SUPREME COURT OF THE UNITED STATES

No. 91–781

UNITED STATES, PETITIONER *v.* A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS, KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[February 24, 1993]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I am in accord with much of the plurality's reasoning, but cannot join its opinion for two reasons. First, while I agree that the "innocent owner" exception in this case produces the same result as would an "innocent owner" exception to traditional common-law forfeiture (with its relation-back principle), I do not reach that conclusion through the plurality's reading of the phrase "property described in subsection (a)," see *ante*, at 14–16, which seems to me implausible. Secondly, I see no proper basis for the plurality's concluding that "respondent has assumed the burden of convincing the trier of fact that she had no knowledge of the alleged source of Brenna's gift in 1982, when she received it," *ante*, at 18.

The Government's argument in this case has rested on the fundamental misconception that, under the common-law relation-back doctrine, all rights and legal title to the property pass to the United States "at the moment of illegal use." Brief for United States 16. Because the Government believes that the doctrine operates at the

time of the illegal act, it finds the term "relation *back*" to be "something of a misnomer." *Ibid.* But the name of the doctrine is not wrong; the Government's understanding of it is. It is a doctrine of *retroactive* vesting of title that operates only upon entry of the judicial order of forfeiture or condemnation: "[T]he decree of condemnation when entered relates back to the time of the commission of the wrongful acts, and takes date from the wrongful acts and not from the date of the sentence or decree." *Henderson's Distilled Spirits*, 14 Wall. 44, 56 (1871). "While, under the statute in question, a judgment of forfeiture relates back to the date of the offense as proved, that result follows only from an effective judgment of condemnation." *Motlow* v. *State ex rel. Koeln*, 295 U. S. 97, 99 (1935). The relation-back rule applies only "in cases where the [Government's] title ha[s] been consummated by seizure, suit, and judgment, or decree of condemnation," *Confiscation Cases*, 7 Wall. 454, 460 (1869), whereupon "the doctrine of relation *carries back* the title to the commission of the offense," *United States* v. *Grundy*, 3 Cranch 337, 350–351 (1806) (Marshall, C. J.) (emphasis added). See also *United States* v. *Stowell*, 133 U. S. 1, 16–17 (1890), quoted *ante*, at 13–14.

Though I disagree with the Government as to the meaning of the common-law doctrine, I agree with the Government that the doctrine is embodied in the statute at issue here. The plurality, if I understand it correctly, does not say that, but merely asserts that in the present case the consequence of applying the statutory language is to produce the same result that an "innocent owner" exception under the common-law rule would produce. Title 21 U. S. C. §881(h) provides: "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." The plurality would read the phrase "property described in

subsection (a)" as not encompassing any property that is protected from forfeiture by the "innocent owner" provision of §881(a)(6). It proceeds to reason that since, therefore, the application of (a)(6) must be determined *before* (h) can be fully applied, respondent must be considered an "owner" under that provision—just as she would have been considered an "owner" (prior to decree of forfeiture) at common law.

I would not agree with the plurality's conclusion, even if I agreed with the premises upon which it is based. The fact that application of (a)(6) must be determined before (h) can be fully applied simply does not establish that the word "owner" in (a)(6) must be deemed to include (as it would at common law) anyone who held title prior to the actual decree of forfeiture. To assume that is simply to beg the question. Besides the fact that its conclusion is a non sequitur, the plurality's premises are mistaken. To begin with, the innocent-owner provision in (a)(6) does *not* insulate any "property described" in (a)(6) from forfeiture; it protects only the "interest" of certain owners in *any* of the described property. But even if it could be regarded as insulating some "property described" from forfeiture, that property would still be covered by subsection (h), which refers to "property *described*," not "property *forfeited*." In sum, I do not see how the plurality can, solely by focusing on the phrase "property described in subsection (a)," establish that the word "owner" in subsection (a) includes persons holding title after the forfeiture-producing offense.

The Government agrees with me that §881(h) "covers all `property described in subsection (a),' including property so described that is nonetheless exempted from forfeiture because of the innocent owner defense." Brief for United States 29. That position is quite incompatible, however, with the Government's contention that §881(h) operates at the

time of the wrongful act, since if both were true *no one* would be protected under the plain language of the innocent-owner provision. In the Government's view, the term "owner" in §881(a)(6) refers to individuals "who owned the seized assets before those assets were ever tainted by involvement in drug transactions." *Id.*, at 21. But if §881(h) operates immediately to vest in the Government legal title to all property described in §881(a), even that class of "owners" would be immediately divested of their property interests and would be at most "former owners" at the time of forfeiture proceedings. Because of this difficulty, the Government is forced to argue that the word "owner" in §881(a)(6) should be interpreted to mean "former owner." Reply Brief for United States 5. Thus, if §881(h) operates at the time of the illegal transaction as the Government contends, either the plain language of the innocent-owner provision must be slighted or the provision must be deprived of all effect. This problem does not exist if §881(h) is read to be, not an unheard-of provision for immediate, undecreed, secret vesting of title in the United States, but rather an expression of the traditional relation-back doctrine—stating when title shall vest *if* forfeiture is decreed. On that hypothesis, the person holding legal title is genuinely the "owner" at the time (prior to the decree of forfeiture) that the court applies §881(a)(6)'s innocent-owner provision.

