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IN THE SUPREME COURT OF THE UNITED STATES

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SILA LUIS, :

Petitioner : No. 14-419

v. :

UNITED STATES. :

- - - - - x

Washington, D.C.

Tuesday, November 10, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

HOWARD SREBNICK, ESQ., Miami, Fla.; on behalf of Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	HOWARD SREBNICK, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	MICHAEL R. DREEBEN, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF	
9	HOWARD SREBNICK, ESQ.	
10	On behalf of the Petitioner	54
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(11:07 a.m.)

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

Mr. Srebnick.

ORAL ARGUMENT OF HOWARD SREBNICK

ON BEHALF OF THE PETITIONER

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

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

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

CHIEF JUSTICE ROBERTS: What do you do about
Monsanto?

MR. SREBNICK: In Monsanto and in Caplin &
Drysdale, those were cases involving tainted funds, drug
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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22
23
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A				
a.m 1:13 3:2	advance 56:25,25	42:8,9 54:19 55:2	40:1 42:14 44:6,9	authority 31:4
ability 23:19 26:2	adversarial 12:17	57:2	44:11 48:21 52:1	authorize 24:23
36:6 37:3	adversary 35:10	Americans 51:14	54:2,5 55:18	automatically
able 12:13 30:5	45:2	amicus 52:1 55:13	arguments 15:11	36:23 38:15
32:4 47:1 52:5	advice 3:12	amount 4:24 13:3,4	15:11 52:18 53:22	available 30:7 32:8
57:2	advocating 50:1	35:13 50:3	53:22	33:18 43:1 49:1,6
above-entitled 1:11	affect 8:4	amounts 41:12	articulated 27:7	51:24
57:7	afford 24:2 48:17	announce 10:17	aside 8:16	avoid 31:13 55:14
abuse 48:12	afforded 38:22	annual 12:1	asked 11:6 22:23	avoidance 32:2
academic 23:23	ago 21:15 24:8	answer 6:8 9:7	24:25	42:7 55:1,6
accepted 54:10	agreed 35:9	14:12 19:25 48:8	asking 22:18,19	avoids 31:21
accident 32:21	ahead 41:16 53:14	54:20	aspects 27:5 36:11	
accommodate	aimed 43:22 52:21	answering 52:14	assault 32:20 48:12	B
19:15 22:19 26:5	alienation 31:5	ante 56:20	assessment 48:23	b 39:25 40:10,17,20
