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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 14-419, Luis v. United States.

5 Mr. Srebnick.

6 ORAL ARGUMENT OF HOWARD SREBNICK

7 ON BEHALF OF THE PETITIONER

8 MR. SREBNICK: Thank you, Mr. Chief Justice,  
9 and may it please the Court:

10 The Sixth Amendment has always recognized  
11 the individual's right to spend his own money to obtain  
12 the advice and assistance of counsel. At the time of  
13 the adoption of the Bill of Rights, that was the core  
14 right, a time when the right to appointed counsel had  
15 not yet been established by this Court.

16 We submit that the right to representation  
17 by private counsel must allow a defendant to use assets  
18 which she rightfully owns, assets over which there is no  
19 dispute that she has good title, so that she may be  
20 represented by the lawyer that she prefers.

21 CHIEF JUSTICE ROBERTS: What do you do about  
22 Monsanto?

23 MR. SREBNICK: In Monsanto and in Caplin &  
24 Drysdale, those were cases involving tainted funds, drug  
25 money.

1 CHIEF JUSTICE ROBERTS: Right. So what is  
2 the logic that says it doesn't violate the Sixth  
3 Amendment if it's tainted funds, but it does if it's  
4 untainted funds?

5 MR. SREBNICK: Mr. Chief Justice, the -- the  
6 logic is that no one has a rightful claim to drug money.  
7 No one can claim a valid property right in drug  
8 proceeds. Ms. Luis is wanting to use assets that are  
9 not drug money. They are her lawful assets. They are  
10 not connected to any crime at all.

11 JUSTICE KAGAN: But, Mr. Srebnick, I mean,  
12 compare two situations.

13 One is the one that Monsanto talked about  
14 where, yeah, a bank robber goes in and he has a pile of  
15 money now. And Monsanto says, you know, even though he  
16 wants to use that money to pay for an attorney, too bad.

17 Now a bank robber goes in, he has a pile of  
18 money, he puts it into a separate bank account, he uses  
19 that bank account to pay his rent, to pay other  
20 expenses, and he uses the money that would have gone for  
21 the rent and other expenses to pay a lawyer.

22 Why should the two cases be treated any  
23 differently for Sixth Amendment purposes?

24 MR. SREBNICK: Because no amount of  
25 so-called dissipation, as the government would suggest,

1     negates petitioner's lawful interest in the property she  
2     owns apart from any alleged criminal activity.

3                   CHIEF JUSTICE ROBERTS: Well, but is --  
4     doesn't it make sense the -- the sort of substitution  
5     rule? I mean, if you've got \$10 million in drug  
6     activity -- money and you had \$5 million, and you spent  
7     \$10 million, you can't say, you know, oh, I spent the  
8     drug money, you can't touch the \$5 million. It seems to  
9     me that's what the statute is doing when it says  
10    whatever it's a reasonable substitute or assets  
11    substituted for.

12                  MR. SREBNICK: And so, Mr. Chief Justice, of  
13    course, if there is a conviction, if the defendant is  
14    found guilty, after the conviction when punishment is  
15    determined, there may well be the opportunity for the  
16    government to seek punishment that includes the  
17    financial penalties associated with the crime. But  
18    before that time, pretrial, when the defendant is the  
19    exclusive owner of the untainted assets, there is no  
20    principle of law that deprives her of the right.

21                  JUSTICE KENNEDY: Well, but I -- I thought  
22    the Chief Justice's question was slightly different. I  
23    don't know if you were privileged to hear the exciting  
24    argument yesterday on tainted assets.

25                   (Laughter.)

1 MR. SREBNICK: I was.

2 JUSTICE KENNEDY: But, you know, there  
3 are degree -- there are degrees of taint. Can you --  
4 can you follow -- can you follow the assets? So just to  
5 say "tainted" or "untainted," it's a -- it's a more  
6 difficult question than that.

7 MR. SREBNICK: Well, in this case, it's a  
8 simple answer, because here we have a stipulation, Joint  
9 Appendix 161, that the assets that are the subject of  
10 the dispute here today are assets that are undisputedly  
11 untainted, not traceable to the crime. They include,  
12 for example, family jewelry, not traced to any criminal  
13 activity. They include real estate that was acquired  
14 before the allegations of the conspiracy.

15 JUSTICE ALITO: Well, let me go back to  
16 Justice -- Justice Kagan's question and ask it in -- in  
17 a different way.

18 So you -- we have two brothers and -- twin  
19 brothers, and they rob a bank. They get \$10,000. They  
20 split it up, \$5,000 each. And on that very same day, it  
21 happens to be their birthday, and their rich uncle comes  
22 and gives each of them \$5,000 as a birthday present. So  
23 they go out to party, and one of them -- and they both  
24 spend \$5,000 partying. One of them spends the money  
25 from the bank robbery. The other one spends the money

1     that was given to them by their rich uncle. And your  
2     position is that the one who spent the money from the  
3     so-called "tainted assets," the money from the bank  
4     robbery, is entitled to use the remaining \$5,000 to hire  
5     an attorney, but the other one is out of luck?

6                 MR. SREBNICK: Yes, because the --

7                 JUSTICE ALITO: What sense does that make?

8                 MR. SREBNICK: Because the property interest  
9     a defendant has in an inheritance or in a gift, those  
10    property rights are not negated simply because the  
11    defendant has allegedly committed a crime, simply  
12    because there's probable cause.

13                JUSTICE KENNEDY: So the law -- you want  
14    this Court to say spend the bank robbery money first.

15                (Laughter.)

16                JUSTICE KENNEDY: That's -- that's your  
17    position?

18                MR. SREBNICK: Well, the -- the government  
19    is concerned about what we would -- have described as  
20    the so-called wily criminal. The defendant who spends  
21    the money, the tainted assets, faces perhaps even more  
22    punishment at the end of the day or at the end of the  
23    conviction, either through money laundering charges or  
24    otherwise.

25                So the Court, keeping in mind that

1 forfeiture has as its primary component punishment,  
2 there are ways of disincentivizing these kinds of  
3 financial transactions that, Justice Kennedy, you're  
4 referring to. But it doesn't affect the defendant's  
5 property interest in assets that are wholly apart from  
6 any criminal activity.

7 CHIEF JUSTICE ROBERTS: How do -- I -- I  
8 don't know how these things actually work. I mean, the  
9 defendant obviously has daily expenses, and -- and that  
10 the government's freeze order apparently goes beyond the  
11 money she has. What, does she get an allowance or -- or  
12 something?

13 MR. SREBNICK: As of now she gets nothing,  
14 Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: So -- so if her --  
16 putting aside lawyers, if her daughter's tuition bill  
17 comes due, she can't pay that?

18 MR. SREBNICK: Under the current restraining  
19 order, she can do nothing.

20 CHIEF JUSTICE ROBERTS: But she can surely  
21 pay the rent or the mortgage?

22 MR. SREBNICK: Under the current restraining  
23 order, she can do nothing. The statute, as it's being  
24 construed by the district court, allows no exception.

25 JUSTICE SOTOMAYOR: I have the --



1 JUSTICE KENNEDY: Is it your position the  
2 government could prevent payment for the tuition but not  
3 for the counsel?

4 MR. SREBNICK: Our position is that there's  
5 a constitutional right under the Sixth Amendment to  
6 retain counsel.

7 JUSTICE KENNEDY: So the answer is you  
8 can -- the government can stop the tuition payment but  
9 not the payment to counsel?

10 MR. SREBNICK: I would think so, in those  
11 kinds of instances. There may be other cases, I  
12 concede, if it's life-or-death matters, life-or-death  
13 expenditures, a different defendant might come before  
14 the Court and say there's a strong compelling need for  
15 that money for other reasons. But if it's ordinary,  
16 routine expenses, our claim today doesn't reach that.  
17 Our claim reaches Sixth Amendment issues.

18 JUSTICE SOTOMAYOR: So you really don't have  
19 a statutory argument. You're making a Sixth Amendment  
20 argument because if it were a statutory argument, it  
21 would be you can -- you can restrain -- you can't  
22 restrain untainted assets.

