the court found that canons of statutory construction require a disjunctive reading. Had the court examined the passage, it would have become clear that the phrase “unless the owner of such property knew or consented to” establishes that if claimants either know about or consent to illicit drug activity, they cannot succeed in demonstrating innocent ownership. Stated in the positive, the phrase would read: “the property would be subject to forfeiture unless the owner of such property neither knew of nor consented to” the illegal conduct. Therefore, claimants must prove a lack of both knowledge and consent. Thus, the legislative history of § 881(a)(7) demonstrates that Congress intended to create an “innocent owner” clause “like that [one] now included in” § 881(a)(6), which is read in the conjunctive. Judge Greenberg correctly realized “that Congress has been consistent in its use of the . . . phrase ‘knew or consented,’” and claimants must therefore prove both a lack of knowledge and a lack of consent to satisfy the “innocent owner” provision of § 881(a)(7).  

128 6109 Grubb Rd., 886 F.2d at 625.  
129 Id.  
130 Id. at 626.  
131 The court in Lot 111-B based its decision entirely upon this explanation, stating first that “a congressional joint committee report explaining the identical language of Section 881(a)(6) leaves no doubt as to the proper interpretation of the 'knew or consented' language,” and then concluding that “if the claimant either knew or consented to the illegal activities, the ‘innocent owner’ defense is unavailable.” United States v. Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990).  
One commentator asserts that although the explanatory statement is persuasive, it is not conclusive because it places the burden of proof on the government, which is inconsistent with established forfeiture procedure. See Loomba, supra note 90, at 484. The statement, however, does not suggest a shifting of burdens, it merely attempts to clarify Congressional intent by presenting an alternative way to view the necessary statutory requirements.  
132 6109 Grubb Rd., 886 F.2d at 663. One commentator argues that the legislative history
2. Recent Revelations Regarding § 881(a)(7)

Although the legislative history of § 881(a)(6) offers insight into Congress' intent regarding the "innocent owner" provision of § 881 (a)(7), the fact that Congress did not comment further on § 881 (a)(7) leaves open the question of whether Congress itself read the "innocent owner" clause in the conjunctive or the disjunctive. However, the subsequent legislative history of § 881(a)(7) provides additional evidence that Congress intended the "innocent owner" clause of § 881 (a)(7) to require that claimants prove a lack of both knowledge and consent.

Generally, courts do not consider subsequent legislative history helpful in determining Congress' original intent when enacting a statute. In fact, the Supreme Court has repeatedly cautioned that subsequent legislative history is normally an unreliable way of discerning Congressional intent. Yet the Court has recognized that in certain circumstances subsequent legislative history is a useful guide to congressional intent, and the Court has continued to use it as a valid interpretive tool. For example, in Andrus v. Shell Oil Co., Shell bought the rights to an oil shale claim that was discovered in 1918. The Department of the Interior denied Shell's claim, finding it invalid because oil shale was not considered a valuable mineral deposit under the general mining laws of 1872. The Court relied on subsequent legislative history and department action—including Department of the Interior instructions issued after the 1920 Act went into effect—to determine that pre-1920 oil shale claims were valid under the Act.

of § 881(a)(6) is inapplicable to § 881(a)(7) because § 881(a)(6) applies exclusively to bona fide purchasers. See O'Brien, supra note 116, at 537-40. This argument has been rendered moot by the United States Supreme Court's decision in United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126 (1993). The Court interpreted the "innocent owner" clause of § 881(a)(6), and held that "the protection afforded to innocent owners is not limited to bona fide purchasers." Id. at 1134. The Court, in a plurality decision, noted that the term "owner" appears in the statute three times, and is never qualified. According to the Court, "[s]uch language is sufficiently unambiguous to foreclose any contention that it applies only to bona fide purchasers." Id. at 1139.

Since § 881(a)(6) does not apply exclusively to bona fide purchasers, courts can, and should use its legislative history and its conjunctive construction to discern Congress' intent regarding § 881(a)(7).

135 446 U.S. 657 (1980).
136 Id. at 660.
137 Id. at 665-66.
Chief Justice Burger recognized that arguments based on subsequent legislative history have to be made and weighed carefully, but determined that the Court should not discard them.\footnote{Id. at 666, n.8.} He noted Chief Justice Marshall, who once exclaimed that "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived."\footnote{United States v. Fisher, 6 U.S. 358, 386 (1805).}

The Supreme Court points out that it should not consider a statute's subsequent legislative history when it can glean the statute's meaning by its language or its legislative history.\footnote{Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980).} This is sound advice, but since the plain language of § 881(a)(7) is what has caused the controversy, and since there is no specific legislative history to illuminate the question, any subsequent discussion of the provision is helpful in understanding how courts should read the clause.

