The Knowledgeable but Non-Consenting Owner: Innocent under 21 USC 881(a)(7)?

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A woman knows that her husband is dealing drugs from the family home. If she does not approve of his behavior, she may turn a blind eye toward his activities, plead with him to stop, or even threaten to report him to the police. Nevertheless, he may ignore her and continue to use their property illegally. Regardless of whether he is charged with a crime, the property may be seized in an \textit{in rem} action pursuant to Section 306(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970,\textsuperscript{1} popularly known as the "Controlled Substances Act." If the government can prove by a preponderance of the evidence that the property was used in violation of a federal narcotics statute bearing a penalty of one year or more in prison, then the property is forfeited to the government.\textsuperscript{2} Because the guilt or innocence of the property owner is irrelevant to forfeiture, given the \textit{in rem} nature of the action, a spouse's property, or her share in jointly owned property, is also subject to forfeiture.\textsuperscript{3}

Congress, however, included an "innocent owner exception" in the statute, permitting an owner to recover her interest in forfeited property if she can prove by a preponderance of the evidence that the property was used "without the knowledge or consent [of the owner]."\textsuperscript{4} The federal courts have split as to whether the innocent owner exception requires a claimant to satisfy both elements of the clause, by proving both lack of knowledge and lack of consent, or whether a claimant must satis-

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\textsuperscript{1} Pub L No 91-513, 84 Stat 1236 (1970), codified at 21 USC § 881(a)(7) (1988) ("Section 881(a)(7)"). This Section, permitting the forfeiture of real property, was added in 1984 by § 306(a), Pub L No 98-473, 98 Stat 250 (1984).
\textsuperscript{2} 21 USC § 881(a)(7) (1988).
\textsuperscript{3} The division of jointly owned property when one spouse's interest is forfeited is largely a function of state law. See Eric G. Zajac, Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans, 54 U Pitt L Rev 553, 556 (1993).
fy only one element by proving, either lack of knowledge or lack of consent.

The majority of courts that have considered this issue have held that a claimant may satisfy her burden by proving either lack of knowledge or lack of consent.⁵ Under this approach, the statute is read so that both “knowledge” and “consent” relate independently to “without.” This interpretation is commonly referred to as the “disjunctive approach.” By contrast, some courts have required the claimant to establish both lack of knowledge and lack of consent in order to avoid forfeiture.⁶ Courts taking this “conjunctive approach” have construed the innocent owner exception so that “without” relates to the entire clause “knowledge or consent.”

This Comment contends that the conjunctive reading of Section 881(a)(7), which requires claimants to prove both lack of knowledge and lack of consent, is the proper interpretation. First, the plain language of the statute best supports this reading. Second, it is the interpretation Congress clearly intended, as evidenced by the statute’s legislative history. Third, this reading avoids the primary weakness of the disjunctive interpretation, which, to be consistent, provides an “innocent owner” defense to claimants who consent to the illegal use of their property but have no actual knowledge of that use. These claimants are able to prove that they lacked knowledge of the criminal activity, thus satisfying one element of the clause “without the knowledge or consent.” Finally, the conjunctive interpretation does not, as its critics allege,⁷ require forfeiture once the owner has discovered illegal activity on her property, regardless of her future actions. Properly understood in light of constitutional considerations, the conjunctive interpretation allows recovery by those owners who take immediate steps to halt the illegal use of their property.

⁵ See, for example, United States v One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Florida, 963 F2d 1496, 1503 (11th Cir 1992); United States v 141st Street Corp., 911 F2d 870, 878-79 (2d Cir 1990), cert denied, 498 US 1109 (1991); United States v Parcel of Real Property Known as 6109 Grubb Road, Millcreek Township Erie County, Pennsylvania, 886 F2d 618, 626 (3d Cir 1989), reh’g denied, 890 F2d 659 (3d Cir 1989).

⁶ See, for example, United States v One Single Family Residence Located at 6960 Miraflores Avenue, 995 F2d 1558, 1561 (11th Cir 1993); United States v One Single Family Residence Located at 15603 85th Avenue North, Lake Park, Palm Beach County, Florida, 933 F2d 976, 981 (11th Cir 1991); United States v One Parcel of Land, Known as Lot 111-B, Tax Map Key 4-4-03-7I(4), Waipouli, Kapaa, Island and County of Kauai, State of Hawaii, 902 F2d 1443, 1445 (9th Cir 1990) (per curiam). See note 13 for a discussion of the intracircuit split in the Eleventh Circuit.

⁷ See, for example, Zajac, 54 U Pitt L Rev at 571 (cited in note 3).
Part I of this Comment examines existing case law and presents arguments for both the conjunctive and disjunctive readings of the statute. Part II interprets Section 881(a)(7) using tools of statutory construction and symbolic logic, and examines its legislative history. It concludes that the conjunctive reading is the preferred approach. Part III analyzes the major weakness of the disjunctive interpretation, that of the consenting-but-ignorant landowner who, under the disjunctive approach, must be allowed to recover her property. Part IV discusses how the conjunctive interpretation affords protection to the non-consenting but knowledgeable claimant who takes immediate steps to halt the illegal activity. The Comment concludes that the conjunctive approach follows both the plain language and legislative purpose of the innocent owner exception, avoids the main weakness of the disjunctive approach, and provides the proper degree of protection to the knowledgeable but non-consenting spouse.

I. ANALYSIS OF CURRENT LAW

Section 881(a)(7) mandates the forfeiture of all property used to commit or facilitate any drug crime punishable by a sentence of more than one year in prison. The innocent owner exception permits the owner to recover her interest in the property if the illegal acts leading to forfeiture are "established by that owner to have been committed or omitted without the knowledge or consent of that owner." In a large number of cases interpreting the innocent owner exception, the claimant-owner is a woman whose husband used marital property for drug dealing. Because of her close per-
sonal relationship to the offender, and because she typically resides on the subject property, the wife of a drug dealer is more likely than an outside owner to have knowledge of her husband's illegal activities. Nevertheless, although cognizant of her husband's criminal activity, she might not be his partner in crime. She may be strongly opposed to his activities but afraid to voice her objections. Even if willing to oppose her husband, she may be unwilling to report him to the police and subject him to a long jail term.

On the other hand, while not explicitly consenting to her husband's activities, she may enjoy the fruits of his illegal acts and thus may not truly be an innocent bystander. She may even actively participate in his drug-dealing, claiming non-consent only in an attempt to preserve her property. It is these dual concerns—fear of taking the property of those whom society perceives as innocent victims and fear of providing a loophole for those who are not—that courts face when interpreting Section 881(a)(7).