23 MR. SREBNICK: Justice Sotomayor, the  
24 statute, 18 U.S.C. 1345, which is different than the  
25 drug forfeiture statute, 18 U.S.C. 1345, it's at the

1 blue brief at page 2 --

2 JUSTICE SOTOMAYOR: I guess I'm -- I  
3 understand what you're going to say because I read your  
4 brief.

5 MR. SREBNICK: Okay.

6 JUSTICE SOTOMAYOR: But the logic of your  
7 argument would suggest that you can't freeze untainted  
8 assets for anything, because you're saying the  
9 government has no property right to it. It's untainted.  
10 It's your money; it's not their money until they secure  
11 a judgment. And so the logic of your position would be,  
12 I think, they can't restrain untainted assets, period,  
13 constitutionally or statutorily.

14 MR. SREBNICK: Well, we do not go that far  
15 in our --

16 JUSTICE SOTOMAYOR: I know you don't because  
17 it's very nice that you limit it. But once we announce  
18 a rule, we have to carry it to its logical conclusion.  
19 And if the rule is it's untainted assets and it belongs  
20 to me, how do we then limit it?

21 MR. SREBNICK: Well, I suppose that if  
22 there's no Sixth Amendment right at stake, if there's no  
23 constitutional right to use the asset today, I don't  
24 know of any prohibition, provided that there's due  
25 process, that would prevent the Court from restraining

1 assets proposed to be used for other purposes.

2 JUSTICE GINSBURG: But you said that this --  
3 this is her property. If it's tainted, you say she  
4 doesn't own it, it's not her money. But if it's  
5 untainted, it is her money. So I think  
6 Justice Sotomayor has asked a fair question.

7 Isn't the logic of your position that the  
8 untainted assets can be used without restraint for  
9 whatever she wants to use it for?

10 MR. SREBNICK: Justice Ginsburg, from a  
11 constitutional perspective, I don't think that that's  
12 necessarily correct because the courts can give  
13 injunctive power to restrain assets, even assets  
14 currently belonging to the defendant. Our objection is  
15 when such an injunction interferes with the  
16 constitutionally protected right to retain counsel of  
17 choice.

18 And so while the statute could  
19 constitutionally allow, provided that there is adequate  
20 hearings, et cetera, the restraint of even a defendant's  
21 owned assets, lawfully owned assets, that principle  
22 can't extend to assets -- the subset of assets she needs  
23 to use counsel of choice.

24 JUSTICE SCALIA: What if -- what if the  
25 woman is a devout Muslim and she -- she makes a -- an

1 annual trip to Mecca every year? Wouldn't she have a  
2 constitutional right to use the money for that?

3 MR. SREBNICK: So certainly she would have a  
4 constitutional right. And whether she could then obtain  
5 the assets free from the injunction immediately would  
6 raise a separate First Amendment question.

7 The Sixth Amendment, because the deprivation  
8 will be permanent, meaning, we need those assets now  
9 before the trial, and the immediacy of the need for  
10 those assets --

11 JUSTICE SCALIA: Well, she has an immediate  
12 need to go to Mecca. I mean, if she doesn't get it now,  
13 she's not going to be able to fulfill what she regards  
14 as a religious obligation. I don't know how you can  
15 limit your -- your principle to the Sixth Amendment.

16 MR. SREBNICK: The Sixth Amendment is  
17 important in the context of the adversarial proceeding  
18 that will determine the ultimate ownership of those  
19 assets at the end of the day. And so unlike the First  
20 Amendment, unlike any other amendment, the Sixth  
21 Amendment is a guarantee that the defendant will be  
22 represented at the proceeding where that property and  
23 her liberty are at stake. And with regard to the  
24 travels to Mecca, those travels, while significant under  
25 the First Amendment, don't bear on the ultimate outcome

1 of the criminal case.

2 And so because the need for assets that we  
3 are requesting limited to that amount needed to retain  
4 counsel of choice, limited to the amount needed to mount  
5 a legal defense to the very charge that threatens her  
6 property rights and her liberty upon conviction, there  
7 needs to be an accommodation so that she can use enough  
8 assets, controlled by the Court, of course --

9 JUSTICE KAGAN: Mr. Srebnick, this goes  
10 back, I think, to the Chief Justice's first question.  
11 It seems that the distinction that you're making is one  
12 that the Court explicitly rejected in Monsanto. In  
13 other words, the Court said the Sixth Amendment here is  
14 the exact same thing as the First Amendment. It even  
15 used that example that Justice Scalia gave, or that  
16 general example.

17 And -- and so it goes back to the  
18 Chief Justice's question in -- in the sense of there's a  
19 very powerful intuition behind your argument, but it's a  
20 powerful intuition that was explicitly rejected by us.  
21 And -- and this case doesn't seem to present any  
22 different circumstances than that one.

23 MR. SREBNICK: Justice Kagan, I -- I think  
24 the circumstances are quite different because of the  
25 tainted property that was at issue in Monsanto.

1           First, we know it was drug money in  
2 Monsanto. It had been established by clear and  
3 convincing evidence. In our case, it's totally  
4 untainted assets.

5           Second, the Court recognized that a  
6 defendant doesn't have a lawful property interest in  
7 drug money. No different than a bank robber does not  
8 have a lawful interest in the bank loot.

9           JUSTICE KENNEDY: Yeah, but your -- your  
10 earlier argument was you have a constitutional right to  
11 establish that it isn't drug money. That was your whole  
12 answer to Justice Scalia.

13           MR. SREBNICK: In this case there's no  
14 dispute that the money is untainted. And I'm not --

15           JUSTICE KENNEDY: I'm talking about the rule  
16 that you're proposing.

17           MR. SREBNICK: The rule I proposed,  
18 consistent with the Court's observation in Kaley, there  
19 are two elements to establish forfeitability; one, that  
20 there's a crime committed, and second, traceability from  
21 the majority opinion in Kaley.

22           Here we have undisputedly untainted assets,  
23 not traceable to a crime. In Monsanto, the assets were  
24 drug money. And a defendant doesn't have the right to  
25 use drug money to represent -- to be represented by the

1 counsel of his choice.

2 CHIEF JUSTICE ROBERTS: I guess you're -- I  
3 think this may be Justice Sotomayor's point.

4 Your argument, you're distinguishing tainted  
5 and untainted assets, and I understand that. I just  
6 don't understand that if you can freeze the assets  
7 despite the Sixth Amendment when they're tainted, I  
8 don't understand why it's not the same rule when they're  
9 untainted.

10 You may have -- may have statutory  
11 arguments, you -- but if you have arguments, it has  
12 nothing to do with the constitutional right to counsel.

13 MR. SREBNICK: Mr. Chief Justice, I think it  
14 has everything to do with the Sixth Amendment because,  
15 at its inception, the Sixth Amendment only encompassed  
16 the right to spend one -- one's own money to be  
17 represented by counsel. There was no right to the  
18 appointment of counsel.

19 So taking away the defendant's lawfully held  
20 assets, whether it be their pension funds, whether it be  
21 an inheritance, whether it be their lawfully earned  
22 labors, to take that away at the inception of this  
23 nation would have meant the defendant would have been  
24 left with no counsel at all since the notion of an  
25 appointed lawyer is really a notion of more recent

1 vintage, in the 20th century.

2                   So indeed, to take away the property rights,  
3 pretrial, of a defendant, at the time when he or she is  
4 under indictment, needs those assets to retain counsel,  
5 any private counsel -- so we're not talking in this case  
6 about a particular --

7                   JUSTICE SCALIA: Well, what if -- what if  
8 the prosecution brings a case for crime X and wins that  
9 case, and it imposes a fine that takes away all of the  
10 defendant's assets, and then the prosecution brings  
11 another case for crime Y, would you be arguing that the  
12 fine had to make an exception for the defense of  
13 crime Y?

