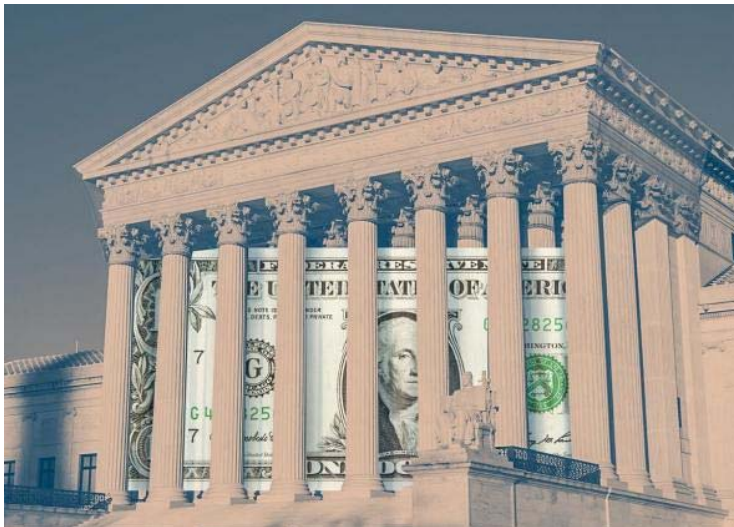


The Supreme Court Affirms Your Right to Hire a Lawyer of Your Choosing

By Mark Joseph Stern



The Supreme Court held on Wednesday that the government cannot freeze your assets and prevent you from hiring your preferred defense counsel.

Photo illustration by Lisa Larson-Walker. Photos by Thinkstock and Reuters.

Sila Luis says she didn't do anything wrong. The United States government says she defrauded Medicare for millions of dollars through kickbacks and overbilling. Now the government is putting her on trial to answer for these serious criminal charges, and Luis wants to hire the best lawyer she can afford. One problem: The government has frozen *all* her assets, including those completely untainted by the alleged fraud. Luis says the asset freeze violates her Sixth Amendment right "to have the assistance of counsel for [her] defense." The government said it doesn't: She can still hire counsel; she just has to find one who'll represent her for free.

On Wednesday, the Supreme Court sided with Luis in an important victory for the Sixth Amendment—which could use a friend these days. In his plurality opinion, Justice

Stephen Breyer reminded the government that the Assistance of Counsel Clause grants a defendant “a fair opportunity to secure counsel of *his own choice*.” (Emphasis mine.) Put differently, the Sixth Amendment shields a defendant’s “right to be represented by an otherwise qualified attorney whom that defendant can afford to hire.” The government “would undermine the value of that right by taking from Luis the ability to use the funds she needs to pay for her chosen attorney.” So Luis must be permitted to pay her preferred lawyer with untainted funds.

Breyer acknowledges that the government has a “contingent interest in securing its punishment of choice (namely, criminal forfeiture),” and that victims have an “interest in securing restitution.” But these interests do not “enjoy constitutional protection,” and, “compared to the right to counsel of choice, these interests would seem to lie somewhat further from the heart of a fair, effective criminal justice system.” Breyer’s opinion was joined by Chief Justice John Roberts, Justice Ruth Bader Ginsburg, and Justice Sonia Sotomayor. Justice Clarence Thomas concurred with Breyer, but only in the judgment. Breyer, Roberts, and Sotomayor are surely pleased by *Luis*’ outcome: They dissented from a recent opinion which held that a criminal defendant indicted by a grand jury has virtually no right to challenge the forfeiture of her assets. *Luis* doesn’t necessarily cut back on that decision, but it does send a clear message that the Sixth Amendment’s Assistance of Counsel provision remains robust.

In a separate opinion, Thomas criticized Breyer for implying that courts may sometimes balance a defendant’s interest in hiring counsel against the government’s interest in freezing assets. “The Sixth Amendment guarantees the right to counsel of choice,” Thomas explains. “As discussed, a pretrial freeze of untainted assets infringes that right. This conclusion leaves no room for balancing.”

The Sixth Amendment denies the Government unchecked power to freeze a defendant’s assets before trial simply to secure potential forfeiture upon conviction. If that bare expectancy of criminal punishment gave the Government such power, then a defendant’s right to counsel of choice would be meaningless, because retaining an attorney requires resources. ... 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.

For what it’s worth, I think Thomas is absolutely correct, although his separate concurrence drew no other justices. (Might Justice Antonin Scalia have joined it were he still alive?) Still, Sixth Amendment supporters should be pleased with the final outcome of the case. A government that can prevent a legally innocent person from hiring her preferred lawyer is a government unrestrained by the Sixth Amendment’s strictures. Make no mistake: *Luis* is a triumph for the right to counsel, at a time when it is in desperate need of a win.