A. The Disjunctive Interpretation

The majority of courts that have examined the innocent owner defense have interpreted the statute's language disjunctively, thus requiring a claimant to prove only one element of the defense, either lack of knowledge or lack of consent. To date, the Second Circuit, Third Circuit, and one panel in the Eleventh

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States v One Single Family Residence Located at 15526 69th Drive N, Lake Park, Florida, 778 F Supp 1215 (S D Fla 1991); United States v Property Titled in the Names of Ponce, 751 F Supp 1436 (D Hawaii 1990). See also United States v Certain Real Property and Premises Known as 890 Noyac Road, Noyac, New York, 945 F2d 1252 (2d Cir 1991) (mother/son); United States v One Single Family Residence Located at 15609 85th Avenue North, Lake Park, Palm Beach County, Florida, 933 F2d 976 (11th Cir 1991) (brother/brother); United States v One Parcel of Property Known as 4.14 Acres in the 19th C.M. District of Bryan County, Georgia, 801 F Supp 737 (S D Ga 1992) (mother/daughter); United States v Forfeiture, Stop Six Center, Located at 3340 Stallcup, Fort Worth, Texas, 781 F Supp 1200 (N D Tex 1992), subsequent proceeding, 794 F Supp 626 (N D Tex 1992) (aunt/nephew); United States v Leasehold Interest in 121 Nostrand Avenue, Apartment 1-C, Brooklyn, New York, 760 F Supp 1015 (E D NY 1991) (grandmother/grandchildren); United States v One Parcel of Property Located at Rt. 1 Box 137, Randolph, Chilton County, Alabama, 743 F Supp 802 (M D Ala 1990) (uncle and aunt/nephew); United States v One Parcel of Real Estate at 5745 N W 110 Street, Miami, Florida, 721 F Supp 287 (S D Fla 1989), aff'd without op, 914 F2d 268 (11th Cir 1990) (woman/brother-in-law).

11 United States v 141st Street Corp., 911 F2d 870, 878-79 (2d Cir 1990), cert denied 498 US 1109 (1991). See also 890 Noyac Road, 945 F2d at 1260 (following 141st Street Corp.); United States v Certain Real Property and Premises Known as 418 57th Street, Brooklyn, New York, 922 F2d 129, 131 (2d Cir 1990) (following 141st Street Corp.); 121 Nostrand Avenue, 760 F Supp at 1032-33 (following 141st Street Corp. and holding that a
Circuit\textsuperscript{13} have taken this position. These courts have espoused three primary justifications for their position, two based on statutory interpretation and one based on the legislative history of Section 881(a)(7).

First, some courts have concluded that the use of the disjunctive "or" in the innocent owner defense dictates that each element be independently sufficient to establish innocence. This argument was first advanced in \textit{United States v Certain Real Property and Premises Known As 171-02 Liberty Avenue, Queens, New York},\textsuperscript{14} one of the first cases examining Section 881(a)(7) in depth. The claimant in that case, the owner of an abandoned building, knew that his property was being used for drug dealing but had not consented to such use.\textsuperscript{15} After several months of aiding the police in their efforts to rid the building of drug dealers, the claimant, fearing retaliation, ceased cooperating.\textsuperscript{16} Subsequently, the government seized his property and initiated forfeiture proceedings.\textsuperscript{17} The claimant was never charged with a crime, and the government never alleged that he profited from or encouraged the drug dealing.\textsuperscript{18}

In denying the government's motion for summary judgment, the court held that Section 881(a)(7) must be read disjunctively\textsuperscript{19} and, therefore, that the claimant must be permitted to assert his lack of consent as a defense.\textsuperscript{20} Following Reiter

leasehold in a public housing project is an ownership interest for purposes of the statute).

\textsuperscript{13} \textit{6109 Grubb Road, 886 F2d at 626. See also 107.9 Acre Parcel of Land Located in Warren Township, 898 F2d at 398-400 (relying on 6109 Grubb Road); United States v Premises Known as 717 South Woodard Street, Allentown, Pennsylvania, 804 F Supp 716, 723-24 (E D Pa 1992), aff'd in part, rev'd in part, 2 F3d 529 (3d Cir 1993) (relying on 6109 Grubb Road).}

\textsuperscript{14} \textit{United States v One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Florida, 963 F2d 1496, 1503 (11th Cir 1992). See also 4.14 Acres, 801 F Supp at 740-41 (relying on 1012 Germantown Road). However, two other panels in the Eleventh Circuit have adopted the conjunctive interpretation. See United States v One Single Family Residence Located at 15603 85th Avenue N, Lake Park, Palm Beach County, Florida, 933 F2d 976, 981 (11th Cir 1991) ("Innocent owners are those who have no knowledge of the illegal activities and who have not consented to the illegal activities.") (emphasis added); United States v One Single Family Residence Located at 6960 Miraflores Avenue, 995 F2d 1558, 1561 (11th Cir 1993) (citing 15603 85th Avenue North). See also United States v One Parcel of Real Estate Located at 6640 S W 48th Street, Miami, Dade County, Florida, 831 F Supp 1578, 1583 n 3 (S D Fla 1993) (noting the contradictory precedent).}

\textsuperscript{15} \textit{Id at 50-52.}

\textsuperscript{16} \textit{Id at 47-48.}

\textsuperscript{17} \textit{Id at 48.}

\textsuperscript{18} \textit{171-02 Liberty Avenue, 710 F Supp at 48.}

\textsuperscript{19} \textit{Id at 49-50.}

\textsuperscript{20} \textit{Id at 52.}
the court stated that clauses separated by "or" must be given independent significance. Thus, if the claimant can establish either element of the defense, he would satisfy the "without knowledge or consent" standard and thus would qualify as an innocent owner. This argument was subsequently adopted by the Third Circuit and by one panel in the Eleventh Circuit.

The Second Circuit in United States v 141st Street Corp. set forth a second statutory argument for the disjunctive approach. In that case, the court concluded that the meaning of "consent" dictated its decision. In order to consent to the use of one's property for illegal purposes, the court reasoned, one must have knowledge of the illegal use. Therefore, consent under the statute cannot exist without knowledge. If knowledge of the illegal activity by itself denies the claimant the innocent owner defense, then the term "consent" is superfluous. The court stated that because each word in a statute has independent significance, lack of knowledge by itself is a sufficient defense. Alternately, if a claimant cannot prove a lack of knowledge, he can still prove lack of consent, because knowledge is a necessary but not sufficient element of consent.