31:2	Alito 6:15 7:7	antifraud 42:19	asset 10:23 30:9	42:4,12 43:5
accommodated	18:12,19 19:1,25	anymore 45:20	55:22 56:5	52:13,23 53:1,6
21:17 25:7	20:5 41:5,16 42:2	anyone's 53:5	assets 3:17,18 4:8,9	back 6:15 13:10,17
accommodation	52:12 54:13,14	anyway 29:21	5:10,19,24 6:4,9	36:13 38:24 47:11
13:7	55:5	apart 5:2 8:5	6:10 7:3,21 8:5	52:10 54:23 55:21
account 4:18,19	Alito's 52:10	apparently 8:10	9:22 10:8,12,19	background 31:10
41:6	allegations 6:14	APPEARANCES	11:1,8,13,13,21	bad 4:16 30:18
accounts 30:13	allege 50:12	1:14	11:21,22,22 12:5	bail 29:3
41:6	alleged 5:2	Appendix 6:9	12:8,10,19 13:2,8	balance 25:1 26:7
accurately 40:8	allegedly 7:11	applied 47:21	14:4,22,23 15:5,6	36:25
accusation 21:21	19:23	applies 18:4 19:5	15:20 16:4,10,20	bank 4:14,17,18,19
accused 22:4,21	allow 3:17 11:19	33:24 53:16	16:23,24 18:7,10	6:19,25 7:3,14
26:6	25:1	apply 18:4 23:7	20:7,8 21:4 22:6,6	14:7,8 27:14
acknowledgment	allowance 8:11	42:8 49:14,15	23:5 24:3,10,23	43:11
35:20	allowed 47:9	appointed 3:14	25:2,20 26:3,21	bank's 39:12
acquired 6:13	allows 8:24 32:14	15:25 21:16,18	26:25 31:20 32:12	banking 25:11
Act 23:8	40:12,14,17 51:17	23:8	32:23 33:25 34:10	30:12 41:3 43:6
activity 5:2,6 6:13	alternative 51:19	appointment 15:18	34:17 35:4,13,14	52:7
8:6 20:10 40:25	altogether 54:12	38:23	36:21 37:7,10,13	banks 41:11
47:15,19	ambiguous 55:4	appropriate 26:15	39:9,10 40:14	bar 23:7,21 33:1
add 23:22 34:2	amendment 3:10	36:25	47:16,23 48:4,11	54:9 56:16
added 42:24 47:24	4:3,23 9:5,17,19	area 32:13,17	48:15,25 49:13	barring 26:24
address 42:11	10:22 12:6,7,15	areas 19:3	54:8 55:24,25	based 21:4 22:2
addressed 26:17	12:16,20,20,21,25	argue 37:11 49:12	56:8,12	44:11
addresses 40:19	13:13,14 15:7,14	argued 24:8 55:8	assistance 3:12	basic 29:7 40:7
adequate 11:19	15:15 17:1,14,16	arguing 16:11	associated 5:17	46:5 47:24 48:3,5
33:6	17:19,21 19:18	argument 1:12 2:2	assume 33:24	basically 32:3,7
adequately 26:23	20:23 21:1,8,10	2:5,8 3:4,6 5:24	attachment 21:4	47:18 50:24
32:4	21:12,22 22:11	9:19,20,20 10:7	attempt 35:15	basis 33:2,12
adopted 26:18 28:5	27:22 29:23 30:21	13:19 14:10 15:4	attorney 4:16 7:5	battery 32:20 48:12
adoption 3:13	30:25 32:5 33:19	18:13 26:4,11	19:9 26:21 49:5	bear 12:25
	37:12,16 38:9	27:4 35:18,23	Aunt 56:11	beginning 19:8