Numerous members of Congress have proposed amendments to the "innocent owner" provision of § 881(a)(7) to bring it into conformity with the "innocent owner" provision of § 881(a)(4) as amended in 1988.\footnote{136 CONG. REC. S6586, S6605 (daily ed. May 18, 1990).} Those proposed amendments would have added "willful blindness" as an additional element of the "innocent owner" defense.\footnote{Id. at S6595.} For instance, Senator Dole introduced the National Drug Control Strategy Implementation Act of 1990 on behalf of the office of National Drug Control Policy. The bill included an amended version of the "innocent owner" clause of § 881(a)(7) to replace the phrase "without the knowledge or consent of that owner," with "without the knowledge, consent, or willful blindness of the owner." This particular change was designed to clearly establish that claimants with knowledge of illegal drug activity cannot avoid forfeiture merely by showing a lack of consent to that activity. The accompanying analysis of the amendment states that it is "intended that, in order to establish the innocent owner exemption, the property owner must establish all three circumstances—i.e., that the owner lacked knowledge, consent, and willful blindness as to the offense giving rise to forfeiture."\footnote{Id. at S6605.} It expressly condemned the 6109 Grubb Road decision that claimants could prove either a lack of knowledge or a lack of consent,\footnote{Id. at S6605-06.} and announced that the "addition of the 'willful blindness' prong under..." \footnote{Id. at S6605.}
scores the incorrectness of" the holding in 6109 Grubb Road, "since it makes no sense that an owner could prevail by showing a lack of willful blindness to the offense even though the owner had knowledge of the offense and consented to it."\textsuperscript{145}

Although this amendment did not pass, the significance of the proposal should not be underestimated. Congress enacted § 881(a)(7) in 1984, but the question of how to read the "innocent owner" clause was not raised in the circuits until 1989. This amendment—which directly addresses that question—was introduced less than one year later. Additionally, the agency in charge of setting drug policy suggested the amendment.\textsuperscript{146} In fact, Senator Biden proposed an identical amendment,\textsuperscript{147} and the Senate approved an identical amendment as part of the Omnibus Crime Bill of 1990.\textsuperscript{148} Senator Kennedy also introduced an amendment to the "innocent owner" provision of § 881(a)(7) and was even more careful to insure that courts would read it in the conjunctive. He replaced the current clause with: "if the owner establishes by a preponderance of the evidence that the act or omission giving rise to the forfeiture was committed or omitted without the owner's knowledge, without his or her consent, and without his or her willful blindness."\textsuperscript{149} Apparently, Congress is attempting to clarify the ambiguity in § 881(a)(7) that has plagued courts for almost ten years.

C. FAIRNESS

Courts reading the "innocent owner" provision of § 881(a)(7) in the disjunctive believe that requiring owners to forfeit their property merely because they had knowledge of illegal activity would lead to unduly harsh results.\textsuperscript{150} They feel that Congress enacted the "innocent owner" defense to shield those with knowledge, but not responsibility for the crime, from the severity of forfeiture.\textsuperscript{151} Accordingly, they assert that forcing claimants to prove a lack of both knowledge and consent wrongly treats those with knowledge as full participants

\textsuperscript{145} Id. at S6606.
\textsuperscript{146} 136 CONG. REC. S6586 (daily ed. May 18, 1990). Although Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843-44 (1984), probably does not obligate courts to defer to agency interpretation in civil forfeiture cases, the fact that the people who set drug policy, and the agency enforcing the statute—the Department of Justice through its prosecutors—interpret § 881(a)(7) in the conjunctive is persuasive.
\textsuperscript{148} 136 CONG. REC. S10,184, S10,238 (daily ed. July 20, 1990).
\textsuperscript{149} 136 CONG. REC. S7154, S7156 (daily ed. June 5, 1990) (emphasis added).
\textsuperscript{150} 6109 Grubb Rd., 886 F.2d at 624.
\textsuperscript{151} United States v. 418 57th St., 922 F.2d 129, 131 (2d Cir. 1990).
in a crime.\textsuperscript{152}