The 141st Street Corp. court also defined what constitutes a lack of "consent" where a claimant cannot prove lack of knowledge. In so doing, it adopted a test of "reasonable preventative actions" as the appropriate balance between Congress's dual goals: stemming the drug trade and protecting the property of innocent owners. Thus the court held that where a claimant can-

22 171-02 Liberty Avenue, 710 F Supp at 50.
23 Id.
24 United States v Parcel of Real Property Known As 6109 Grubb Road, Millcreek Township Erie County, Pennsylvania, 886 F2d 618, 626 (3d Cir 1989), reh'g denied, 890 F2d 659 (3d Cir 1989).
25 United States v One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Florida, 963 F2d 1496, 1503-04 n 3 (11th Cir 1992) (relying on 6109 Grubb Road). See note 13 for a discussion of the intracircuit split in the Eleventh Circuit.
27 Id at 878.
28 Id.
29 Id.
30 141st Street Corp., 911 F2d at 878. See also United States v Forfeiture, Stop Six Center, Located at 3340 Stallcup, Fort Worth, Texas, 781 F Supp 1200, 1208 (N D Tex 1991), subsequent proceeding, 794 F Supp 626 (N D Tex 1992) (adopting the reasoning of 141st Street Corp.).
31 141st Street Corp., 911 F2d at 879.
not prove a lack of knowledge regarding the illegal use of his property, he still can establish lack of consent by showing that he had done all that could be reasonably expected to prevent the illegal activity. If he can prove that he had taken all reasonable steps to prevent the illegal use, the court stated, then he qualifies as an innocent owner under the statute. If not, then he implicitly consented to the illegal use of his property, rendering it forfeitable.\textsuperscript{32}

In addition to these statutory arguments, some courts adopting the disjunctive approach have relied on the legislative history of Section 881(a)(7) to support their decision. In United States v Parcel of Real Property Known As 6109 Grubb Road, Millcreek Township Erie County, Pennsylvania,\textsuperscript{33} the Third Circuit noted that the legislative history of the Comprehensive Crime Control Act of 1984, which included Section 881(a)(7), focuses primarily on strengthening criminal forfeiture statutes.\textsuperscript{34} Discussion of the innocent owner defense to civil forfeiture proceedings is limited to one paragraph in the Senate Report.\textsuperscript{35} Given this lack of information, the court proceeded to examine the legislative history of Section 881(a)(6), an analogous provision governing the forfeiture of monies and securities mentioned in the Senate report recommending the adoption of Section 881(a)(7).\textsuperscript{36}

After summarizing the legislative history of Section 881(a)(6), the court emphasized Congress's desire that only property "substantially connected" to the drug trafficking be forfeited and that "innocent owners" not lose their property.\textsuperscript{37} The court stated:

quite plainly, Congress stated that "due to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent."\textsuperscript{38}

\textsuperscript{32} Id.
\textsuperscript{33} 886 F2d 618, 624-27 (3d Cir 1989), reh'g denied, 890 F2d 659 (3d Cir 1989).
\textsuperscript{34} Id at 624.
\textsuperscript{35} Id at 625. See note 93 and accompanying text for discussion of the legislative history of Section 881(a)(7).
\textsuperscript{36} Id. See notes 96-98 and accompanying text for discussion of the legislative history of Section 881(a)(6).
\textsuperscript{37} 6109 Grubb Road, 886 F2d at 624-26.
\textsuperscript{38} Id at 625, quoting the Psychotropic Substances Act of 1978, 95th Cong, 2d Sess, in 124 Cong Rec 34664, 34671-03 (Oct 7, 1978), reprinted in 1978 USCCAN 9518, 9522.
In light of this legislative intent, the *6109 Grubb Road* court held that Section 881(a)(7) must be read disjunctively.\(^3\) Other courts adopting the disjunctive approach, rather than focusing on Section 881(a)(6), have relied instead on what they have described as Congress's "normal pattern" of strengthening innocent owner provisions as it enacts tougher forfeiture statutes.\(^4\)

B. The Conjunctive Interpretation

The conjunctive interpretation of Section 881(a)(7) requires that the claimant prove that the property was used illegally both without her knowledge and without her consent. The Ninth Circuit has adopted this approach in dicta.\(^4\) Two panels in the Eleventh Circuit have also interpreted Section 881(a)(7) in this manner,\(^4\) and the Sixth Circuit implied in one case that it would do likewise.\(^4\) In addition, several district courts in other circuits have adopted this reading.\(^4\) These courts have relied on

\(^3\) Id at 626.


\(^4\) United States v One Parcel of Land, Known as Lot 111-B, Tax Map 4-4-03-71(4), Waipouli, Kapaa, Island and County of Kauai, State of Hawaii, 902 F2d 1443, 1445 (9th Cir 1990) (per curiam).

\(^4\) United States v One Single Family Residence Located at 6960 Miraflorres Avenue, 995 F2d 1558, 1561 (11th Cir 1993); United States v One Single Family Residence Located at 15603 85th Avenue N, Lake Park, Palm Beach County, Florida, 933 F2d 976, 981 (11th Cir 1991). But see United States v One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Florida, 963 F2d 1496, 1503 (11th Cir 1992) (adopting the disjunctive approach). See note 13 and accompanying text for further discussion of the intracircuit split in the Eleventh Circuit.

\(^4\) United States v Lots 12, 13, 14, and 15, Keeton Heights Subdivision, Morgan County, Kentucky, 869 F2d 942, 948 n 2 (6th Cir 1989) ("If [she] knew that the jointly owned property was being used by her husband for illegal drug purposes, we take it that her interest would be subject to forfeiture.").

\(^4\) See United States v 124 E North Avenue, Lake Forest, Illinois, 651 F Supp 1350, 1357 (N D Ill 1987) ("When trial on the merits of this case occurs, [claimant] will have an opportunity to prove she had no knowledge of and gave no consent to her husband's alleged unlawful activities.") (emphasis added); United States v Two Tracts of Real Property, Containing 30.80 Acres, More or Less, With Appurtenances, Located in Bruce Township, Guilford County, North Carolina, 665 F Supp 422, 428 (M D NC 1987), aff'd on other grounds, 856 F2d 675 (4th Cir 1988) (concluding that the claimant had knowledge of the unlawful use and that the property must therefore be forfeited). See also United States v Certain Real Property and Premises Known as 890 Noyac Road, Noyac, New York, 739 F Supp 111, 112-14 (E D NY 1990), rev'd, 945 F2d 1252, 1255 (2d Cir 1991); United States v Parcel of Real Property Known as 3201 Caughey Road, Millcreek Township, Erie County, Pennsylvania, 715 F Supp 131, 133 (W D Pa 1989), aff'd without op, 945 F2d 397 (3d Cir
two arguments in support of their approach, one based on the construction of the statute and the other on its legislative history.