14                  MR. SREBNICK: No, Justice Scalia.

15                  JUSTICE SCALIA: What's the difference?

16                  MR. SREBNICK: There's a judgment. Upon  
17 judgment, a defendant can lose his right to property  
18 upon execution of that judgment. So the government  
19 could execute on that criminal judgment and take as much  
20 of the defendant's assets needed to satisfy the fine.

21                  Our objection is to the government doing it  
22 before conviction, before there's been any judgment.  
23 Locking down somebody's assets at the very moment when  
24 he or she needs those assets to exercise the right to  
25 counsel. As it was envisioned --



1 JUSTICE SCALIA: The Sixth Amendment only --  
2 only protects your money up until the point where  
3 there's a judgment?

4 MR. SREBNICK: Yes.

5 JUSTICE KENNEDY: But in -- in this case,  
6 there was a finding of probable cause.

7 MR. SREBNICK: Yes.

8 JUSTICE KENNEDY: So you want us to make a  
9 distinction between probable cause and a judgment?

10 MR. SREBNICK: Yes. Every case, every  
11 indictment brings with it a finding of probable cause.  
12 It's -- the two rights have to coexist. The right to be  
13 represented by counsel of choice under the Sixth  
14 Amendment has to coexist with the indictment, because  
15 under *Patterson v. Illinois*, the right under the Sixth  
16 Amendment is triggered by the indictment. It's  
17 triggered by the finding of probable cause.

18 To then say that probable cause destroys the  
19 right to the Sixth Amendment is to then say that they  
20 don't coexist. But, of course, they do, because the  
21 Sixth Amendment was established in 1791, and it's part  
22 of our fabric.

23 JUSTICE KAGAN: I might just be repeating  
24 myself, but -- but I thought that, again, that  
25 distinction was the one specifically rejected in

1     Monsanto. I mean, Monsanto could have said Caplin &  
2     Drysdale is different because it's postconviction. But  
3     Monsanto refused to say that. Monsanto said the same  
4     rule that applies postconviction ought to apply upon a  
5     finding of probable cause.

6                 MR. SREBNICK: Yes, Justice Kagan, but  
7     probable cause to believe the assets are tainted.  
8     Probable cause to believe that the drug money is not the  
9     defendant's to spend. Not probable -- there's no  
10    probable cause here as to these assets that Ms. Luis  
11    proposes to use to retain counsel of choice.

12                JUSTICE ALITO: The problem with this  
13    argument is that as a matter of economics and -- and  
14    common sense, money is fungible. To say if the -- if  
15    the so-called tainted money has been spent, and what's  
16    left is the untainted money, it doesn't make a  
17    difference which -- you know, which pot has been spent  
18    and which pot hasn't been spent.

19                MR. SREBNICK: Respectfully, Justice Alito,  
20    it makes a major difference. Our property laws, while  
21    money in some instances is fungible when they're  
22    commingled, if there is segregated property, when  
23    creditors try to levy against property that's not part  
24    of a secured interest, the law treats it very  
25    differently.

1 JUSTICE ALITO: Well, yes, but then  
2 there's -- that's all sorts of complicated rules in  
3 those areas.

4 I mean, let's -- suppose you have --  
5 and none of that necessarily applies here. Suppose you  
6 have the situation where what's at stake is money that's  
7 going to be used for restitution, all right? So at the  
8 beginning of the case, the question is whether the  
9 defendant can spend that money to hire the attorney of  
10 the defendant's choice, which is certainly a very  
11 powerful interest, or whether that money, at the end of  
12 the case if there is a conviction, is going to go to the  
13 victims.

14 So how do you -- how do you try to  
15 accommodate those two interests?

16 MR. SREBNICK: Well, to provide a  
17 restitution exception would just swallow the entire  
18 Sixth Amendment out of the Constitution for the  
19 following reason. In most cases, a victim has sustained  
20 an injury. It might be property damage. It might be  
21 personal injury. And if, for example, to use a  
22 hypothetical, if someone were to steal the Mona Lisa, or  
23 allegedly steal the Mona Lisa but the Mona Lisa isn't  
24 found, there's no principle this Court has ever --

25 JUSTICE ALITO: So your answer is that the

1 defendant's right to hire counsel of choice takes  
2 precedence over the rights of the victims, and you would  
3 say that no matter how strong the proof is?

4 MR. SREBNICK: Yes.

5 JUSTICE ALITO: Until there's -- until there  
6 is a verdict?

7 MR. SREBNICK: As long as the assets that  
8 the defendant proposes to use are her lawful assets,  
9 untainted, not connected to the crime, not traceable to  
10 any criminal activity, yes, because --

11 JUSTICE SCALIA: That seems to me not a  
12 very -- I don't know -- not a very persuasive line.  
13 You're relying on property law. What you're saying is  
14 the government can take away all your money if it's  
15 tainted, if there is probable cause to believe that it's  
16 tainted, right? It can take away all of your money if  
17 there is a judgment. But it can't take away all of your  
18 money if there's simply probable cause to believe that  
19 you're going to owe this money.

20 MR. SREBNICK: Right.

21 JUSTICE SCALIA: Your crime. That seems to  
22 me a very -- I don't know, not -- not -- an evanescent  
23 line. I -- I don't know why the Sixth Amendment case  
24 is -- the property case is -- is stronger in one  
25 situation than the other, but I'm not sure that the

1 Sixth Amendment case is any stronger.

2 MR. SREBNICK: What -- what the statute is  
3 purporting to do is give the government a prejudgment  
4 attachment on the defendant's assets based on a  
5 projected judgment.

6 JUSTICE SCALIA: That's right. It's  
7 property law.

8 MR. SREBNICK: And the Sixth Amendment --

9 JUSTICE SCALIA: You're complaining about  
10 property law, not the Sixth Amendment.

11 MR. SREBNICK: Well, I'm complaining that  
12 the Sixth Amendment, because at its root contemplated  
13 the use of property to retain counsel, the two in some  
14 degree are interrelated, of course, because without  
15 money 220 years ago or so, you couldn't hire a lawyer,  
16 and none would be appointed for you.

17 So while the Court has accommodated the  
18 indigent by providing them with appointed counsel, that  
19 is not a license for the government to render people who  
20 are not indigent, indigent. It's not a license to  
21 impoverish them by virtue of the accusation alone. That  
22 would simply write out the Sixth Amendment from the  
23 Constitution.

24 In every single case where there is a victim  
25 who claims injury, every single one, the government has

1 by definition probable cause because the indictment is  
2 based on probable cause. And it's not subject to  
3 challenge under the Kaley opinion. And so if we are  
4 going to say that merely being accused in this country  
5 because a grand jury has found probable cause is now  
6 sufficient to lock down all of your assets, assets you  
7 have owned for decades, perhaps, because at some future  
8 time maybe a jury will convict and maybe a judge will  
9 enter a judgment, and then maybe the court will then  
10 have to enforce that judgment, really is to write out  
11 the Sixth Amendment.

12 And there are ways -- if the point of a  
13 criminal case is to inflict punishment on a defendant,  
14 there are ways other than financial means to do so. Of  
15 course, incarceration is the number one form of  
16 punishment.

17 And while the needs of the victims are  
18 certainly important, what we're asking here is to  
19 accommodate both. We're not asking that all the funds  
20 be released, only so much as are necessary so that the  
21 accused can be represented by private counsel.

22 JUSTICE SOTOMAYOR: I know this is not part  
23 of the question asked, but I know that it -- it's  
24 suggested in the fringes of the briefs. How does the  
25 district court ensure that she doesn't use every penny

1 for defense costs when the district court thinks that  
2 that's not reasonable, for example?

3 MR. SREBNICK: I don't think there's an  
4 issue, particularly in this case with that issue,  
5 because the court which now has control over the assets  
6 would manage the disbursement of funds for counsel, and  
7 the bar rules would apply. Just as with a CJA-appointed  
8 lawyer, Criminal Justice Act appointed lawyer, goes to  
9 the court, and says, here are my hours. Here's what I  
10 need for investigation. Here's what I need for support  
11 services for discovery. That would be managed by the  
12 district courts.