<p>28:18 behalf 1:15,18 2:4 2:7,10 3:7 26:12 54:3 believe 18:7,8 20:15,18 26:19 34:19 43:20 belong 27:11 45:1 belonging 11:14 belongs 10:19 27:13 43:11 44:25 beyond 8:10 27:17 28:23 29:12 bill 3:13 8:16 37:23 birthday 6:21,22 bit 30:3 blue 10:1 bodily 32:22 boiler 42:20 bona 23:21 books 49:15 bought 45:4 break 30:3 Breyer 27:9,13,23 27:24 28:1,3,10 28:13 29:9,14 30:15 32:7 34:3 38:24 39:3,6,16 39:17,20,23 40:4 43:4,25 45:15 49:19 51:21 Breyer's 51:11 brief 10:1,4 23:25 24:5 51:14 briefs 22:24 brings 16:8,10 17:11 43:3 brothers 6:18,19 brought 42:6</p>	<p>36:15 54:6 55:18 56:4,7,17 care 32:24 51:6 carry 10:18 case 3:4 6:7 13:1,21 14:3,13 16:5,8,9 16:11 17:5,10 19:8,12 20:23,24 21:1,24 22:13 23:4 24:8,22 25:22,23 26:16,19 27:8,15,21 29:25 30:17 32:5,9,11 32:19 33:5,7,17 35:21 36:15 38:11 38:22,23 40:23 42:1,9,18 43:2,2 43:23 44:3,17 46:18 47:6 48:12 48:13,19,24 50:7 50:9,22 51:6,25 52:6 53:8 55:11 57:5,6 cases 3:24 4:22 9:11 19:19 31:10 36:7 44:13 48:13 48:17 49:2,3,8,9 49:20,21 56:14 cause 7:12 17:6,9 17:11,17,18 18:5 18:7,8,10 20:15 20:18 22:1,2,5 26:23 28:12 33:9 33:12 34:19 41:23 43:20 caused 32:21 century 16:1 cert 42:5 54:18,21 55:6 certainly 12:3 19:10 22:18 25:7 cetera 11:20 challenge 22:3 chance 31:24 changed 45:24 charge 13:5</p>	<p>charges 7:23 Chief 3:3,8,21 4:1,5 5:3,12,22 8:7,14 8:15,20 13:10,18 15:2,13 23:13,16 26:9,13 27:1 33:21 34:2,12,16 37:5,22 38:6 49:7 50:5,14,18,21 51:1 53:14,24 54:4 57:4 choice 11:17,23 13:4 15:1 17:13 18:11 19:10 20:1 24:3 25:9 36:6 37:3 38:10 56:3 56:22 Circuit 25:5 54:22 55:3 circuits 24:22 25:3 circumstances 13:22,24 28:6 29:4 civil 37:18 38:3 43:2 CJA 23:14 CJA-appointed 23:7 claim 4:6,7 9:16,17 claims 21:25 clean 41:19 clear 14:2 44:14 48:8 52:21 clearly 34:9 40:1 client 43:9 client's 56:11 coexist 17:12,14,20 coexistence 56:2 collect 47:1 combine 35:19 come 9:13 25:15 31:10 32:11 36:23 42:22 44:22 comes 6:21 8:17 29:8 37:8,23 38:4 comfortable 35:23</p>	<p>coming 36:13 commingled 18:22 commits 35:2 committed 7:11 14:20 34:20 common 18:14 compare 4:12 compelling 9:14 compensation 49:6 50:8 competing 55:13 complaining 21:9 21:11 completely 52:13 complicated 19:2 36:6 component 8:1 concede 9:12 concept 44:23 46:5 concern 32:2 concerned 7:19 34:3 concerns 24:24,24 concluded 40:18 55:3 conclusion 10:18 32:5 33:6,17 42:1 43:1 44:16 47:6 48:18,24 51:25 52:5 confines 32:17 conflated 24:11 Congress 25:1,10 26:1 32:10 41:8 42:24 47:14,21 52:20 congressional 52:19 connected 4:10 20:9 consequence 48:9,9 48:20 consequences 48:16 consideration 38:15</p>	<p>considered 55:13 consistent 14:18 conspiracies 47:18 conspiracy 6:14 Constitution 19:18 21:23 24:1 55:9 constitutional 9:5 10:23 11:11 12:2 12:4 14:10 15:12 26:22 30:25 31:14 31:21 32:1 42:6 49:25 54:24,25 55:6,14 constitutionally 10:13 11:16,19 constrained 54:22 construed 8:24 contains 40:7 contemplated 21:12 context 12:17 25:22 27:2 30:12 34:3 41:3,4 44:19 50:9 52:4 54:19 contingent 33:2 contrary 44:12 contributes 42:15 control 23:5 controlled 13:8 25:17 34:21 controversial 23:24 convict 22:8 convicted 28:23 29:3,12 39:13 43:17 50:3 conviction 5:13,14 7:23 13:6 16:22 19:12 convictions 49:24 convincing 14:3 core 3:13 correct 11:12 29:14 33:3,14 34:1 35:4 39:22 55:8 cost 37:9 costs 23:1 48:14</p>
<p>C</p>				
<p>C 2:1 3:1 called 29:22 55:23 candidly 56:18 Caplin 3:23 18:1 23:25 24:5,8</p>				