The strongest statutory construction argument supporting the conjunctive interpretation is that developed by Judge Greenberg in his dissent from the Third Circuit's denial of the government's petition for rehearing in 6109 Grubb Road. Judge Greenberg agreed with the panel's conclusion that the disjunctive "or" in the statute requires that a court accord independent significance to each element. Judge Greenberg stated, however, that for each element to receive independent significance, the claimant must prove both that she lacked knowledge of the offense and that she did not consent to the illegal use of her property. If she had knowledge or if she consented, then the property must be forfeited. Under the panel's opinion, he continued, knowledge and consent are conflated; both elements must be present for the property to be forfeited. Neither is independently significant.

Taking a different path to the same end, the court in United States v Certain Real Property and Premises Known as 890 Noyac Road, Noyac, New York argued that "or" may be read as "and" in certain contexts. It cited a common insurance clause as an example of a context in which "or" must be read conjunctively:

[Consider] the insurance policy which requires the insurer to pay benefits for the "loss of life, limbs, sight or time." Surely this would not restrict the insured's recovery to loss of limbs or loss of sight but not both. The context ... demands that the court read the "or" as a connector in a compound phrase, much like the word "and."
From the context, the court concluded, "or" must be read conjunctively in Section 881(a)(7); otherwise, a claimant might consent to the illegal use of her property but, by remaining ignorant of any actual crimes committed there, nevertheless recover her property.\(^{52}\)

As previously discussed, the legislative history of Section 881(a)(7) is scant, containing little more than a reference to the analogous innocent owner defense in Section 881(a)(6), a similar provision governing the forfeiture of securities.\(^{53}\) In *United States v One Parcel of Land, Known as Lot 111-B, Tax Map Key 4-4-03-71(4), Waipouli, Kapaa, Island and County of Kauai, State of Hawaii*,\(^{54}\) the Ninth Circuit concluded that this legislative history compelled a conjunctive reading. In the court's opinion, the key sentence is the explanatory statement accompanying Section 881(a)(6): "Specifically, the property would not be subject to forfeiture unless the owner of such property knew of or consented to the illegal conduct."\(^{55}\) The court held that this phrase requires forfeiture if the claimant either knew or consented to the illegal activity.\(^{56}\) To justify its holding, the court noted that the goal of Section 881(a)(7) is to seize all property substantially related to a given narcotics offense. In the court's opinion, this goal would be "substantially undercut if persons who were fully aware of the illegal connection or source of their property were permitted to reclaim the property as 'innocent' owners."\(^{57}\)

Proponents of the conjunctive approach have also emphasized that the disjunctive reading would permit recovery by those owners who consented to the illegal use of their property but had no knowledge of an actual crime. This reading would permit a property owner to participate as an active co-conspirator or as a well-paid facilitator yet, by carefully remaining ignorant of actual

\(^{52}\) *890 Noyac Road, 739 F Supp at 114.*

\(^{53}\) See notes 93-99 and accompanying text.

\(^{54}\) *902 F2d at 1443 (9th Cir 1990) (per curiam).*


\(^{56}\) *Lot 111-B, 902 F2d at 1445.*

\(^{57}\) Id. See also *6109 Grubb Road, 890 F2d at 663-64* (Greenberg dissenting) ("I will only state that it is highly implausible that Congress, in enacting provisions clearly intended to strengthen the forfeiture weapon, left a massive loophole in them.").
illegal use, avoid forfeiture of his property. Judge Greenberg posited this example:

[A] landlord might rent a property to a person known to him to be a drug dealer and, because of the substantial rent paid, be completely indifferent to the use of the property and thus not have actual knowledge of what has happened to it. Yet he could be taken to have consented to the illegal use.

Thus, Judge Greenberg concluded that neither a knowledgeable but non-consenting owner, nor a consenting but ignorant owner, should be considered innocent.

Due to the procedural posture of the case, the Ninth Circuit’s adoption of the conjunctive approach in Lot 111-B was technically dicta. This has permitted the district courts in the Ninth Circuit to modify or ignore the conjunctive approach suggested in Lot 111-B, leaving the state of the law in that circuit uncertain. To date, three district courts in the Ninth Circuit have followed Lot 111-B, while one district court rejected it in favor of a disjunctive reading of Section 881(a)(7).

United States v Property Titled in the Names of Ponce is the most important district court decision to follow Lot 111-B. Ponce adopted the conjunctive interpretation endorsed by the appellate court but modified the test to protect owners who discover the illegal use only shortly before the property is seized. In Ponce, the claimant was a middle-aged woman who admittedly knew that her husband was growing marijuana on their marital

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58 Id at 663-65. See also 890 Noyac Road, 739 F Supp at 114; Ponce, 751 F Supp at 1439 n 3.
59 6109 Grubb Road, 890 F2d at 662.
60 Id at 663.
61 In Lot 111-B, the court held that the claimant was a straw owner with no standing to challenge forfeiture. Lot 111-B, 902 F2d at 1443-45 (per curiam). Because the court rejected the defendant's claim on this preliminary issue, its discussion of Section 881(a)(7) was unnecessary to its holding and therefore dicta. See United States v 5.935 Acres of Land, Tax Map Key (3)2-8-017-43, Honoum, 752 F Supp 359, 361-62 (D Hawaii 1990); Ponce, 751 F Supp at 1436, 1439 n 1.
62 See United States v All Monies in Account No. 29-0101-62 in Name of Abusada, 746 F Supp 1432, 1440 (D Hawaii 1990); Ponce, 751 F Supp at 1439; United States v Property Entitled in the Names of Alexander Morio Toki and Elizabeth Mila Toki, 779 F Supp 1272, 1279 (D Hawaii 1991) (relying on Ponce).
63 5.935 Acres of Land, 752 F Supp at 362-63 (citing 6109 Grubb Road and 141st Street Corp.).
64 751 F Supp 1436 (D Hawaii 1990).
property. She claimed, however, that she had discovered the plants only one day before her husband was arrested. Furthermore, she claimed to have told her husband that she was going to destroy the plants herself the next day if he failed to remove them. Therefore, she sought to invoke the innocent owner exception to Section 881(a)(7).

