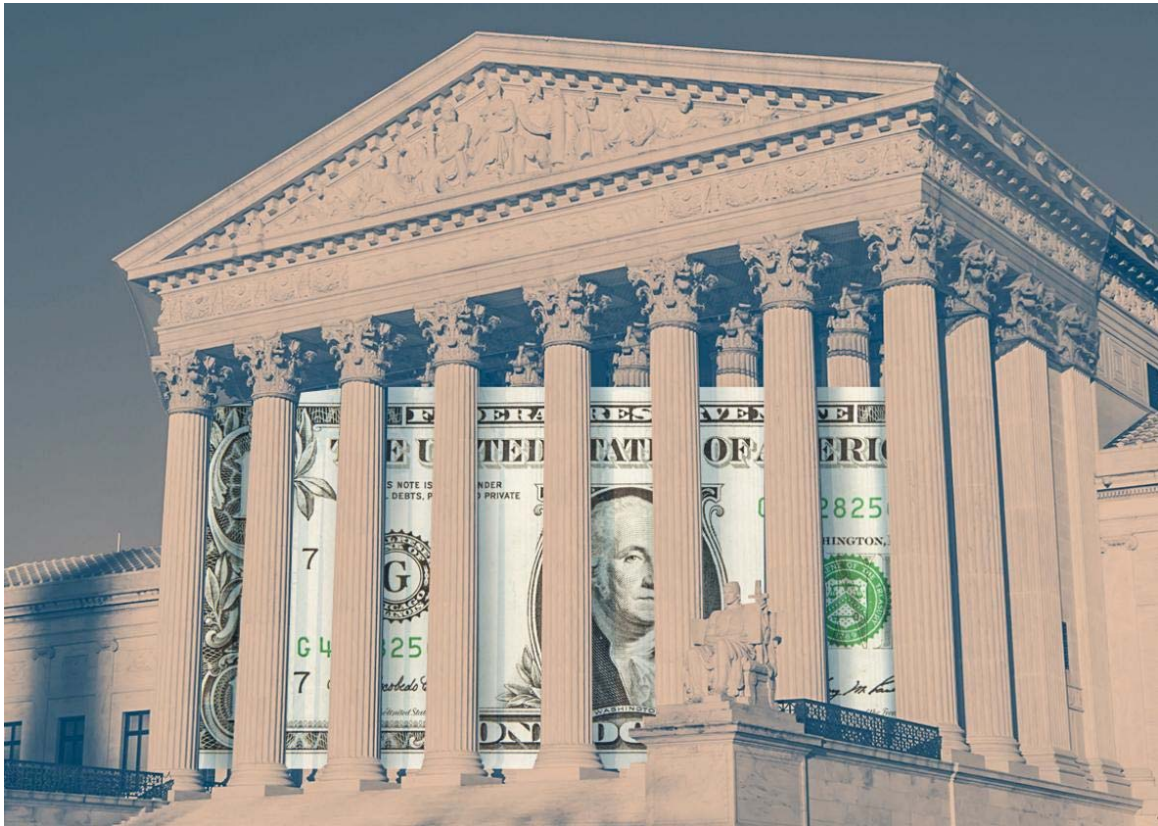


**SUPREME COURT DISPATCHES**  
**ORAL ARGUMENT FROM THE COURT**  
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## When Can the Government Freeze Your Assets?

On bank robbers, rent, and partying with Justice Samuel Alito.

*By Mark Joseph Stern*



On Tuesday, in *Luis v. United States*, the Supreme Court debated when the government can freeze your assets.

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**S**ila Luis wants a good lawyer. Charged with defrauding Medicare for millions of dollars through kickbacks and overbilling, Luis faces a three-week criminal trial—and, if convicted, heavy fines and a lengthy prison sentence. To secure counsel, Luis hopes to draw from an account entirely unrelated to her alleged fraud. But the federal government refuses to give her access to a single cent, freezing *all* of her

assets, including those untainted by her purported fraud. You can still get a lawyer to represent you, the government tells her—you just have to find one who'll do it for free.



Nobody is eager to stand up for a rich woman who allegedly swindled taxpayers for millions then demands the right to hire a fancy lawyer. But Luis seeks support from that longtime defender of unpopular plaintiffs, the Constitution of the United States. Scan through the Sixth Amendment, and you'll find that "in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." The Supreme Court has long held that this

provision includes the right of a defendant "to secure counsel of his own choice." Luis argues that, by denying her access to legitimate, untainted funds, the government is unconstitutionally denying her the right to choose her preferred attorney.

On Tuesday morning, Luis took her case to the Supreme Court to see if she could find five justices who agree with her theory. It'll be a close call. After a lively hour of arguments, it's not at all clear which way the court is leaning. This is one of those cases that transcends ideological (or, for cynics, partisan) divisions: a good old-fashioned stumper where what *seems* right and what the Constitution demands may very well be at complete odds.