Those courts adhering to a conjunctive interpretation maintain that Congress’ primary purpose in enacting § 881(a)(7) was to remove the profit motive from drug trafficking by seizing all real property substantially connected to that trafficking.\textsuperscript{153} Thus, allowing claimants who were aware of illicit drug activity on their property to avoid forfeiture is contrary to Congressional policy\textsuperscript{154} and would severely undermine the efficiency of the Government’s forfeiture effort.\textsuperscript{155}

To determine whether or not the “innocent owner” clause of § 881(a)(7) creates injustices under certain circumstances, it is necessary to examine the terms “knowledge” and “consent.” As stated, a majority of courts have ruled that Congress intended “knowledge” to mean “actual” knowledge, rather than “constructive” knowledge.\textsuperscript{156} Obviously, a standard based on actual knowledge creates less of a burden for claimants to meet than a standard based on constructive knowledge, because claimants need to show only that they had no personal knowledge of illegal drug activity on their property.\textsuperscript{157}

Even though actual knowledge is less of a burden for claimants, the actual knowledge standard is most likely the correct interpretation of Congress’ intent. The legislative history of § 881(a)(4) indicates that Congress did not intend the term “knowledge” to encompass the concept of truth avoidance. The initial proposal in 1988 to amend § 881(a)(4) by adding an “innocent owner” provision did not contain any language referring to willful blindness. Congress later added a “willful blindness” prong to alleviate concerns that the amendment “would lead to a ‘look-the-other-way’ defense,”\textsuperscript{158} and to “prevent the owner of a conveyance from closing his eyes to a violation.”\textsuperscript{159} Therefore, the absence of a “willful blindness” prong in § 881(a)(7) “constrains courts to employ . . . [an actual knowledge standard] rather than . . . [a constructive knowledge] standard for assessing the claimant’s knowledge.”\textsuperscript{160}

\begin{footnotesize}\begin{enumerate}
\item[153] United States v. Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990).
\item[154] Id.
\item[155] Id.
\item[156] See supra text accompanying note 114.
\item[157] The courts that have adopted this standard have done so after noting that nothing in either the statute itself, nor the legislative history, suggests that courts need to assess whether or not claimants should have known about illegal drug activity on their property. See supra note 114.
\item[160] United States v. 7326 Highway, 965 F.2d 311, 315 (7th Cir. 1992). The fact that
\end{enumerate}\end{footnotesize}
The debate over whether "consent" includes an implicit approval of illegal activity stems from the "all reasonable steps" requirement set out in Calero-Toledo v. Pearson Yacht Leasing Company.\textsuperscript{161} In Calero-Toledo, the claimant leasing company leased a yacht to certain Puerto Rican residents.\textsuperscript{162} After the authorities found marijuana on board, they seized the yacht pursuant to the Puerto Rican Controlled Substances Act.\textsuperscript{163} The leasing company learned of the seizure when it tried to repossess the vessel from the lessees who had failed to pay their rent.\textsuperscript{164} Although the claimant was not involved with the illegal activity, and had no knowledge of it, the Court, in an opinion by Justice Brennan, upheld the constitutionality of the forfeiture procedure under the statute. The Court noted that the leasing company voluntarily entrusted the lessees with the yacht and offered no proof that it had done all that it reasonably could have done to prevent its property from being used illegally.\textsuperscript{165} In much cited dicta, however, the Court acknowledged that it might be unconstitutional to cause property owners to forfeit their property if those owners were both uninvolved in, and unaware of, the illegal activity, and if they had done all that reasonably could be expected to prevent that illegal use.\textsuperscript{166} This dicta has become known as the "Calero-Toledo" defense and has prompted courts to consider whether such a standard is applicable to cases originating under § 881(a)(7), and if so, the extent to which it applies.

Presently, courts have taken one of three positions regarding the Calero-Toledo defense and § 881(a)(7). Certain courts have concluded that the Calero-Toledo defense is not applicable to cases originating under § 881(a)(7).\textsuperscript{167} Other courts have incorporated the

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Congress has proposed amendments to § 881 (a)(7) which include the insertion of a "willful blindness" prong also indicates the current constraints on how courts define "knowledge." See supra section IV B-2.
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\textsuperscript{161} 416 U.S. 663 (1974).
\textsuperscript{162} Id. at 665.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 668.
\textsuperscript{165} Id. at 690.
\textsuperscript{166} Id. at 689. Also, in dicta, the Court related two situations which might create an exception to the rule that the innocence of the owner is irrelevant to forfeiture proceedings:

