

ABOVE THE LAW

WHITE-COLLAR CRIME

The Supreme Court Says You Can Pay Your Lawyer!

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Good news from the Supreme Court! You can use your money to pay for a lawyer if you're charged with a crime!

The bad news for America, though, is that this issue had to get litigated all the way to the Supreme Court.

For those of you not familiar with the issues in the Supreme Court's decision last week in *Luis v. United States*, here's the basic background. The Sixth Amendment says you get a lawyer to defend you if you're being prosecuted. Generally, that right can be made real in one of two ways; you can have a lawyer appointed for you and paid for by the government — though you don't get to choose who that lawyer will be — or you can hire a lawyer of your choice who you then have to pay.

This right is threatened by the government's forfeiture powers. The government has the right to take money that you've gained from an illegal enterprise before you're found guilty of a crime. They can even take money that they think you've gotten from a criminal offense before you're even charged with a crime. And, to make matters worse, they can seize what are called "substitute assets" — which generally means money that is the same amount as what they think you made from a crime, even if it isn't the actual money you made from the crime.

Of course, if the government seizes your substitute assets and you don't have any other assets lying around to pay for a lawyer, you can see how taking this money could put a serious crimp in the Sixth Amendment's style.

Justice Breyer announced the judgment of the Court, joined by the Chief, Ginsburg, and Sotomayor. The plurality opinion notes that the government has an interest in having money forfeited and that that interest is really very important, but that there's a Constitutional right here so that right is more important than the government's interest.

Justice Thomas wrote separately in what I think is the most interesting opinion in the case, basing the holding exclusively on the Sixth Amendment's text and history.

Here's his opener:

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The Sixth Amendment provides important limits on the Government's power to freeze a criminal defendant's forfeitable assets before trial. And, constitutional rights necessarily protect the prerequisites for their exercise. The right “to have the Assistance of Counsel,” U. S. Const., Amdt. 6, thus implies the right to use lawfully owned property to pay for an attorney. Otherwise the right to counsel—originally understood to protect only the right to hire counsel of choice—would be meaningless. History confirms this textual understanding. The common law limited pretrial asset restraints to tainted assets. Both this textual understanding and history establish that the Sixth Amendment prevents the Government from freezing untainted assets in order to secure a potential forfeiture. The freeze here accordingly violates the Constitution.

Perhaps more interesting, for those of us who talk to clients about forfeiture – and how aggressive the government is about it – is Thomas's discussion of the history of the use of forfeiture in England (internal quotations omitted).

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An unlimited power to freeze a defendant's potentially forfeitable assets in advance of trial would eviscerate the Sixth Amendment's original meaning and purpose. At English common law, forfeiture of all real and personal property was a standard punishment for felonies. That harsh penalty never caught on in America. The First Congress banned it. But the Constitution did not. If the Government's mere expectancy of a total forfeiture upon conviction were sufficient to justify a complete pretrial asset freeze, then Congress could render the right to counsel a nullity in felony cases. That would have shocked the Framers.

Thomas's opinion gives an interesting window into our views of forfeiture as a punishment. It's barely interesting to say that our government and laws have moved from many of the libertarian impulses of the framers. But to see how this one specific tool — forfeiture of your assets as a punishment for a crime — was the tool of English kings, was rejected by our framers, and is now, again, coming to be popular as a mechanism for punishment, is a nice window into how far we've moved from England.

Which is to say, how far we've moved back to what we were trying to move away from when we moved away from England.

But at least we still don't wear wigs in court.