13 CHIEF JUSTICE ROBERTS: But you're not --  
14 you're not looking for CJA rates, are you?

15 MR. SREBNICK: No, we're not, Justice.

16 CHIEF JUSTICE ROBERTS: I didn't think so.

17 (Laughter.)

18 MR. SREBNICK: And -- and so given the  
19 ability of our district courts to manage those issues,  
20 the only standard we would ask for, that they be  
21 reasonable and bona fide, and the bar rules govern that.

22 I should add that while we are having a --  
23 an academic discussion here, it didn't seem to be such a  
24 controversial proposition to the government when in  
25 Caplin & Drysdale in their brief, they wrote the

1 following: "The Constitution requires that a court  
2 afford a defendant a fair opportunity to secure counsel  
3 of choice using whatever assets he has at his lawful  
4 disposal."

5 That's the brief of Caplin & Drysdale by the  
6 Solicitor General at page 42.

7 And so when the Solicitor General's office  
8 argued this case in Caplin & Drysdale 25 years ago, they  
9 came to the Court and said there was a difference  
10 between tainted and untainted assets. And some 26 years  
11 later, those are being conflated as if there is no  
12 difference between the two.

13 JUSTICE SOTOMAYOR: Well, we have a new  
14 statute. 853 made a difference between -- and still  
15 does -- between tainted and untainted.

16 MR. SREBNICK: That is very true,  
17 Justice Sotomayor. And to the --

18 JUSTICE SOTOMAYOR: This section came later,  
19 and it says substitute property.

20 MR. SREBNICK: That is true. So there is  
21 a -- a statute, the statute that's at issue in this  
22 case, different from 853. 853 in most circuits does not  
23 authorize the pretrial restraint of untainted assets.  
24 So all the concerns about victims, all the concerns that  
25 emanate from the questions that have been asked today,



1 Congress struck that balance and did not allow for the  
2 restraint of substitute assets, at least in most  
3 circuits as it has been interpreted. The Solicitor  
4 General has a different view of the statute as it  
5 expressed in the Fourth Circuit.

6 But in all events, though the victims are  
7 certainly to be accommodated, so, too, the rights of the  
8 criminal defendant who needs to be represented by the  
9 counsel of choice.

10 JUSTICE GINSBURG: But Congress seemed to  
11 have singled out these banking frauds and healthcare  
12 frauds for special treatment, so they're not governed by  
13 the general forfeiture statute, which makes the  
14 distinction between tainted and untainted. They seem to  
15 want to come down very hard on these two crimes. So why  
16 would we interpret -- was it 1345? -- as doing nothing,  
17 as being controlled essentially by 853?

18 MR. SREBNICK: So 1345, although it doesn't  
19 use the word "forfeiture," it doesn't say what happens  
20 to these assets. It simply locks them down, so to  
21 speak, until something happens. It doesn't even talk  
22 about a criminal case, but it is in the context of  
23 Title 18. And the one court -- court -- Fang case talks  
24 about, there needs to be some sort of criminal procedure  
25 that follows the lockdown.

1                   And Justice Ginsburg, while Congress may  
2     have given in this instance the ability of the  
3     government to restrain assets of equivalent value,  
4     notwithstanding our statutory interpretation argument,  
5     it still needs to accommodate the rights of the criminal  
6     accused.

7                   If I may reserve the balance of my time for  
8     rebuttal.

9                   CHIEF JUSTICE ROBERTS: Thank you, counsel.  
10                  Mr. Dreeben.

11                  ORAL ARGUMENT OF MICHAEL R. DREEBEN

12                  ON BEHALF OF THE RESPONDENT

13                  MR. DREEBEN: Thank you, Mr. Chief Justice,  
14     and may it please the Court:

15                  I think that the appropriate starting point  
16     for this case is the last sentence of Monsanto, not  
17     because Monsanto specifically addressed substitute  
18     property, but because it adopted a principle that I  
19     believe resolves this case. And the last sentence of  
20     Monsanto says, "If the government may, posttrial, forbid  
21     the use of forfeited assets to pay an attorney, then  
22     surely no constitutional violation occurs when after  
23     probable cause is adequately established, the government  
24     obtains an order barring a defendant from frustrating  
25     that end by dissipating his assets prior to trial."

1 CHIEF JUSTICE ROBERTS: Well, that was said  
2 in the context of the government's submission that  
3 there's a difference between tainted and untainted,  
4 right? Your -- your argument in Monsanto focused on the  
5 tainted aspects of the proceeds.

6 MR. DREEBEN: Yes, it did. And that's why I  
7 say that the principle that the court articulated in  
8 that sentence is what decides this case.

9 JUSTICE BREYER: Why is that the principle?  
10 The principle -- they're talking about money that  
11 doesn't belong to the defendant.

12 MR. DREEBEN: Well --

13 JUSTICE BREYER: It belongs to Smith or  
14 Jones of the bank. Now, let's try that principle in a  
15 case where it's the defendant's money. The principle is  
16 that the government, without proving that he's guilty of  
17 any crime beyond a reasonable doubt, can take all his  
18 money. Oh, because he might be fined.

19 I've never heard of such a principle,  
20 frankly. I've just never heard of it. Now, if there is  
21 some case that says --

22 JUSTICE SCALIA: Sixth Amendment or not.

23 JUSTICE BREYER: So -- now I can imagine --

24 MR. DREEBEN: Justice Breyer, let me try to  
25 explain --

1 JUSTICE BREYER: I can go from there and  
2 find interests on both sides, da, da, da.

3 MR. DREEBEN: Justice Breyer, I think that  
4 it's important to start with, actually, the principle  
5 that Monsanto adopted, not because it resolved the  
6 factual circumstances here, but because it's talking  
7 about the point in time after the government wins a  
8 judgment. And the principle is that if the government  
9 will have a right to forfeit that property at the end --

10 JUSTICE BREYER: Yes.

11 MR. DREEBEN: -- if it can show probable  
12 cause --

13 JUSTICE BREYER: I -- I understood that. I  
14 just wanted to try it with the facts here.

15 I mean, the first principle is if, in fact,  
16 the defendant has somebody else's money that he's taken  
17 unlawfully, and he has to give it up at the end of the  
18 trial, we can make him give it up at the beginning to  
19 make sure it's there.

20 Now let's try it with the facts here. If a  
21 defendant has some money, which maybe he will have to  
22 pay in a fine, what we'll do is we'll take all his money  
23 away before he's been convicted beyond a reasonable  
24 doubt. Okay. That's the difference in the  
25 propositions.

1                   And I'm saying it's pretty hard for me to  
2   think in a country which says that before he's  
3   convicted, you have to release him on bail except in  
4   unusual circumstances, that nonetheless, you can take  
5   all his money away so he can't hire a lawyer.

6                   I know that's a little simpleminded, but  
7   nonetheless, that seems fairly basic. I don't know  
8   where it comes from.

9                   MR. DREEBEN: So Justice Breyer, I think  
10   that the -- the embedded premise there is that people  
11   will not suffer restraints on their liberty or property  
12   before they have been convicted beyond a reasonable  
13   doubt.

14                  JUSTICE BREYER: That's correct. That is  
15   the principle, and now we make a number of exceptions.  
16   And one exception is if you think he's going to -- I  
17   mean, I can think of exceptions where we do keep people  
18   in jail. That is, of course, right. And -- and here,  
19   what they're saying, I think, in essence is, let's try  
20   and think of an exception for this one. Pretty hard.  
21   And anyway, if there is one, what he wants to use the  
22   money for is to make sure he has a lawyer. It's called  
23   the Sixth Amendment.

24                  All right. Now, there we are. That's where  
25   I -- at this moment in my mind, that's where the case

1 is.

2 MR. DREEBEN: All right. So can I try to  
3 break that down a little bit? Because I do think that  
4 the principle in Monsanto is critical. The principle in  
5 Monsanto is that if the government will be able to  
6 forfeit the property at the end of the day, it has an  
7 interest in ensuring that it is available and not  
8 dissipated. It's the monetary equivalent of flight.  
9 It's asset flight.