While agreeing with the Ninth Circuit's interpretation of Section 881(a)(7) as set out in Lot 111-B, the Ponce court nevertheless distinguished the case at hand. Whereas in Lot 111-B the claimant knew of the illegal use for some time, in Ponce the claimant only recently had acquired knowledge of the illegal use of her property. The court noted that, carried to its logical end, a strict interpretation of Section 881(a)(7) under Lot 111-B would require the forfeiture of an individual's property the instant she discovered the illegal use, even if she immediately destroyed the drugs or called the police. Therefore, the district court adopted a standard of due care that permits recovery where a property owner makes "reasonable efforts to terminate the illegal activity as soon as possible." While recognizing that the disjunctive interpretation of Section 881(a)(7) would lead to the same result, the court rejected that approach because it permits a person to "consent in advance to a future illegal usage of his or her property, without ever knowing whether or not such use was implemented."

Moreover, the court noted that its test comports with the constitutional standard outlined by the Supreme Court in Calero-Toledo v Pearson Yacht Leasing Co. In outlining the constitutional limits on civil forfeiture statutes, the Court in Pearson noted that, under certain circumstances, a forfeiture may violate

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Id at 1437.
Id. Id at 1437-38.
Id at 1437-38.
Ponce, 751 F Supp at 1440.
Id. Id at 1441.
Id. Id.
Ponce, 751 F Supp at 1440 n 3.
Ponce, 751 F Supp at 1440 n 3.
416 US 663 (1974), reh'g denied, 417 US 977 (1974). In this case, a yacht on which marijuana was found was forfeited pursuant to a Puerto Rican statute. The lessor, uninvolved in the criminal offense, sued to recover his property. Id at 665-668. He claimed that the forfeiture was unconstitutional under the Fifth and Fourteenth Amendments because it deprived him of his property without just compensation. Id at 668. The court rejected the lessor's claim, holding the statute at issue constitutional at least in its application to his case, since he could have taken positive steps to prevent the criminal activity. Id at 680-89.
the Fifth and Fourteenth Amendments as a taking without due compensation. The Court refused to formulate a definitive test to be used in evaluating forfeiture statutes, but it speculated that forfeiture would be unconstitutional when an owner could prove "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." In such a case, the Court continued, it "would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." From this language, the Ponce court concluded that a property owner must have an opportunity to take reasonable steps to prevent future illegal activity after learning that her property is being used for narcotics trafficking.

II. STATUTORY INTERPRETATION

Courts adopting the conjunctive interpretation have often relied on the Supreme Court's statement in Reiter: "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings . . . ." However, they have ignored the end of this sentence: " . . . unless the context dictates otherwise." Often, as noted above, the context does dictate otherwise—"or" can mean "and." In order to determine the proper meaning of "or" in Section 881(a)(7), it is necessary to consider the statute in its context, including the logical reading of the statute, the legislative intent in enacting the statute, and the policy implications of the two readings.

A. Logical Analysis

The best way to determine exactly what a claimant must prove in order to establish that her property was used "without [her] knowledge or consent" is to separate the key phrase into its logical elements. Symbolically, it is expressed:

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74 Calero-Toledo, 416 US at 689.
75 Id.
76 Ponce, 751 F Supp at 1441-42.
78 Id. See also Black's Law Dictionary 1095 (West, 6th ed 1990) (stating that "or" must, in some contexts, be read conjunctively).
79 See notes 50-52 and accompanying text.
80 Throughout this discussion, "-" symbolizes the negation of the subsequent phrase, "\(^\wedge\)" symbolizes the conjunctive "and", and "\(\vee\)" symbolizes the disjunctive "or".
A principle of logic, one of DeMorgan’s Laws, states that a disjunctive phrase that is negated, such as \( \neg(k \lor c) \), is logically equivalent to the conjunction of the negation of element A and the negation of element B. Symbolically, this equivalent is expressed:

\[
\neg k \land \neg c
\]

without knowledge and without consent

Thus, under rules of logic, the phrase is satisfied only by establishing the negative of each element. In order to prove her innocence and recover her property, a claimant must prove that her property was used both without her knowledge and without her consent.

Of course, the analysis would be very different if the phrase read “without knowledge or without consent.” In this case, the claimant’s burden would be expressed:

\[
\neg k \lor \neg c
\]

without knowledge or without consent

Expressed in this manner, a claimant could satisfy her burden by proving either of the two elements, lack of knowledge or lack of consent. Some courts adopting the disjunctive interpretation have implicitly adopted this incorrect reading of the statute by applying the negative “without” to each element rather than to the clause in its entirety. The 171-02 Liberty Avenue court did this explicitly, stating that the claimant must prove that the illegal use was “without knowledge or without consent.”

It is perhaps easier to understand what a claimant must prove to be deemed innocent by hypothesizing what the government would be required to establish if it, not the claimant, bore the burden of proving that a claimant was not guilty or, in other

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61 “Without”, as a preposition, modifies the entire prepositional phrase “knowledge or consent” as a unit.
62 \((p \lor q) = \neg(p \land \neg q)\). Kenneth A. Ross and Charles R. B. Wright, *Discrete Mathematics* 74 (Prentice Hall, 2nd ed 1988).
63 United States v Certain Real Property and Premises Known as 171-02 Liberty Avenue, Queens, New York, 710 F Supp 46 (E D NY 1989).
64 Id at 50.
words, that the property was used "not without [her] knowledge or consent." Symbolically, this phrase is expressed:

\[
\neg \neg (k \lor c) \\
\text{not without knowledge or consent}
\]

Eliminating the double negative, it is clear that the government's burden would be to prove that the property was used with the claimant's knowledge or consent:

\[
(k \lor c) \\
\text{knowledge or consent}
\]

The government would be able to meet its burden by proving merely one of the two elements: that the property was used with the claimant's knowledge, or that the property was used with the claimant's consent. If either element were true, then the claimant would lose her property. Because the statute places the burden on the claimant to disprove this proposition, it follows that she must prove the absence of both elements to avoid forfeiture:

\[
\neg k \land \neg c \\
\text{without knowledge and without consent}^{85}
\]

Another more intuitive way to approach the problem is to use the same logical construction in an ordinary setting. Imagine two travelers stranded in a country cabin. The first traveler says: "here we are, ten miles from a store, without ham or eggs." What does he mean by this statement? Certainly not that they have ham but no eggs, or that they have eggs but no ham. Clearly he means that they have neither ham nor eggs; they are without ham and eggs.\(^6\) It is clear from the context that the "or" must be read conjunctively.