[I]t 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. . . . 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 expected 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{167} United States v. 4,657 Acres, 730 F. Supp. 423, 427 (S.D. Fla. 1989); United States v. Certain Real Property, 724 F. Supp. 908, 914 (S.D. Fla. 1989); United States v. 171-02 Lib-
defense into the “innocent owner” provision of § 881(a)(7) as an additional requirement which claimants must prove to avoid forfeiture.168 And yet another group of courts has used the Calero-Toledo dicta to define the boundaries of the term “consent.”169

Those courts which reject the applicability of the Calero-Toledo defense to cases arising under § 881(a)(7) maintain that the Supreme Court’s statement in *Calero-Toledo* is irrelevant because it “dealt with constitutional defenses to a forfeiture statute which did not incorporate the express ‘knowledge or consent’ defense contained in § 881(a)(7).”170 These courts seem to believe that the statute’s definitions of “knowledge” and “consent” do not encompass the *Calero-Toledo* standard of reasonable steps.171 In fact, these courts contend that had Congress intended to incorporate the *Calero-Toledo* standard into the “innocent owner” defense of § 881(a)(7), it would have done so, because the Supreme Court decided *Calero-Toledo* ten years before Congress enacted § 881(a)(7).172 Because Congress did not adopt that requirement, courts cannot read the statute to include it now.

Those courts which have incorporated the Calero-Toledo defense into the “innocent owner” clause of § 881(a)(7) have not provided much explanation for doing so. They apparently believe that the Supreme Court’s *dicta* revealed the extent of the burden borne by claimants seeking the innocent ownership exemption. Therefore, not only are claimants required to prove their lack of “actual” knowledge or lack of consent or both, but also that they did all that could be reasonably expected to prevent illicit use of their property.173
Lastly, those courts which use the Calero-Toledo standard to define the borders of the "consent" requirement of the "innocent owner" clause of § 881(a)(7) seem to view it as a rationalization for interpreting the statute in the disjunctive. Once claimants have actual knowledge of illegal activity on their property, they can avoid forfeiture only by proving a lack of consent, which is accomplished by showing that they have done all that could reasonably be expected of them to prevent that illegal activity from continuing. This approach is touted as balancing the announced congressional purposes of preventing drug trafficking and protecting the constitutional rights of innocent owners.

1. The Correct Application

Courts should not incorporate the Calero-Toledo defense into § 881(a)(7) to impose an additional burden on claimants. Had Congress wanted to codify the Calero-Toledo standard in § 881(a)(7), it could have done so when it added that provision in 1984. Legislative history of the 1988 amendments to § 881(a)(4) lends strength to this conclusion. When Congress debated the addition of a “willful blindness” prong to § 881(a)(4), those who endorsed the idea made it clear that “this section [was] not intended to overturn existing case law rendered under the Supreme Court decision in Calero-Toledo...” The “willful blindness” provision of § 881(a)(4) was meant to require the same “reasonable expectation” standard as courts adopting the Calero-Toledo standard had required. Since Congress added a “willful

standard similar to that used in 11885 46th Street).

174 United States v. Ponce, 751 F. Supp. 1436, 1441 (D. Haw. 1990). (“Mere knowledge of illicit activity on one’s property is enough to allow forfeiture of that property, if the claimant does not do all that reasonably could be expected to prevent the illegal activity once he or she learns of it.”).

175 “We find the Calero-Toledo standard appropriate for section 881(a)(7) forfeiture cases because, when combined with our construction of the phrase ‘knowledge or consent,’ it provides a balance between the two congressional purposes of making drug trafficking prohibitively expensive for the property owner and preserving the property of an innocent owner.” United States v. 141st Street Corp., 911 F.2d 870, 879 (2d Cir. 1990), cert. denied 498 U.S. 1109 (1991). See also United States v. 19 and 25 Castle St., 31 F.3d 35, 40 (2d Cir. 1994); United States v. 418 57th St., 922 F.2d 129, 132 (2d Cir. 1990) (“[W]e balanced our determination of the knowledge-consent issue with a stringent interpretation of consent...”). A significant difference between courts following this standard, and those courts using the Calero-Toledo dicta as an additional prong, is that claimants are expected to have taken reasonable steps after the illicit activity has been discovered. In jurisdictions where the Calero-Toledo defense is considered a separate requirement, claimants must prove that they took reasonable steps to prevent wrongful activity from occurring at all.