10 And this statute, Section 1345, was  
11 specifically designed, as Justice Ginsburg observed, for  
12 crimes in the banking and in the healthcare context in  
13 which money flows into accounts, money is fungible, very  
14 difficult to --

15 JUSTICE BREYER: I think -- I think that's  
16 a -- what you say is, look, this is equivalent to the  
17 case where we keep the guy in jail because he might run  
18 away. That's your point. That's not a bad point. So I  
19 have on that on one side, and I have on the other side  
20 that he'd like to have a lawyer which is a Sixth  
21 Amendment right.

22 So I have a suggestion that I want you to  
23 focus on. The suggestion is -- let's read this statute  
24 in light of what you've said, that there is an interest  
25 on your side and there is a constitutional amendment on

1 the other side. Why can't we read this statute to say  
2 they accommodate those interests in this way?

3 If they're going to run away from -- with  
4 the property, then the court has the authority to enjoin  
5 the alienation or disposition of property, say tainted,  
6 then you can ask for a restraining order to prohibit the  
7 prohibition, not just of the tainted property but also  
8 of property of equivalent value.

9 If I read that without knowing the  
10 background, I would say a lot of cases come up where you  
11 get TROs, where they're not precise because you don't  
12 know exactly what property you're talking about. So  
13 what do you think about reading this statute to avoid  
14 the constitutional question to say the TRO means TRO?

15 And a TRO means where there's some property  
16 out there and it may be tainted, mixed up with the  
17 untainted, you can get a TRO on the whole thing. You  
18 have to have a speedy hearing. He has to be  
19 represented. And your purpose of that is to separate  
20 the two kinds of assets. That seems to me to work for  
21 the purpose, and it also avoids the constitutional  
22 question.

23 MR. DREEBEN: So two things on that. I hope  
24 I get a chance to say both of them.

25 First, I don't think that it is a serious

1 constitutional question in light of Monsanto, so I don't  
2 really think that there's a serious avoidance concern  
3 here. Monsanto basically said that if the government  
4 has shown adequately that it will be able to forfeit the  
5 money at the conclusion of the case, the Sixth Amendment  
6 doesn't override the government's interests.

7           After all, Justice Breyer, this is basically  
8 a zero-sum game. Either there will be money available  
9 at the end of the case for the victims or the money will  
10 have been spent on lawyers. And Congress made a  
11 judgment that the government can't come in in every case  
12 and simply restrain assets upon a showing of nothing.  
13 But it does have a statute in a very specific area that  
14 allows it to --

15           JUSTICE SOTOMAYOR: Do you really --

16           JUSTICE KENNEDY: But what is it that  
17 confines your -- your rationale to a specific area? It  
18 seems to me that if the government prevails in this  
19 case, every State in the union, every locality could say  
20 that in the event of assault and battery, malicious --  
21 malicious mischief, drunk -- an accident caused by drunk  
22 driving, any crime involving a bodily injury, that the  
23 government is entitled to restrain disposition of assets  
24 that might be used for medical care, for pain and  
25 suffering. And this would, in effect, prevent the



1 private bar from -- from practicing law unless it did so  
2 on a contingent basis.

3 MR. DREEBEN: Justice Kennedy, it's correct  
4 that our principle is not limited to the types of crimes  
5 that are in this case. It is limited to the government  
6 making an adequate showing that at the conclusion of the  
7 case, it will have the right to the money.

8 JUSTICE KENNEDY: Well, but you're talking  
9 about probable cause. But -- but there's --

10 MR. DREEBEN: Understood.

11 JUSTICE KENNEDY: The government can often  
12 show probable cause, and that's usually the basis for  
13 the indictment.

14 MR. DREEBEN: That's correct. And, I --  
15 again, I think that Monsanto resolved this question by  
16 saying that if the government can take title to the  
17 property at the conclusion of the case, it has an  
18 interest in ensuring that it is available, and the Sixth  
19 Amendment doesn't override it.

20 JUSTICE KAGAN: Mr. Dreeben --

21 CHIEF JUSTICE ROBERTS: It takes the -- it -  
22 it establishes that right in the same way as the issue  
23 here, without counsel on the part of the defendant,  
24 because you -- I assume Kaley applies to untainted  
25 assets as well as untainted.

1 MR. DREEBEN: That's correct.

2 CHIEF JUSTICE ROBERTS: So add to the  
3 context of what Justice Breyer was concerned about. You  
4 not only can do that, you can do that without giving the  
5 defendant any type of hearing, right?

6 MR. DREEBEN: No, I think the defendant is  
7 often entitled to a hearing. The question is what  
8 issues the defendant may raise at the hearing. Here,  
9 for example, there was clearly an issue of whether the  
10 defendant was, in fact, dissipating assets. And that  
11 would have been something that the defendant --

12 CHIEF JUSTICE ROBERTS: I thought -- I  
13 thought under Kaley, the defendant didn't have to be  
14 provided a -- a hearing with respect to the pretrial --

15 MR. DREEBEN: With --

16 CHIEF JUSTICE ROBERTS: -- seizure of  
17 assets.

18 MR. DREEBEN: With respect to whether  
19 there's probable cause to believe that the defendant  
20 committed an offense. That's what Kaley said is  
21 controlled.

22 JUSTICE SOTOMAYOR: Kaley was a question of  
23 tracing, because it was --

24 MR. DREEBEN: It -- it was,  
25 Justice Sotomayor. And that --

1 JUSTICE SOTOMAYOR: But you don't have any  
2 tracing problem here. As soon as he commits a crime  
3 that you say was worth \$45 million, you can freeze  
4 \$45 million worth of assets, correct?

5 MR. DREEBEN: Although there were far fewer  
6 here because most of them had been dissipated. And I  
7 think that the reason why --

8 JUSTICE SOTOMAYOR: I respect that, and --  
9 but -- but you agreed that these particular funds were  
10 untainted. I'm told by your adversary --

11 MR. DREEBEN: We -- we stipulated -- it's  
12 technical, but we -- we stipulated that there may be  
13 some unquantified amount of untainted assets in the  
14 assets being restrained. We did not know, and did not  
15 attempt to figure out, and that would be an issue for a  
16 later day if the Court said that that mattered.

17 JUSTICE KAGAN: Mr. Dreeben, I think, you  
18 know, in essence your argument goes like this: You have  
19 Monsanto, you combine Monsanto with a -- a simple  
20 factual acknowledgment that money is fungible, and it  
21 gets you to a judgment in this case. You win, the  
22 petitioner loses. And -- and, you know, that's a fair,  
23 strong argument, if -- if one is comfortable with  
24 Monsanto.

25 I mean, there is -- so I think I would just

1 ask you, I mean, suppose the Court is just uncomfortable  
2 with the path we started down the road on in Monsanto?  
3 And you might be right that it just doesn't make sense  
4 to draw a line here, but it leaves you with a situation  
5 in which more and more and more we're depriving people  
6 of the ability to hire counsel of choice in complicated  
7 cases. And so what should we do with that intuition  
8 that Monsanto sent us down the wrong path?

9 MR. DREEBEN: Well, I -- I would hope that  
10 the Court sees that even if there are some uncomfortable  
11 aspects of Monsanto, it actually rests on a sound legal  
12 judgment. And I -- I realize I have said this, but I  
13 will keep coming back to this because I think it is the  
14 touchstone for Monsanto.

15 Caplin & Drysdale was a postjudgment case.  
16 And it said once these funds are forfeitable, the  
17 defendant, if he pays his lawyer with them, is paying  
18 the lawyer with somebody else's money, namely, the  
19 government.

20 Then the question is, can the government do  
21 anything to prevent dissipation of the assets before it  
22 obtains the judgment? And the Court said not  
23 automatically, not as a general rule it can always come  
24 in and say this is what we want, this is what we get.  
25 But with an appropriate hearing, the balance of interest

1 does permit the government to preserve the equities.