I acknowledge that there is some textual difficulty with the interpretation I propose as well: §881(h) says that title "shall vest in the United States upon commission of the act giving rise to forfeiture," and I am reading it to say that title "shall vest in the United States upon forfeiture, effective as of commission of the act giving rise to forfeiture." The former is certainly an imprecise way of saying the latter. But it is, I think, an imprecision one might expect in a legal culture familiar with retroactive forfeiture, and less of

an imprecision than any of the other suggested interpretations require. Moreover, this interpretation locates the imprecision within a phrase where clear evidence of imprecision exists, since §881(h)'s statement that "all right . . . shall vest in the United States" flatly contradicts the statement in §881(a) that "[t]he following shall be *subject to forfeiture* to the United States." What the United States already owns cannot be forfeited to it.

This interpretation of §881(h) is the only one that makes sense within the structure of the statutory forfeiture procedures. Subsection 881(d) provides that forfeitures under §881 are governed by the procedures applicable to "summary and judicial forfeiture, and condemnation of property for violation of the customs laws," set forth in 19 U. S. C. §1602 *et seq.* It is clear from these procedures that the Government does not gain title to the property until there is a decree of forfeiture. Section 1604, for example, requires the Attorney General to commence proceedings in district court where such proceedings are "necessary" "for the recovery" of a forfeiture. See *United States* v. *$8,850*, 461 U. S. 555, 557–558, and n. 2 (1983) (detailing circumstances requiring judicial forfeiture proceedings). If, however, legal title to the property actually vested in the United States at the time of the illegal act, judicial forfeiture proceedings would never be "necessary." Under the customs forfeiture procedures the United States can, in certain limited circumstances, obtain title to property by an executive declaration of forfeiture. The statute provides that such an executive "declaration of forfeiture . . . shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States," and then specifies what that effect is: "Title *shall be deemed to vest* in the United States . . . from the date of the act for which the forfeiture was incurred." 19 U. S. C.

§1609(b) (emphasis added). Finally, if the Government's construction of §881(h) were correct, the statute-of-limitations provision, 19 U. S. C. §1621,[1] would need to state that title *reverts* to the former owners of the property, rather than (as it does) simply limit the right of the United States to institute an "action to recover" a forfeiture.[2]

The traditional operation of the relation-back doctrine also explains the textual difference between §881(a)(6)'s innocent-"owner" and §853's innocent-"transferee" provisions—a difference on which the Government relies heavily. See Brief for United States 31–35; Reply Brief for United States 10–11. Section 853, which provides for forfeiture of drug-related assets in connection with criminal

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[1]In the proceedings below, the Government argued that §1621 was the relevant statute of limitations for §881 and the Court of Appeals agreed. See Brief for United States, Plaintiff-Appellee in No. 90–5823 (CA3), pp. 19–23; App. to Pet. for Cert. 14a–15a. That ruling was not appealed and is consistent with other authority. See *United States* v. *One Parcel of Real Property, 2401 S. Claremont, Independence, Mo.*, 724 F. Supp. 670, 673 (WD Mo. 1989). See also *United States* v. *$8,850*, 461 U. S. 555, 563, n. 13 (1983) (forfeiture statute not specifying procedures to be used held to incorporate statute of limitations in §1621).

[2]Section 881(d) provides that the customs procedures are applicable only to the extent "not inconsistent with the provisions [of §881]"—so one might argue that the provisions I have discussed in this paragraph, to the extent contrary to the Government's interpretation of §881(h), are simply inapplicable. That disposition is theoretically possible but not likely, since it produces massive displacement of not merely the details but the fundamental structure of the referenced forfeiture procedures.

convictions, uses the term "transferee"—not "owner"—to protect the interests of persons who acquire property after the illegal act has occurred.[3] The Government contends that the reason for this variance is that the term "owner" simply does not cover persons acquiring interests after the illegal act. That explanation arrives under a cloud of suspicion, since it is impossible to imagine (and the Government was unable to suggest) *why* Congress would provide greater protection for postoffense owners (or "transferees") in the context of criminal forfeitures. The real explanation, I think, is that the term "owner" could not accurately be used in the context of §853 because third parties can assert their property rights under that section only "[f]ollowing the entry of an order of forfeiture." 21 U. S. C. §853(n). See also §853(k) (prohibiting third parties from intervening to vindicate their property interests except as provided in subsection (n)). Thus, at the time the third-party interests are being adjudicated, the relation-back doctrine has already operated to carry back the title of the United States to the time of the act giving rise to the forfeiture, and the third parties have been divested of their property interests. See §853(c)

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[3]Title 21 U. S. C. §853(c) provides:

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

(codifying the relation-back principle for criminal forfeiture). Indeed, if the court finds that the transferee has a valid claim under the statute, it must "amend the order of forfeiture." §853(n)(6).