<p>49:4 counsel 3:12,14,17 9:3,6,9 11:16,23 13:4 15:1,12,17 15:18,24 16:4,5 16:25 17:13 18:11 20:1 21:13,18 22:21 23:6 24:2 25:9 26:9 33:23 36:6 37:2,4,5,21 38:10,21,22 45:20 47:5 48:17 51:17 53:17,20,24 56:3 56:13,21,21 57:4 counterintuitive 55:24 country 22:4 29:2 course 5:13 13:8 17:20 21:14 22:15 29:18 53:8 court 1:1,12 3:9,15 7:14,25 8:24 9:14 10:25 13:8,12,13 14:5 19:24 21:17 22:9,25 23:1,5,9 24:1,9 25:23,23 26:14 27:7 31:4 35:16 36:1,10,22 37:8,19,21 38:19 38:20 40:17,18 43:9 44:8 49:16 52:17 53:22 54:10 54:25 55:10,13 57:3 Court's 14:18 44:12 56:13 courts 11:12 23:12 23:19 covers 53:2,2 creditors 18:23 crime 4:10 5:17 6:11 7:11 14:20 14:23 16:8,11,13 20:9,21 27:17 32:22 35:2 39:13 45:5 49:15</p>	<p>crimes 25:15 30:12 33:4 52:8 criminal 5:2 6:12 7:20 8:6 13:1 16:19 20:10 22:13 23:8 25:8,22,24 26:5 38:21,23 43:2,21 47:19 48:13 critical 30:4 current 8:18,22 currently 11:14</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 D.C 1:8,18 da 28:2,2,2 daily 8:9 damage 19:20 date 48:13 55:21 daughter's 8:16 37:23 38:8 day 6:20 7:22 12:19 30:6 35:16 days 37:25 deals 46:23 decades 22:7 decides 27:8 defects 47:16 defendant 3:17 5:13,18 7:9,11,20 8:9 9:13 11:14 12:21 14:6,24 15:23 16:3,17 19:9 20:8 22:13 24:2 25:8 26:24 27:11 28:16,21 33:23 34:5,6,8,10 34:11,13,19 36:17 37:4,8,25 38:4,16 38:17,18,21,22 41:9,10,21 46:6 47:4 49:8 51:17 56:19,25 57:1 defendant's 8:4 11:20 15:19 16:10</p>	<p>16:20 18:9 19:10 20:1 21:4 27:15 43:24 44:1 defense 13:5 16:12 23:1 54:9 56:15 definition 22:1 degree 6:3 21:14 degrees 6:3 delivered 54:6 Department 1:18 depends 44:5 deprivation 12:7 deprives 5:20 depriving 36:5 Deputy 1:17 derived 40:25 described 7:19 40:16 describes 40:8,9,11 40:21 42:17 designed 30:11 despite 15:7 destroys 17:18 determine 12:18 determined 5:15 developed 47:17 devout 11:25 difference 16:15 18:17,20 24:9,12 24:14 27:3 28:24 42:3 45:14 different 5:22 6:17 9:13,24 13:22,24 14:7 18:2 24:22 25:4 42:16 46:4,4 46:5 48:2 52:19 differently 4:23 18:25 difficult 6:6 30:14 41:7 52:7 disappear 54:11 disbursement 23:6 discovery 23:11 discretion 37:20 38:4,8,12 53:21 55:10</p>	<p>discussion 23:23 disincentivizing 8:2 disposal 24:4 disposition 31:5 32:23 dispute 3:19 6:10 14:14 dissipated 30:8 35:6 dissipating 26:25 34:10 52:22 dissipation 4:25 36:21 distinction 13:11 17:9,25 25:14 distinctions 49:17 50:6 distinguish 44:7 distinguishing 15:4 district 8:24 22:25 23:1,12,19 37:19 37:21 53:21 doctrine 42:6 44:12 54:25 doing 5:9 16:21 25:16 52:22 dollars 41:4 49:23 dormant 47:13 doubt 27:17 28:24 29:13 draw 36:4 45:17 49:17 drawn 50:6 54:7 Dreeben 1:17 2:6 26:10,11,13 27:6 27:12,24 28:3,11 29:9 30:2 31:23 33:3,10,14,20 34:1,6,15,18,24 35:5,11,17 36:9 37:15 38:2,14 39:2,5,16,18,22 40:3,6 41:18 42:16 43:18 44:4 44:18 45:8,11,18</p>	<p>45:21,25 46:3,12 46:15 47:7,12,23 48:18,22 49:16 50:4,16,20,23 51:2,8,18 52:9,16 53:4,19 drew 56:3,4 driving 32:22 drug 3:24 4:6,7,9 5:5,8 9:25 14:1,7 14:11,24,25 18:8 47:18 drunk 32:21,21 druthers 54:9 Drysdale 3:24 18:2 23:25 24:5,8 36:15 54:6 55:19 56:4,8,17 due 8:17 10:24 37:24</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 14:10 41:5 48:1,8 56:1 earned 15:21 economically 44:6 economics 18:13 effect 32:25 37:2,3 either 7:23 32:8 elements 14:19 Eleventh 54:22 55:3 else's 28:16 36:18 emanate 24:25 embedded 29:10 encompassed 15:15 enforce 22:10 enjoin 31:4 ensure 22:25 43:1 ensuring 30:7 33:18 41:24 enter 22:9 entertain 53:22 entire 19:17 entitle 37:13</p>
---	--	--	--	--