2 Now, this has an effect on counsel of  
3 choice. It has no effect on the ability of the  
4 defendant to be represented by counsel.

5 CHIEF JUSTICE ROBERTS: Counsel, how -- I  
6 don't know how these things work. Let's say you get an  
7 order freezing the assets, and it's \$10 million, and --  
8 and the defendant comes into the court, whatever, and  
9 says, look, my lawyer is going to cost \$100,000, one  
10 percent of the assets that are at issue here. Then you  
11 would argue, no, even though it's only a tiny fraction  
12 of what we're seizing, the Sixth Amendment doesn't even  
13 entitle him to one percent of the assets that might --  
14 might end up being forfeitable?

15 MR. DREEBEN: Yes. I don't think there's an  
16 exception in the Sixth Amendment.

17 Now, this is a statute in which the  
18 government proceeded through seeking a civil injunction  
19 and restraining order, and the district court does have  
20 discretion. It's not a flat rule that forbids the  
21 district court from releasing funds for counsel.

22 CHIEF JUSTICE ROBERTS: How does it work?  
23 Like the -- you know, the daughter's tuition bill comes  
24 due, you know, and it's whoever -- you know, who knows  
25 how much these days, \$60,000. And the defendant cannot

1 pay that?

2 MR. DREEBEN: Not as a matter of right. But  
3 this is a civil statute in which the judge can exercise  
4 equitable discretion. And if the defendant comes in and  
5 says --

6 CHIEF JUSTICE ROBERTS: Well, why was it --  
7 why would it be -- if he can exercise equitable  
8 discretion for the daughter's tuition, why -- why not  
9 when the Sixth Amendment is at stake? And, you know,  
10 counsel of choice, it turns on that, it would seem to me  
11 that if there's going to be a case in which equitable  
12 discretion will be exercised, it ought to be in that  
13 situation.

14 MR. DREEBEN: Well, I don't think  
15 automatically so. Here the judge said one consideration  
16 is, will the defendant have representation in the 1345  
17 proceeding itself? The defendant did. Mr. Srebnick  
18 represented the defendant in that proceeding. So the  
19 court said, I don't need to worry about that.

20 Then the court turned to the question of  
21 whether the defendant needed counsel in the criminal  
22 case and said, the defendant will be afforded counsel in  
23 the criminal case, by appointment if necessary.

24 JUSTICE BREYER: Can you get back -- you had  
25 two responses to my reading of the statute. I heard the

1 first, and I didn't hear the second.

2 MR. DREEBEN: So this --

3 JUSTICE BREYER: By the way, let me -- let  
4 me remind you --

5 MR. DREEBEN: I remember exactly what --

6 JUSTICE BREYER: But I want to say it,  
7 because maybe you can focus on this. We're in before  
8 the judge on a TRO. Our object of the TRO is to  
9 separate the assets that are not this man's from the  
10 assets that are this man's. So we do that separation.

11 Now we say \$10,000 is not his, it's the  
12 bank's. \$15,000 or \$10,000 over here is totally his;  
13 he's never been convicted of the crime.

14 What's the government's interest? And why  
15 can't he take this other, once we've had the TRO --

16 MR. DREEBEN: So Justice Breyer --

17 JUSTICE BREYER: -- to separate it?

18 MR. DREEBEN: -- I think I need to stop you  
19 here because it's not a TRO. The statute does not --

20 JUSTICE BREYER: I know. It says  
21 restraining order --

22 MR. DREEBEN: That's correct.

23 JUSTICE BREYER: -- and my suggestion is we  
24 read those words "restraining order" as "temporary  
25 restraining order," which (3)(b), it seems to me,

1 clearly permits, but we can get into that argument.

2 I'll worry about that later.

3 MR. DREEBEN: Well, I think that the --

4 JUSTICE BREYER: I want to know what your  
5 second response was to that.

6 MR. DREEBEN: My second response is that  
7 this a statute that contains two basic provisions. I  
8 think petitioner describes it accurately.

9 Section (a) describes the things the  
10 government can seek under the statute; Subsection (B)  
11 describes the procedure that's used.

12 Subsection (A) first allows the government  
13 to get an injunction against fraud in (A)(1). In (A)(2)  
14 it allows it to restrain assets as the ultimate object  
15 of the suit, not as a temporary interim measure.

16 Temporary interim measures are described in  
17 Subsection (B) where it specifically allows the Court to  
18 impose various restraints until the Court has concluded  
19 the proceeding. So it addresses temporary relief in  
20 (B).

21 Subsection (A)(2) describes the things that  
22 the government can seek as the ultimate object of the  
23 case. Injunction against the person who has the funds,  
24 or a restraining order against any person to restrain  
25 the funds that are derived from illegal activity, or



1 funds of equivalent value.

2 And just to make one final point on that,  
3 the reason that makes sense in a banking context and in  
4 a healthcare context is dollars are fungible, as  
5 Justice Alito said earlier. They will flow into an  
6 account; they will flow out into other accounts. It's  
7 difficult to trace them.

8 So Congress obviated the need to do that by  
9 saying you can restrain the defendant, but we're not  
10 going to rely only on restraining the defendant. You  
11 can also restrain the banks where the funds are. And  
12 you can restrain them not only in the amounts that  
13 represent the tainted funds, but represent the monetary  
14 equivalent of them.

15 So in a sense --

16 JUSTICE ALITO: I don't -- go ahead and  
17 finish.

18 MR. DREEBEN: Well, I think, in a sense,  
19 this statute negates the premise that there is a clean  
20 line between tainted funds and untainted funds. The  
21 money is fungible once it's received by the defendant.

22 There is Medicare fraud if the government  
23 establishes probable cause, and its financial interest  
24 is ensuring that it can have a judgment to make whole  
25 the Medicare trust fund or other victims at the

1 conclusion of the case.

2 JUSTICE ALITO: I'm -- I'm troubled by this  
3 statute. I -- I can't understand the difference between  
4 (a) and (B). I don't think -- the issue was not raised  
5 in the cert petition, and I don't know whether it can be  
6 brought in with the Doctrine of Constitutional  
7 Avoidance, because it really has nothing to do with the  
8 Sixth Amendment. This would apply regardless of whether  
9 there's any Sixth Amendment issue in the case.

10 But, having said that -- Mr. Srebnick can  
11 address those in rebuttal if he wishes to, but having  
12 said that, if (B) does not refer to a temporary form of  
13 relief, then -- which I understand to be your  
14 argument -- then I don't understand what (a)  
15 contributes.

16 MR. DREEBEN: So (a)(2) has two different  
17 sections, and it describes what the government can seek  
18 as the ultimate relief in the case.

19 This started out as an antifraud injunction  
20 statute. Somebody is going around with the boiler room  
21 operation or a Ponzi scheme; it takes a while to get the  
22 evidence to indict. The government can come in and seek  
23 an injunction to prevent further fraud.

24 Then Congress added (a)(2) on the theory  
25 that there's something else the government needs to do,

1 ensure that money is available at the conclusion of  
2 whatever parallel criminal case or civil fraud case the  
3 government brings.

4 JUSTICE BREYER: So what they can do is  
5 this? If we read this literally under (B), that  
6 Mr. Smith is indicted for a banking law violation, he  
7 has \$100,000 of other people's money. The government  
8 can say that the order -- the restraining order of the  
9 Court prohibits his wife, any other client, the milk  
10 man, anyone in the world, from taking, not the \$100,000  
11 that belongs to the bank, but any other \$100,000 that he  
12 got for any other purpose, I guess including his  
13 retirement fund, including no matter what.

14 I mean, that is -- goes -- it seems to me  
15 that's what it says -- any other person from taking  
16 property of equivalent value, and he hasn't been  
17 convicted of anything.

18 MR. DREEBEN: Yes, but it's -- it's  
19 referring, again, to a person who has -- there is  
20 probable cause to believe has obtained money as a result  
21 of a criminal violation, and then it provides a  
22 mechanism for restraining it. It's not aimed at  
23 restraining people who have nothing to do with the case,  
24 unless they're holding the defendant's money.