No court adopting the conjunctive reading of Section 881(a)(7) has conducted a rigorous logical analysis of the statute in support of its argument. Indeed, several of the courts interpreting Section 881(a)(7) conjunctively have done nothing more

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85 See United States v Parcel of Real Property Known as 6109 Grubb Road, Millcreek Township Erie County, Pennsylvania, 886 F2d 618 (3d Cir 1989), reh'g denied, 890 F2d 659, 662-63 (3d Cir 1989) (Greenberg dissenting).

86 This example was suggested by Professor Kenneth Dam of The University of Chicago Law School.
than merely state their conclusion, offering no explanation of the logic behind their interpretation. Interestingly, both Judge Greenberg in his dissent to 6109 Grubb Road, and the Ninth Circuit in Lot 111-B, characterized the claimant's burden as "without either knowledge or consent." Although "either" has no logical significance in this setting, it emphasizes that "without" is correctly applied to the phrase as a whole rather than to its individual elements.

The sole commentator to examine Section 881(a)(7) using logical analysis agreed that, from a logical standpoint, the conjunctive interpretation of the innocent owner defense is correct. Furthermore, this commentator also agreed that the courts adopting the disjunctive approach misread Reiter, which they cited as requiring that phrases separated by an "or" be given independent significance. Yet despite this acknowledgement, the commentator concluded that courts should read the statute disjunctively because, in that commentator's opinion, the legislative history of the statute and public policy support such a reading.

The plain language of the statute, interpreted using both the tools of statutory construction and logical analysis, requires that the "or" be read conjunctively and that the claimant prove both lack of knowledge and lack of consent to qualify as an innocent owner. Furthermore, the legislative history and policy underlying the innocent owner defense also point to the same conclusion.

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87 See United States v One Single Family Residence Located at 15603 85th Avenue N, Lake Park, Palm Beach County, Florida, 933 F2d 976, 981 (11th Cir 1991) ("Innocent owners are those who have no knowledge of the illegal activities and who have not consented to the illegal activities."); United States v One Single Family Residence Located at 6960 Miraflores Avenue, 995 F2d 1558, 1561 (11th Cir 1993) (relying on 15603 85th Avenue); United States v 124 E North Avenue, Lake Forest, Illinois, 651 F Supp 1350, 1357 (ND Ill 1987) ("[claimant must] prove she had no knowledge and gave no consent ....") (emphasis added); United States v Premises Known as 1908-1910 Jackson Street, Philadelphia, PA., 1987 WL 13086, *2 (E D Pa 1987) ("must prove ... they had no knowledge of nor gave their consent to the illegal acts ....") (emphasis added).
88 6109 Grubb Road, 890 F2d at 662 (Greenberg dissenting); Lot 111-B, 902 F2d at 1445 (per curiam).
91 Loomba, 58 Fordham L Rev at 481-82 (cited in note 89).
92 Id.
B. Legislative History

The legislative history of the innocent owner exception is very short: "This provision would also include an ‘innocent owner’ exception like that now included in those provisions permitting the civil forfeiture of . . . moneys or securities."[93] Because of this reference, both courts[94] and commentators[95] have turned to the legislative history of Section 881(a)(6), which provides for forfeiture of money or securities. Its legislative history includes this commentary on the innocent owner defense: “Specifically, the property would not be subject to forfeiture unless the owner of such property knew or consented [to its use].”[96]

This statement is disjunctive and doubly negated. The negatives cancel each other, and thus the sentence symbolically reads “if (k v c) then forfeiture.” Therefore, if either element—knowledge of or consent to the illegal use—is present, then the property must be forfeited. One commentator agreed that the legislative history of Section 881(a)(6) leads to this conclusion.[97] However, the commentator noted that, unlike the final version of the statute, the explanatory statement implies that the burden of proof rests with the government.[98] This discrepancy, suggested the commentator, renders impossible the task of determining Congress's true intent.[99]

Certainly, if the government had the burden of proof, it would be required to establish the presence of only one element, either knowledge or consent. Thus, if the claimant bears the burden of disproving the proposition, she must disprove both elements, establishing the absence of both knowledge and consent. The allocation of the burden does not change the interpretation of the proposition; it merely establishes what must be proven by

[94] See, for example, United States v One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Florida, 963 F2d 1496, 1505 (11th Cir 1992) (adopting the disjunctive approach); Lot 111-B, 902 F2d at 1445 (per curiam) (adopting the conjunctive approach).
[95] Loomba, 58 Fordham L Rev at 483-84 (cited in note 89).
[97] Loomba, 58 Fordham L Rev at 484 (cited in note 89).
[98] Id. Compare the Joint Explanatory Statement of Titles II and III, reprinted in 1978 USCCAN at 9522 (cited in note 39) (“the property would not be subject to forfeiture unless the owner of the property knew or consented”), with 21 USC § 881(a)(6) (“no property shall be forfeited . . . if . . . established by that owner to have been committed or omitted without the knowledge or consent of that owner”).
[99] Loomba, 58 Fordham L Rev at 484 (cited in note 89).
whom in court. Either knowledge or consent still requires forfeiture.\textsuperscript{100}

Those courts adopting the disjunctive position have relied on general language in the legislative history of Section 881(a)(6) indicating that Congress did not intend to require innocent owners to forfeit their property.\textsuperscript{101} Unfortunately, in adopting the disjunctive position, these courts have engaged in circular reasoning. To protect innocent owners, Congress included in the statute a test to determine who qualifies as innocent. Rather than focusing on the plain meaning of the statute, these courts in essence have determined that, given the equities of the situation, a knowledgeable but non-consenting owner should be deemed innocent. Thus, instead of following the mandate of the statute, these courts in effect have created their own definition of "innocence."\textsuperscript{102}

Alternately, courts adopting the conjunctive interpretation have focused on Congress's intent that the property be substantially connected to the crime.\textsuperscript{103} This requirement was intended to ensure that the property subject to the \textit{in rem} action played a central role in the crime—that drugs were stored there or sold there, for instance—and has nothing to do with a claimant's guilt or innocence.\textsuperscript{104} The courts that utilized these general statements of congressional intent to develop their own test of innocence have ignored the clear, specific definition set out in the legislative history and the statute.