<p>entitled 7:4 32:23 34:7 envisioned 16:25 equitable 38:4,7,11 equities 37:1 equivalent 26:3 30:8,16 31:8 41:1 41:14 43:16 46:7 52:2 ESQ 1:15,17 2:3,6 2:9 essence 29:19 35:18 46:20 essentially 25:17 53:1 54:11 establish 14:11,19 56:5 established 3:15 14:2 17:21 26:23 establishes 33:22 41:23 estate 6:13 et 11:20 evanescent 20:22 event 32:20 events 25:6 evidence 14:3 42:22 exact 13:14 exactions 50:7 exactly 31:12 39:5 example 6:12 13:15 13:16 19:21 23:2 34:9 exception 8:24 16:12 19:17 29:16 29:20 37:16 exceptions 29:15 29:17 exciting 5:23 exclusive 5:19 execute 16:19 execution 16:18 exempts 53:20 exercise 16:24 38:3 38:7 56:21 57:2</p>	<p>exercised 38:12 expands 52:24 53:1 expect 45:22 expenditure 47:10 expenditures 9:13 53:18 expenses 4:20,21 8:9 9:16 explain 27:25 explained 51:20 explicitly 13:12,20 expressed 25:5 expressing 45:15 extend 11:22</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fabric 17:22 faces 7:21 fact 28:15 34:10 46:21 50:1 52:6 53:6 facts 28:14,20 factual 28:6 35:20 fair 11:6 24:2 35:22 55:11 fairly 29:7 family 6:12 Fang 25:23 far 10:14 35:5 favor 45:23 feature 46:24 fee 56:25 fewer 35:5 fide 23:21 figure 35:15 final 41:2 financial 5:17 8:3 22:14 41:23 financial-type 52:8 find 28:2 49:22 finding 17:6,11,17 18:5 fine 16:9,12,20 28:22 49:11,13 50:2 56:19,23 fined 27:18</p>	<p>fines 49:17,18,23 finish 41:17 first 7:14 12:6,19 12:25 13:10,14 14:1 28:15 31:25 39:1 40:12 44:20 47:9,20 54:17,20 fiscal 50:24 five 45:23 Fla 1:15 flat 37:20 flight 30:8,9 flow 41:5,6 flows 30:13 focus 30:23 39:7 52:19,21 focused 27:4 54:24 follow 6:4,4 following 19:19 24:1 follows 25:25 forbid 26:20 forbids 37:20 forfeit 28:9 30:6 32:4 45:9 forfeitability 14:19 forfeitable 36:16 37:14 45:7 forfeited 26:21 forfeiture 8:1 9:25 25:13,19 46:1,6,7 46:17 47:2,13,24 48:3,11 51:14 form 22:15 42:12 forth 51:13 found 5:14 19:24 22:5 49:8 founding 55:21 four 53:25 Fourth 25:5 fraction 37:11 frankly 27:20 45:22 fraud 40:13 41:22 42:23 43:2 49:20 49:21 50:9,11,13</p>	<p>51:3 52:23 frauds 25:11,12 free 12:5 freeze 8:10 10:7 15:6 35:3 48:11 48:11,15 49:12 51:5 freezing 37:7 50:1 friend 53:11 fringes 22:24 front 56:20 frozen 56:6 frustrating 26:24 fulfill 12:13 function 46:4 fund 41:25 43:13 50:11,15,16,17,23 51:2 funds 3:24 4:3,4 15:20 22:19 23:6 35:9 36:16 37:21 40:23,25 41:1,11 41:13,20,20 44:20 44:22,23 47:10 49:5 51:3,4,6,24 56:11 fungible 18:14,21 30:13 35:20 41:4 41:21 further 42:23 future 22:7</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 game 32:8 general 1:17 13:16 24:6 25:4,13 36:23 General's 24:7 gift 7:9 Ginsburg 11:2,10 25:10 26:1 30:11 48:6 51:8,18 give 11:12 21:3 28:17,18 53:21 given 7:1 23:18</p>	<p>26:2 52:6 54:23 gives 6:22 46:13 53:5,11 giving 34:4 go 6:15,23 10:14 12:12 19:12 28:1 41:16 47:11 50:18 50:21 52:9 53:14 goes 4:14,17 8:10 13:9,17 23:8 35:18 43:14 44:11 50:14 going 10:3 12:13 19:7,12 20:19 22:4 29:16 31:3 37:9 38:11 41:10 42:20 46:20 47:1 good 3:19 44:9 govern 23:21 governed 25:12 government 4:25 5:16 7:18 9:2,8 10:9 16:18,21 20:14 21:3,19,25 23:24 26:3,20,23 27:16 28:7,8 30:5 32:3,11,18,23 33:5,11,16 36:19 36:20 37:1,18 40:10,12,22 41:22 42:17,22,25 43:3 43:7 44:15,21 46:18 47:1,10 48:25 52:5 54:10 55:20 56:5,9,18 56:23 57:1 government's 8:10 27:2 32:6 39:14 44:16 47:5 governments 49:10 49:11 grand 22:5 guarantee 12:21 guess 10:2 15:2 43:12 49:14 guilty 5:14 27:16</p>
---	--	---	--	--