25 JUSTICE BREYER: Well, this is -- this is

1     innocent money, the defendant's, not the money he  
2     obtained as a result of the violation. The money he  
3     didn't obtain, that's what this case is about.

4                     MR. DREEBEN: The innocent money versus  
5     tainted money all depends on a theory that they are  
6     economically pure. Now, the -- the only argument that  
7     Mr. Srebnick made to distinguish them, and I realize  
8     there may be members of the Court who think this is not  
9     a very good argument, and maybe the question is whether  
10    Monsanto is at root problematic, but at least insofar as  
11    that argument goes, it's based on a reading of the  
12    relation-backed doctrine that's contrary to this Court's  
13    cases.

14                    Monsanto itself made this very clear. It  
15    said that the government can restrain money that will  
16    become the government's property at the conclusion of  
17    the case.

18                    JUSTICE SOTOMAYOR: Mr. Dreeben, you're  
19    taking Monsanto out of context, because 853, by its  
20    nature, was limited to tainted funds. This is the first  
21    statute if -- that I know of that permits the government  
22    to come in and take untainted funds. The incidence of  
23    the tainted funds concept was, you can't spend another  
24    person's money. You stole this money somehow, and you  
25    can't spend that money because it belongs to someone

1     else.  It really doesn't belong to you.  But it's not  
2     until a judgment -- and this is what your adversary is  
3     trying to say -- that the money that's untainted, the  
4     money that -- or the property that he bought before this  
5     crime, this untainted property becomes yours.  It's not  
6     until that moment, the judgment, that the property is  
7     forfeitable.

8                 MR. DREEBEN:  That's true.

9                 JUSTICE SOTOMAYOR:  You can't forfeit it  
10    beforehand.  So now the issue is --

11                MR. DREEBEN:  That's true for all -- that's  
12    true or all money, tainted and untainted.

13                JUSTICE SOTOMAYOR:  Well, but -- but still  
14    the question becomes, is there a substantive difference,  
15    and I think Justice Breyer is expressing -- the problem  
16    with this, as Justice Kagan said, this intuitive sense,  
17    which is where do we draw this line?

18                MR. DREEBEN:  So --

19                JUSTICE SOTOMAYOR:  Does the right to  
20    counsel have any meaning anymore?

21                MR. DREEBEN:  I think it does.

22                JUSTICE SOTOMAYOR:  Frankly, I expect within  
23    three to five years, if we rule in your favor, 853 will  
24    be changed to have this same language.

25                MR. DREEBEN:  So 853, Justice Sotomayor,

1 does permit forfeiture of substitute property.

2 JUSTICE SOTOMAYOR: Yes, but not pretrial.

3 MR. DREEBEN: Not -- not pretrial. This  
4 statute is different because it has a different function  
5 and a different purpose. But the basic concept of  
6 forfeiture is punishing the defendant by taking money  
7 through forfeiture that's equivalent to the tainted  
8 property if the tainted property is gone. That's the  
9 policy behind it. Now --

10 JUSTICE SOTOMAYOR: But that's true of every  
11 judgment.

12 MR. DREEBEN: It is true --

13 JUSTICE SOTOMAYOR: Every judgment gives you  
14 a right to substitute property of some sort.

15 MR. DREEBEN: Yes, but -- but the point is  
16 that the tainted property and the substitute property  
17 are similarly situated at the end of the forfeiture  
18 case. The government has a property right in each of  
19 them, but the -- I don't think the property right is  
20 really the essence of what's going on here.

21 The fact that Section 853 permits pretrial  
22 restraint of tainted property, but it doesn't reference  
23 the subsection that deals with substitute property, is a  
24 feature of that statute, but I think that has nothing to  
25 do with the underlying point, which is that if the

1 government is going to be able to collect on its  
2 forfeiture judgment, sometimes it will need to restrain  
3 property. Monsanto recognizes that, and I don't think  
4 that saying that the defendant has a interest in paying  
5 for counsel trumps the government's interest in being  
6 made whole at the conclusion of the case.

7 JUSTICE KAGAN: Mr. Dreeben --

8 JUSTICE SCALIA: When did the -- when did  
9 the -- when was the first statute that allowed the  
10 government to restrain the expenditure of tainted funds?  
11 Does that go back a long time or --

12 MR. DREEBEN: Well, the -- the whole history  
13 of in personam forfeiture was dormant until 1970, and  
14 then Congress passed a statute that permitted this kind  
15 of activity. It improved the statute in 1984 to remedy  
16 defects in the pretrial restraint of assets.

17 So it was relatively recently developed,  
18 targeting basically drug conspiracies and organized  
19 criminal activity.

20 JUSTICE SCALIA: And -- and the first time  
21 that Congress ever applied it to non-tainted property  
22 was what year?

23 MR. DREEBEN: Well, the substitute assets  
24 provision was added to the -- the basic forfeiture  
25 statute, and it was there at least by 1984. I think

1     that it may have been earlier as well.

2                     This provision is different, as Justice  
3     Sotomayor pointed out, from the basic forfeiture statute  
4     in permitting pretrial restraint of any assets, but I  
5     think that it reflects the same basic underlying idea.

6                     JUSTICE GINSBURG:   And that --

7                     JUSTICE KENNEDY:   And -- but just -- just to  
8     be clear, so that I understood your earlier answer, the  
9     consequence, the necessary consequence of your position  
10    is that any State in the union can provide for  
11    forfeiture or a freeze -- a freeze of assets pending  
12    trial in any assault and battery case, spousal abuse  
13    case, criminal negligence, date rape cases in order to  
14    make the victim whole, to pay for medical costs, to pay  
15    for pain and suffering, and can freeze those assets even  
16    if the consequences of that is that in most of those  
17    cases most people cannot afford counsel.

18                    MR. DREEBEN:   So if -- if at the conclusion  
19    of the case --

20                    JUSTICE KENNEDY:   That's the consequence of  
21    your argument?

22                    MR. DREEBEN:   Well, I think that if there is  
23    a -- yes, if there is a monetary assessment that will  
24    become provable at the conclusion of the case and the  
25    government can show a need to preserve the assets so



1     that they're available.

2                 I mean, think about the cases that you're  
3     talking about, Justice Kennedy. They are cases in which  
4     victims have been harmed. Serious medical costs may be  
5     at issue. If the funds are spent on an attorney, they  
6     will not be available for compensation.

7                 CHIEF JUSTICE ROBERTS: Well, and they're  
8     all cases in which the defendant has not been found  
9     guilty. And -- and in all those cases, I mean, all you  
10    have to do, all the governments have to do, all the  
11    State governments have to do, is provide for a fine and  
12    argue, then, well, unless we -- if we don't freeze the  
13    assets, there won't be money left to pay a fine. So  
14    this could apply -- I guess this is the point. This  
15    could apply to every crime on the books.

16                MR. DREEBEN: So I -- I do think the Court  
17    could draw distinctions among the types of fines and the  
18    purposes of the fines that are at issue. So it's not --

19                JUSTICE BREYER: Have you seen -- have you  
20    seen the judgments in the fraud on the market cases? I  
21    mean, it isn't too tough in cases involving fraud on the  
22    market to find judgments of tens or hundreds of millions  
23    of dollars, I mean, judgments in fines after  
24    convictions, and that's what, I think, the question is.

25                The principle of constitutional law that

1     you're advocating would, in fact, permit the freezing of  
2     what might be paid afterwards in a fine which could be a  
3     huge amount before the person is convicted. Am I right?