III. PROBLEMS WITH THE DISJUNCTIVE INTERPRETATION OF SECTION 881(A)(7)

As previously noted,\textsuperscript{105} in many forfeiture cases the claimant is the spouse or a relative of the criminal, an unwilling victim dragged into the illegal activity and already facing a difficult situation without the added loss of his or her property. Interpreting Section 881(a)(7) disjunctively permits a court to determine

\textsuperscript{100} See note 85 and accompanying text. Loomba acknowledges that in placing the burden of proof on the claimant in the final version of Section 881(a)(6), Congress was conforming to the norm; civil forfeiture statutes generally require the claimant to prove innocent ownership once the government has shown probable cause. Loomba, 58 Fordham L Rev at 484 (cited in note 89).
\textsuperscript{101} See notes 33-39 and accompanying text.
\textsuperscript{102} Id at 625.
\textsuperscript{103} Id at 625.
\textsuperscript{104} See Zajac, 54 U Pitt L Rev at 561-66 (cited in note 3), and the cases cited therein.
\textsuperscript{105} See note 10 and accompanying text.
that these claimants are innocent owners and allows such claimants to recover their property.

Yet in bending logical analysis and legislative intent to protect this class, the disjunctive interpretation unfortunately permits recovery of property by those who consented to the illegal use of their property but had no actual knowledge of its illegal use. Unlike non-consenting but knowledgeable owners, these owners should not be deemed morally innocent. Consent requires a reasoned, voluntary agreement and cannot be given under duress. An owner who has consented to the use of her property for a crime, even if she does not actively participate in it, is at least sanctioning the criminal activity in a way that an owner with mere knowledge of the illegal use does not. Forfeiture is a just remedy where an owner has given a reasoned consent to the use of her property. But if Section 881(a)(7) permits recovery either upon proof of lack of knowledge or upon proof of lack of consent, then such owners must be allowed to recover their property because they can prove lack of knowledge.

This weakness in the disjunctive approach has been noted by several of the courts adopting the conjunctive interpretation of Section 881(a)(7). While sympathetic to spouses and other owners placed in difficult situations because of their knowledge of a co-owner's crimes, these courts have been unwilling to read the statute disjunctively, given the aforementioned loophole such a reading would create.

By contrast, one court inexplicably denied that this loophole exists, even though it adopted the disjunctive approach. Other courts that adopted the disjunctive interpretation have recognized that it creates this troublesome defense but have failed to grapple with the resulting problem. For instance, in United States v 5.935 Acres of Land, Tax Map Key (3)2-8-017-43,

107 See United States v Property Titled in the Names of Ponce, 751 F Supp 1436, 1440 n 3 (D Hawaii 1990); United States v Certain Real Property and Premises Known as 890 Noyac Road, Noyac, New York, 739 F Supp 111, 114 (E D NY 1990), rev'd, 945 F2d 1252 (2d Cir 1991). See also 6109 Grubb Road, 890 F2d at 662 (Greenberg dissenting); notes 59, 71-72 and accompanying text.
108 See 6109 Grubb Road, 890 F2d at 664 (Greenberg dissenting) (“I appreciate the fact that enforcement of the forfeiture laws may produce discord in some marriages . . . .”).
109 Ponce, 751 F Supp at 1440 n 3; 890 Noyac Road, 739 F Supp at 114.
110 United States v Certain Real Property and Premises Known as 418 57th Street, Brooklyn, New York, 922 F2d 129, 131 (2d Cir 1990) (“We reject the government's characterization of our conclusion—that a defense to forfeiture may depend alternately upon lack of consent or lack of knowledge—as nothing more than dicta.”).
Honomu,111 the court assumed that the disjunctive approach permits two statutory defenses—"one based on lack of knowledge, and the other based on lack of consent."112 The Third Circuit also recognized this possibility in 6109 Grubb Road, stating:

[W]e conclude that [the claimant] can show innocent ownership by proving by the preponderance of the evidence that the illegal use of the property occurred either without her knowledge or without her consent.113

At least one commentator has stated that this is the inexorable result of reading Section 881(a)(7) disjunctively.114 Yet most courts adopting the disjunctive interpretation do not appear to have recognized this problem, perhaps because they have interpreted "consent" as encompassing "knowledge." Under this view, if a claimant has consented to an act, then by definition she has knowledge of that act.115 One commentator has even suggested that "knowledge" should be removed from the statute as superfluous, so that property could only be forfeited if the owner fails to prove a lack of consent.116

This view incorrectly assumes that consent requires knowledge. Consent and knowledge are independent concepts. Commonly accepted definitions of consent do not include knowledge as a necessary element.117 Admittedly, in the majority of cases the consenting party knows that the sanctioned acts took place, especially in repeat transactions or continuing operations. Nevertheless, occasions arise where consent can be given without knowledge, especially where "knowledge" is limited to actual knowledge, as courts have defined the concept under Section 881(a)(7).118 As a result, the property owner must actually have...

111 752 F Supp 359 (D Hawaii 1990).
112 Id at 363.
113 886 F2d 618, 626 (3d Cir 1989), reh'g denied, 890 F2d 659 (3d Cir 1989).
114 Zajac, 54 U Pitt L Rev at 571 (cited in note 3).
115 See notes 26-30 and accompanying text.
118 See Annotation: Who is Exempt From Forfeiture Of Real Property Under "Innocent Owner" Provision of 21 USC § 881(a)(7), 110 ALR Fed 569, § 3 at 578-80 (citing cases); United States v Real Property & Improvements Located at 5000 Palmetto Drive, Fort Pierce, St. Lucie County, Florida, 928 F2d 373, 375 (11th Cir 1991); United States v All That Lot of Ground Known as 2511 E Fairmont Ave., Baltimore, Maryland, 722 F Supp 1273, 1281 (D Md 1989), subsequent proceeding, 737 F Supp 878 (D Md 1990). See also United States v Sixty (60) Acres, More or Less With Improvements, Located in Etowah County, Alabama, 727 F Supp 1414, 1417-18 (N D Ala 1990) (distinguishing actual
known—not should have known, or could have known—that her property was being used illegally in order to be considered "knowledgeable" under Section 881(a)(7). This reading of knowledge protects naive property owners, but it also permits those who deliberately remain ignorant successfully to disclaim knowledge.

As noted, a property owner could consent to the illegal use of his property and purposely avoid learning whether the crime took place. Or, less deviously, a property owner could give his consent to a future, tentative crime and, because he lives in a distant place, never be in a position to know whether the property was used as authorized. In either case, to be consistent, a court following the disjunctive interpretation must allow the innocent owner defense.