177 “The language of Calero-Toledo and the line of cases that follow require property owners to be reasonably informed concerning the purpose for which another person may use their property. This provision in the bill before us is intended to allow the courts to deter-
blindness" prong to the "innocent owner" clause of § 881(a)(4), but has not added one to the "innocent owner" clause of § 881(a)(7), Congress cannot have intended the Calero-Toledo standard to apply to the "innocent owner" clause of that provision. Therefore, as the statute is written, claimants ought to be able to demonstrate a lack of consent simply by showing that they gave no express approval to the illegal activity.

2. Applying Definitions to Determination of Fairness

The proper definitions of both "knowledge" and "consent" create the minimum burden for claimants. They have to show only that they had no actual knowledge of the particular activity giving rise to forfeiture and that they did not expressly consent to it. But combining the low threshold Congress has created for successful claimants with a disjunctive interpretation of the "innocent owner" provision of § 881(a)(7) leads to results which are both undesirable and contrary to Congress' stated intent. Under such a reading, owners could tacitly condone illegal drug activity on their property without giving express consent and avoid forfeiture even though they had actual knowledge. A good example of this is the claimant in United States v. 171-02 Liberty Avenue, who was the landlord of a building where dealers sold their drugs out of a second floor apartment. The police sought his cooperation on numerous occasions. The dealers responded by building fences around the property to obstruct police surveillance and installing steel doors with peepholes and multiple slide bolt locks to fortify the floor against police raids. Begrudgingly, the claimant agreed to press trespassing charges against non-resident dealers and buyers arrested by the police and to allow the police to tear down the fortifications. He refused, however, to fire the building's caretaker, who police believed to be one of the drug traffickers. In addition, ongoing renovation made it difficult for police to distinguish the legitimate workers from those hired by the claimant.

mine whether owners have taken the type of actions contemplated by the Supreme Court . . .

See O'Brien, supra note 116, at 546-48 (determining that the Calero-Toledo defense is inapplicable to cases arising under § 881(a)(7) because it would impose an additional burden on claimants which Congress did not intend).

See supra notes 103 to 112 and accompanying text.


Id. at 47.

Id. at 47-48.

Id. at 47.

Id.

Id. at 48.

Id. at 47-48.
drug dealers to erect the fences and steel doors. One detective sent the claimant a letter asking him to provide each legitimate contractor with his business card.\textsuperscript{187} If workers failed to produce the card the police would arrest them for trespassing.\textsuperscript{188} After police arrested a drug dealer who was carrying the detective's business card, they ceased their efforts to enlist the claimant's cooperation and seized the building.\textsuperscript{189} However, because the court interpreted the "innocent owner" provision of § 881 (a) (7) in the disjunctive, the claimant avoided forfeiture by proving lack of consent.\textsuperscript{190}

The injustice of this outcome was made possible because the court interpreted the statute in the disjunctive. The court noted that the claimant had cooperated with the police by pressing trespassing charges and allowing the police to raze the barricades erected by the drug dealers.\textsuperscript{191} The court then stated, that given the statute's requirements, it could not "comprehend why [the claimant] was obligated to provide even this much cooperation in order to avoid forfeiture . . . ."\textsuperscript{192}

The court noted however, that being arrested for trespassing was only a minor inconvenience, because "two hours later they would be back."\textsuperscript{193} Further, instead of forbidding his tenants from putting up the fences and steel doors, the landlord forced the police to expend resources and energy tearing them down. And the large sums of cash generated from the sale of drugs made it simple for the dealers to have the barricades quickly replaced.\textsuperscript{194} The claimant argued that he felt threatened by the drug dealers and did not want to risk getting injured.\textsuperscript{195} Although this explanation may have been true, and would make his actions reasonable, any collaborator wishing to avoid forfeiture could raise this defense. Such a defense, if allowed, would gut the government's efforts to abate drug trafficking.

A conjunctive interpretation provides the government with a greater ability to combat drug trafficking. That interpretation may also lead to injustice under certain circumstances where owners genuinely try to stop illegal drug activity on their property.\textsuperscript{196} If, however,
owners who find themselves in that situation honestly desire to rid their property of the illicit activity, they should notify the proper authorities. Those authorities could take the steps necessary to alleviate the problem and protect the owners from any potential harm. Even if the owners' relatives are involved in the illegal activity, the law does not allow them to do anything less. "At some point the obligations of citizenship in a drug-ridden society must overcome [family] loyalty and even [family] intimidation."