4                 MR. DREEBEN: So -- well, I -- I do think  
5     that I was trying to say to the Chief Justice that there  
6     could be distinctions that are drawn among various  
7     monetary exactions. I think the strongest case is when  
8     victim compensation is at issue. All the money in  
9     the -- the context of a Medicare fraud case like this,  
10    although it's not required by statute, it will be  
11    returned to the Medicare trust fund. This is a fraud  
12    against the people. \$45 million is obtained, we allege,  
13    by fraud. Most of --

14                CHIEF JUSTICE ROBERTS: It goes to the  
15    Medicaid trust fund?

16                MR. DREEBEN: Medicare trust fund,  
17    provided to the Medicare trust fund.

18                CHIEF JUSTICE ROBERTS: The -- will go to  
19    the victims?

20                MR. DREEBEN: Yes.

21                CHIEF JUSTICE ROBERTS: Does that go to the  
22    victims in case?

23                MR. DREEBEN: Well, the Medicare trust fund,  
24    which represents basically the fiscal interests of the  
25    people of the United States is the victim.

1 CHIEF JUSTICE ROBERTS: I'm sorry?

2 MR. DREEBEN: The Medicare trust fund, from  
3 which the funds came that we say are obtained by fraud,  
4 is the victim. So the funds will be returned to the  
5 victim. That's the purpose of trying to freeze the  
6 funds in a health care case, so that they can be  
7 returned.

8 JUSTICE GINSBURG: Mr. Dreeben, you're  
9 saying that your -- your view, your interpretation, your  
10 reading of the statute is the only tenable one, but if  
11 one took the view that Justice Breyer's interpretation,  
12 that restraining order means a temporary restraining  
13 order, or it was another interpretation put forth in the  
14 Americans for Forfeiture Reform brief, because if -- if  
15 a judge were to take the position that all of -- all  
16 three are plausible readings of the statute, but we'll  
17 pick the one that allows the defendant to have counsel.

18 MR. DREEBEN: So Justice Ginsburg, we don't  
19 think that any of the alternative readings are  
20 plausible. For the reasons that I explained to Justice  
21 Breyer, this statute doesn't limit the restraining order  
22 to temporary relief, nor would it make any logical sense  
23 to do that because the purpose of this statute was to  
24 preserve funds so that they would be available at the  
25 conclusion of the case.

1           I also think that the amicus argument is not  
2   a tenable one because it simply reads "or equivalent  
3   value" out of the statute and without any reference to  
4   the context of the statute, which is to try to make the  
5   government be able to be made whole at the conclusion of  
6   a case if, in fact, it obtains a judgment given the very  
7   difficult process of segregating out money in banking  
8   and financial-type crimes.

9           JUSTICE KAGAN: Mr. Dreeben, if I could go  
10   back to Justice Alito's questions about your  
11   interpretation of the statute, I think what Justice  
12   Alito was suggesting was that (a) (2) (A) would be  
13   completely subsumed by (a) (2) (B) on your interpretation,  
14   and I don't think that you got around to answering that  
15   question.

16           MR. DREEBEN: So I -- I think that that --  
17   that is true. I think this Court understands, from  
18   arguments last week, that superfluity is no stranger to  
19   congressional statutes. They do have a different focus,  
20   though, and I think it was quite reasonable for Congress  
21   to make clear what that focus is. 2(A) is aimed at the  
22   person who's doing the dissipating themselves, the  
23   person who obtained the property by fraud, and (B)  
24   expands that out.

25           JUSTICE KAGAN: No, but in -- in just saying

1     that, you're essentially saying, yes, (B) expands it  
2     out, meaning it covers everything that (A) covers and  
3     some more.

4                   MR. DREEBEN:  Yes, but the -- it's not that  
5     this is a statute that anyone's reading gives off  
6     provisions of fact because the (b) section, 1345(b)  
7     permits restraining orders or prohibitions during the  
8     course of the case as are needed to protect the  
9     United States against the substantial injury.  So that  
10    provision would subsume the -- the reading that my  
11    friend gives.

12                  JUSTICE KAGAN:  Do you think that there's  
13    any --

14                  CHIEF JUSTICE ROBERTS:  Go ahead.

15                  JUSTICE KAGAN:  Do you think that there's  
16    any way to read this statute such that it applies to  
17    people who wish to retain counsel as opposed to make  
18    other expenditures?

19                  MR. DREEBEN:  No, I don't think there's any  
20    reading of the statute that exempts counsel.

21                  It does give discretion to the district  
22    court to entertain arguments.  Those arguments were made  
23    here and rejected.

24                  CHIEF JUSTICE ROBERTS:  Thank you, counsel.

25                  Mr. Srebnick, you have four minutes

1 remaining.

2 REBUTTAL ARGUMENT OF HOWARD SREBNICK

3 ON BEHALF OF THE PETITIONER

4 MR. SREBNICK: Thank you, Mr. Chief Justice.

5 I think all of us who heard the argument of  
6 Monsanto and Caplin & Drysdale when it was delivered in  
7 1989 understood the line was drawn between tainted and  
8 untainted assets. And that was a line -- while the  
9 defense bar had its druthers, was a line that was  
10 accepted by the Court. The government proposes now to  
11 move that line and essentially make the line disappear  
12 altogether.

13 Justice Alito --

14 JUSTICE ALITO: I don't want to use up your  
15 rebuttal time, but I do want to ask you two quick  
16 questions about the statute.

17 First is: Did you raise anything about this  
18 in your cert petition? And the second is: Is there a  
19 way to limit this to the Sixth Amendment context?

20 MR. SREBNICK: The answer to the first  
21 question is no. In our cert petition, since we were  
22 constrained in the Eleventh Circuit by the  
23 interpretation that had been given back in 1999, we  
24 focused on the constitutional issue in order to suggest  
25 to the Court that the doctrine of constitutional

1 avoidance should be triggered because there's a Sixth  
2 Amendment problem.

3 The Eleventh Circuit has concluded that the  
4 statute is ambiguous.

5 JUSTICE ALITO: You didn't say anything  
6 about constitutional avoidance in your cert position,  
7 did you?

8 MR. SREBNICK: That is correct. We argued  
9 that the Constitution would be violated, and because  
10 this Court, in its discretion and indeed in the Rumsfeld  
11 vs. FAIR case, looks at a statute even if the  
12 interpretation is offered at the merit stage by an  
13 amicus, the Court has considered those competing  
14 interpretations in order to avoid the constitutional  
15 issue.

16 Justice Scalia, in response to your question  
17 about property, it sure sounded to anyone who heard the  
18 argument and read the opinions in Monsanto and Caplin &  
19 Drysdale that it was much about property. The  
20 government, by invoking the taint theory, which does  
21 date back to the founding of our nation, taints a  
22 particular subject, and that is the tainted asset.  
23 That's why it's called the taint theory. It's  
24 counterintuitive to suggest that untainted assets should  
25 be treated as tainted assets.

1                   And because, as I used the word earlier,  
2   there must be a coexistence between the taint theory and  
3   the right to counsel of choice, Monsanto drew the line,  
4   Caplin & Drysdale drew the line and said if the  
5   government can establish that the asset is tainted, it  
6   can be frozen.

7                   Nothing about Monsanto, nothing about Caplin  
8   & Drysdale, suggested that assets over which the  
9   government has no present property interest, no  
10   relation-backed theory, no taint theory to speak of, can  
11   then take Aunt Sally's money or a client's pension funds  
12   needed to -- for representation to use those assets to  
13   retain counsel. Nothing in this Court's precedent in  
14   those cases suggests that.

15                  And naturally, as a member of the defense  
16   bar, we would welcome a revisiting of Monsanto and  
17   Caplin & Drysdale because the parade of horrors is  
18   here today. The government says quite candidly there is  
19   no line. If the fine is \$1 million, the defendant has  
20   to pony up, ante up \$1 million up front in order to  
21   exercise his right to counsel. The right to counsel of  
22   choice will have a price tag. And it is whatever the  
23   government says the maximum fine is. Whatever the  
24   maximum restitution is, that will be the price that the  
25   defendant must pay in advance. It's an advance fee that



1 the defendant must pay according to the government in  
2 order to be able to exercise his Sixth Amendment rights.  
3 We ask the Court to reject such an interpretation.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

6 (Whereupon, at 12:07 p.m., the case in the  
7 above-entitled matter was submitted.)

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