IV. APPLICATION OF THE CONJUNCTIVE INTERPRETATION TO THE KNOWLEDGEABLE BUT NON-CONSENTING SPOUSE

The conjunctive approach has been criticized as providing no protection to the knowing but non-consenting owner, not even one who discovers illegal activity on her property and immediately calls the police. But, properly understood, the conjunctive construction of Section 881(a)(7) provides adequate protection to these owners. The courts that have adopted the conjunctive reading of Section 881(a)(7) have recognized that Congress could not have intended to forfeit the property of an owner who discovers drug activity on her property and promptly takes steps to prevent or report it. Furthermore, the Constitution compels this result.

In Ponce, the court explicitly rejected immediate forfeiture where a claimant discovered her husband's illegal use of knowledge from constructive knowledge but finding from the facts of the case that the claimant had actual knowledge of her husband's activities), order vacated on other grounds, 736 F Supp 1579 (N D Ala 1990), rev'd, 930 F2d 857 (11th Cir 1990), reh'g denied, 952 F2d 413 (11th Cir 1991). The government, however, may present circumstantial evidence to refute a claimant's assertion that she did not have actual knowledge. See Zajac, 54 U Pitt L Rev at 574-75 (cited in note 3).

See, for example, Property Located at Rt. 1, Box 137, Randolph, Chilton County, Alabama, 743 F Supp at 804, 806 (holding that, although marijuana plants planted by nephew were within plain sight of the house, the uncle and aunt's testimony that they had never seen a marijuana plant except on television created an issue of fact as to actual knowledge).

See United States v Property Titled in the Names of Ponce, 751 F Supp 1436, 1440 n 3 (D Hawaii 1990).

See, for example, United States v 5.935 Acres of Land, Tax Map Key (3)2-8-017-43, Honomu, 752 F Supp 359 (D Hawaii 1990) (criticizing Lot 111-B).

751 F Supp 1436 (D Hawaii 1990).
their property less than twenty-four hours before the police seized their property, and where the claimant planned to destroy the drugs if her husband failed to cease his activities. Instead, the court adopted a "due care" standard requiring the claimant to take "reasonable steps to terminate the illegal usage promptly after acquiring knowledge." The court noted the similarity between the results obtained by this test and those obtained by the Second Circuit's disjunctive reading of Section 881(a)(7) for claimants with knowledge of illegal acts. Critically, however, it noted that it had rejected the disjunctive interpretation adopted by the Second Circuit because of the opening that such an interpretation leaves for property owners who consent to the illegal use of their property but deliberately remain ignorant of any such use.

In his dissent to the Third Circuit's denial of rehearing in 6109 Grubb Road, Judge Greenberg also implicitly rejected immediate forfeiture. He expressed sympathy for a spouse who, upon discovering illegal drugs on her property, is required under the statute to report her spouse to the police to avoid forfeiture. Nevertheless, Judge Greenberg criticized the majority for permitting, through their adoption of the disjunctive interpretation, "a wife who is intimately aware of her husband's criminal activity" to recover her property. If forfeiture were to immediately follow knowledge, then a spouse would likely never report the other spouse's illegal activity because her property would nevertheless be forfeited. Like the Ponce court, Judge Greenberg did not interpret Section 881(a)(7) as requiring forfeiture immediately upon knowledge, only upon inaction following continued knowledge.

Finally, requiring forfeiture immediately upon knowledge would probably be unconstitutional, especially where an owner has taken reasonable steps to prevent illegal use. While in an in rem civil forfeiture the guilt or innocence of the owner theoretically is of no concern to the court, the Court in Calero-Toledo

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123 Id at 1437-38.
124 Id at 1441. See also notes 70-76 and accompanying text.
125 Id.
126 Ponce, 751 F Supp at 1441 n 3.
127 See 6109 Grubb Road, 890 F2d 659 (3d Cir 1990) (Greenberg dissenting).
128 Id at 665.
129 Id.
recognized that, at some level, the culpability of the owner is relevant. The Constitution prohibits forfeiture of the property of an owner who is uninvolved in, unaware of, and who has taken reasonable steps to prevent illegal activity on the property.\(^{131}\)

Thus, it is clear that a property owner must be given an opportunity to act upon learning of the illegal use. Otherwise, the constitutional requirements outlined in Calero-Toledo are meaningless. The court in Ponce acknowledged this constitutional limitation\(^{132}\) in its holding that an owner who did not consent to the illegal use of her property must be allowed to act upon the discovery of illegal use. Therefore, not only is the limitation on the conjunctive reading adopted in Ponce prudent, it is constitutionally mandated.

CONCLUSION

Congress, in formulating drug policy, concluded that forfeiture is a powerful tool that may curtail drug trafficking, or at least strip the profits from those involved. Civil forfeiture of real property plays an important role in that strategy. A logical examination of Section 881(a)(7) and a review of its legislative history indicate that Congress intended that both those owners who abdicate their responsibility to the public by consenting to the illegal use of their property, and those owners who learn of such use but do not take steps to prevent it, should have their property forfeited. The statute should therefore be read conjunctively: claimants should be required to prove both lack of knowledge and lack of consent in order to recover their property.

The conjunctive reading has long been misunderstood by both courts and commentators.\(^{133}\) Properly applied, as in Ponce,\(^{134}\) the conjunctive interpretation offers adequate relief to those owners who discover that their property is being used illegally but take due care to prevent future abuses. Forfeiture should not follow instantly upon knowledge, but only when

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\(^{131}\) Id at 689-90. See notes 73-75 and accompanying text.

\(^{132}\) United States v Property Titled in the Names of Ponce, 751 F Supp 1436, 1441-42 (D Hawaii 1990).

\(^{133}\) Perhaps this is the case because the Ninth Circuit, the only circuit to adopt the conjunctive interpretation, did so only in a short and incomplete opinion that did not wrestle with the hard issue of the knowledgeable but non-consenting spouse. See United States v One Parcel of Land, Known as Lot 111-B, Tax Map Key 4-4-03-7(4), Waipouli, Kapaa, Island and County of Kauai, State of Hawaii, 902 F2d 1443 (9th Cir 1990) (per curiam).

\(^{134}\) Ponce, 751 F Supp at 1436.
knowledge is coupled with inaction. Unlike the disjunctive interpretation, however, a conjunctive reading of Section 881(a)(7) would permit the forfeiture of property of those who consent to the illegal use of their property but have carefully avoid gaining actual knowledge of crimes committed on that property. Therefore, the courts should apply Section 881(a)(7) conjunctively, mindful of the limitations imposed by Calero-Toledo. In so doing, they would remain true to congressional intent and would ensure that those who have knowledge of or have consented to drug trafficking have their property forfeited. At the same time, application of the conjunctive approach respects the rights of innocent owners who reasonably attempt to prevent illegal activity on their property.