Further, the United States Supreme Court has recently recognized significant constitutional protections for claimants whose real property has been seized. In Austin v. United States, the Court held that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture. Also, in United States v. Good, the Court held that the Due Process Clause of the Fifth Amendment prohibits the government from seizing real property without first giving the owner notice and the opportunity to contest the seizure at a pre-seizure hearing. The application of these provisions to civil forfeiture provides ample protection against potential inequities.

Also, the constitutional concerns discussed in Calero-Toledo would not arise within the context of a § 881(a)(7) forfeiture. The Court noted that forfeiture may be unconstitutional if claimants had neither "actual" nor "constructive" knowledge (i.e. they truly had no idea), and that they did everything they could do—prior to the illegal use of their property—to prevent that illegal use from occurring. A conjunctive interpretation of § 881(a)(7) does not allow forfeiture in that situation. As stated, under § 881(a)(7) property cannot be forfeited unless claimants had "actual" knowledge or explicitly consented to illegal activity. According to the Court in Calero-Toledo, once either of

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199 Id. at 2812. For a complete analysis of the Court's decision in Austin v. United States, see David Lieber, Note, Eighth Amendment—The Excessive Fines Clause, Austin v. United States, 113 S. Ct. 2801 (1993), 84 J. CRIM. L. & CRIMINOLOGY 805 (1994).
201 Id. at 505.
these circumstances is proven, forfeiture is constitutional.\textsuperscript{203}

To argue that a conjunctive reading of the "innocent owner" provision of § 881(a)(7) is improper because it may result in unfairness, is to forget why Congress enacted the statute. Congress' purpose was to strengthen the government's ability to fight illegal drug trafficking—an effort which already costs the American public tens of billions of dollars a year and has been largely unsuccessful.\textsuperscript{204} The fact that Congress provided some protection for innocent owners cannot allow the statute as a whole to be suborned. It is important to remember that prior to the enactment of § 881(a)(7), real property owners had no defense at all against forfeiture.\textsuperscript{205} Congress appears to have recognized the need to protect truly innocent owners. However, Congress did not give owner's rights precedence over the government's interest in finding an effective method of depriving drug dealers of their profits. Since the definition of "innocent" is "acting in good faith, and without knowledge of incriminatory circumstances,"\textsuperscript{206} the only way that claimants truly meet this default is by proving both a lack of knowledge and a lack of consent. Only then can courts be sure that the owners are innocent and deserve to keep their property.

V. Solution

It is obvious that the current statute creates certain inequities. Therefore, Congress should amend the statute to eliminate the negative effects on both the government and the claimants. Inserting a "willful blindness" prong and incorporating the Calero-Toledo defense would be one way to accomplish this objective. This would alleviate the concerns of both sides. The incorporation of the Calero-Toledo defense would prevent the government from taking property from claimants like the father in 908 T Street,\textsuperscript{207} who may have known about the illegal activity, but took positive steps to thwart it. Similarly, the inclusion of a "willful blindness" prong would eradicate the government's concern that claimants, like the landlord in 171-02 Liberty Avenue, could silently condone the illegal activity on their property, yet avoid forfeiture.

To prevent further confusion, Congress could take care to word the statute clearly. A possible example might be:

The claimant must prove by a preponderance of the evidence that he or she was not willfully blind to the fact that someone was using the prop-

\textsuperscript{203} Id.
\textsuperscript{204} See Bureau of Justice Statistics, supra note 8.
\textsuperscript{205} See Calero-Toledo, 416 U.S. at 683.
\textsuperscript{207} See supra note 196.
erty for illegal purposes. If a claimant is found to have been willfully blind, he or she cannot be considered an innocent owner. If a claimant succeeds in proving that he or she was not willfully blind, the claimant must then prove that he or she did not have actual knowledge that the property was connected to illegal drug activity. If, however, the claimant is found to have had actual knowledge of the illegal activity, and as a result of that knowledge, had done all that could be reasonably expected to prevent the illegal activity from continuing, that claimant’s property shall not be forfeited.

VI. CONCLUSION

Until Congress chooses to amend the statute, courts must read the “innocent owner” provision of § 881(a)(7) in the conjunctive. A logical reading of the clause, its legislative history, the legislative history of related clauses, subsequent clarifications, and basic principles of equity require claimants to prove both a lack of knowledge and a lack of consent to satisfy the innocent owner requirement of § 881(a)(7). Perhaps the injustices of the current “innocent owner” provision which this comment has pointed out, will prompt Congress to take action to help clear the smoke from the battlefield of the government’s war on drugs.