The owner/transferee distinction is found in other provisions throughout the United States Code, and the traditional relation-back doctrine provides the only explanation for it. While Congress has provided for the protection of "owners" in many other forfeiture statutes, see, *e.g.*, 15 U. S. C. §715f(a) (allowing court to order the return of oil subject to forfeiture "to the owner thereof"); 16 U. S. C. §2409(c) (permitting the "owner" of property seized for forfeiture to recover it, *pendente lite*, by posting bond); §2439(c) (same); 18 U. S. C. §512(a) (permitting the "owner" of motor vehicle with altered identification number to avoid forfeiture by proving lack of knowledge), it consistently protects "transferees" in criminal forfeiture statutes that follow the procedure set forth in §853: forfeiture first, claims of third parties second. See 18 U. S. C. §1467 (criminal forfeitures for obscenity); 18 U. S. C. §1963 (1988 ed. and Supp. III) (criminal RICO forfeitures); 18 U. S. C. §2253 (1988 ed. and Supp. III) (criminal forfeitures for sexual exploitation of children).[4]

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[4]It is worth observing that, if the Government's view of the relation-back principle were correct, the protection provided for transferees in the last-mentioned statute would be utterly illusory. The property subject to forfeiture under 18 U. S. C. §2253 (1988 ed. and Supp. III) is also covered by a parallel civil forfeiture statute that follows the pattern of §881: It protects only the rights of "owners," and has an express relation-back provision. See 18 U. S. C. §§2254(a), 2254(g) (1988 ed. and Supp. III). Under the Government's view, whenever the United States would be unable to obtain property through the criminal forfeiture mechanism because of the

I think the result reached today is correct because the relation-back principle recited in §881(h) is the familiar, traditional one, and the term "owner" in §881(a)(6) bears its ordinary meaning.

I cannot join the plurality's conclusion that respondent has assumed the burden of proving that "she had no knowledge of the alleged source of Brenna's gift in 1982, when she received it." *Ante*, at 18. To support this, the plurality cites a passage from respondent's brief taking the position that the owner's lack of knowledge of the criminal activity should be tested "at the time of the transfer," Brief for Respondent 37–38. The fact of the matter is that *both* parties took positions before this Court that may be against their interests on remand. The Government may find inconvenient its contention that "the statutory test for innocence . . . looks to the claimant's awareness of the illegal acts giving rise to forfeiture at the time they occur." Reply Brief for United States 8. Which, if either, party will be estopped from changing position is an issue that we should not address for two simple reasons: (1) Neither party has yet attempted to change position. (2) The issue is not fairly included within the question on which the Court granted certiorari. (That question was, "Whether a person who receives a gift of money derived from drug trafficking and uses that money to purchase real property is entitled to assert an `innocent owner' defense in an action seeking civil

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innocent-"transferee" defense, it could simply move against the same property in a civil forfeiture proceeding, which gives a defense only to "owners." See also 18 U. S. C. §981 (1988 ed. and Supp. III) (civil forfeiture provision), 18 U. S. C. §982 (1988 ed., Supp. III) (parallel criminal forfeiture statute incorporating by reference the procedures in 21 U. S. C. §853).

forfeiture of the real property." Pet. for Cert. i. The plurality's reformulation of the question in the first sentence of the opinion is inexplicable.)

This question of the relevant time for purposes of determining knowledge was not a separate issue in the case, but arose indirectly, by way of argumentation on the relation-back point. The Government argued that since (as it believed) knowledge had to be measured at the time of the illegal act, §881(h) must be interpreted to vest title in the United States immediately, because otherwise the statute would produce the following "untenable result": A subsequent owner who knew of the illegal act at the time he acquired the property, but did not know of it at the time the act was committed, would be entitled to the innocent-owner defense. Brief for United States 25. That argument can be rejected by deciding *either* that the Government's view of the timing of knowledge is wrong, *or* that, even if it may be right, the problem it creates is not so severe as to compel a ruling for the Government on the relation-back issue. (I take the latter course: I do not find inconceivable the possibility that post-illegal-act transferees with post-illegal-act knowledge of the earlier illegality are provided a defense against forfeiture. The Government would still be entitled to the property held by the drug dealer and by close friends and relatives who are unable to meet their burden of proof as to ignorance of the illegal act when it occurred.) But it entirely escapes me how the Government's argument, an argument *in principle*, can be answered by simply saying that, in the present case, respondent has committed herself to prove that she had no knowledge of the source of the funds at the time she received them.

For the reasons stated, I concur in the judgment.