Howard Srebnick, a lawyer from Florida, where Luis's alleged crimes occurred, kicks off arguments with a defense of Luis, and his glorious mullet instantly stands out in a courtroom filled with neatly trimmed locks and balding pates. Srebnick wants the court to draw a simple line between tainted and untainted funds. Tainted funds, the court held in 1989, can be constitutionally frozen even when doing so bars the defendant from retaining her preferred attorney. ("A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney," the court huffed.) But untainted funds, Srebnick argues, cannot be entirely frozen: The Sixth Amendment requires that a defendant be permitted to draw from untainted assets to pay an attorney of her choice.

This distinction holds for approximate 45 seconds, at which point Justice Elena Kagan thrusts the court into an ontological debate about money. Kagan describes two bank robbers: one who uses stolen money to pay an attorney, and one who uses stolen money to pay his rent—then uses the money he saved on rent to pay an attorney.

"Why," Kagan asks, "should the two cases be treated any differently for Sixth Amendment purposes?"

Srebnick tries to slither out of the hypothetical, but Justice Samuel Alito circles back to it with a devilishly clever twist. Imagine two brothers, Alito says, who rob a bank together and take \$5,000 each. That same day, a rich uncle gives them each another \$5,000.

"So they go out to party," Alito says, using "party" as a verb in a way that makes him seem weirdly hip. "And they both spend \$5,000 partying. One of them spends the

money from the bank robbery. The other one spends the money given to him by the rich uncle.”

“And your position,” Alito concludes with a look of pre-emptive incredulity, “is that the one who spent the money from the bank robbery” gets to use his \$5,000 to hire a lawyer—but the one who spent the money from the uncle is “out of luck”?

This is a trap, and Srebnick walks straight into it.

“Yes,” he responds firmly. Justice Anthony Kennedy looks flustered, as he so often does.

“You want this court to say, spend the bank robbery money first,” Kennedy says. The audience in the courtroom laughs a bit pityingly.

Srebnick recalibrates his argument to win over Justice Antonin Scalia’s heart. Scalia loves few things more than property and originalism, so Srebnick brings up both. He starts with property, arguing that defendants have a “valid property right” in untainted assets, which the government cannot violate. Scalia quickly shoots him down, asking why, if Luis fully owns her untainted assets, she has a right to use them for a lawyer and not for anything else she chooses.

“That seems to me a very evanescent line,” Scalia grouses. “I don’t know why the property case is stronger” in the Sixth Amendment context.

“So they go out to party,” Alito says, using “party” as a verb in a way that makes him seem weirdly hip.

Good point! Srebnick veers toward originalism instead, noting that the Supreme Court did not grant all indigent defendants a right to state-appointed counsel until 1963. That means that, when the Sixth Amendment was ratified in 1791, the right to counsel would have been meaningless if the government could simply freeze defendants’ assets and “impoverish them by virtue of the accusation alone.” No money, no lawyer.

This argument is actually pretty compelling, but it finds no apparent takers. Srebnick seems to have lost his case—until Deputy Solicitor General Michael Dreeben steps up to argue for the prosecution. Dreeben suddenly faces an enfilade of sharp questions from Chief Justice John Roberts, Justice Sonia Sotomayor, and Justice Stephen Breyer. This unlikely troika dissented from the court’s latest criminal forfeiture case, a truly awful decision that found that indicted defendants don’t have the right to a hearing when the government freezes their legal funds. This time around, the three home in on an internal inconsistency with the federal law at issue. The statute, Roberts points out, allows a judge to exercise “equitable discretion” in unfreezing funds the defendant may need—to pay her daughter’s tuition, for instance.

“If he can exercise equitable discretion for the daughter’s tuition,” Roberts asks, eyebrows furrowed, “why not when the Sixth Amendment is at stake? It would seem to

me that if there's going to be a case in which equitable discretion will be exercised, it ought to be in that situation."

"Well, I don't think automatically so," Dreeben answers weakly. Breyer makes a similar point, noting that the government often lets defendants out of jail on bail unless they pose a serious flight or safety risk. Shouldn't there be a similar principle allowing defendants like Luis to use untainted funds to pay their preferred lawyers?

"Let's try to think of an exception" for the forfeiture rule, Breyer concludes. "If there is one ... *it's called the Sixth Amendment.*"

Sotomayor pulls out another frayed thread of Dreeben's argument, observing that the government's position here is really quite unprecedented.

"This is the first statute that I know of," Sotomayor says, "that permits the government to come in and take untainted funds." If the court signs off on this, what's the limiting principle? With tainted funds, Sotomayor explains, the principle was clear: "You stole this money somehow, and you can't spend that money because it belongs to someone else." But what about your own hard-earned cash? Can the government really take all of that away from you when you are, in the eyes of the law, completely innocent?

Dreeben does not have a solid answer to this question except to promise that the government won't go too crazy with forfeiture. Is that enough? It's hard to count five votes for Luis—but it's hard to count five votes for the government, either. Luis isn't an appealing defendant, and her request to spend lavishly on an excellent lawyer doesn't exactly tug at the heartstrings. At the same time, the idea that the government can control her finances when she's been convicted of no crime is deeply troubling. In recent years, the abusive use of forfeiture has surged as a key civil liberties issue, as reports of law enforcement targeting the poor and defenseless draw outrage. The Supreme Court can't halt the practice by letting Luis hire a lawyer. But with the right ruling, it could tip off the government that its habit of freezing and seizing legally innocent people's money has spiraled out of control.