49:9 guy 30:17	22:15 inception 15:15,22 incidence 44:22 include 6:11,13 includes 5:16 including 43:12,13 indict 42:22 indicted 43:6 indictment 16:4 17:11,14,16 22:1 33:13 indigent 21:18,20 21:20 individual's 3:11 inflict 22:13 inheritance 7:9 15:21 injunction 11:15 12:5 37:18 40:13 40:23 42:19,23 injunctive 11:13 injury 19:20,21 21:25 32:22 53:9 innocent 44:1,4 insofar 44:10 instance 26:2 instances 9:11 18:21 interest 5:1 7:8 8:5 14:6,8 18:24 19:11 30:7,24 33:18 36:25 39:14 41:23 47:4,5 56:9 interests 19:15 28:2 31:2 32:6 50:24 interferes 11:15 interim 40:15,16 interpret 25:16 interpretation 26:4 51:9,11,13 52:11 52:13 54:23 55:12 57:3 interpretations 55:14 interpreted 25:3 interrelated 21:14	intuition 13:19,20 36:7 intuitive 45:16 investigation 23:10 invoking 55:20 involving 3:24 32:22 49:21 issue 13:25 23:4,4 24:21 33:22 34:9 35:15 37:10 42:4 42:9 45:10 49:5 49:18 50:8 54:24 55:15 issues 9:17 23:19 34:8	18:19 19:1,25 20:5,11,21 21:6,9 22:22 23:8,13,15 23:16 24:13,17,18 25:10 26:1,9,13 27:1,9,13,22,23 27:24 28:1,3,10 28:13 29:9,14 30:11,15 32:7,15 32:16 33:3,8,11 33:20,21 34:2,3 34:12,16,22,25 35:1,8,17 37:5,22 38:6,24 39:3,6,16 39:17,20,23 40:4 41:5,16 42:2 43:4 43:25 44:18 45:9 45:13,15,16,19,22 45:25 46:2,10,13 47:7,8,20 48:2,6,7 48:20 49:3,7,19 50:5,14,18,21 51:1,8,11,18,20 52:9,10,11,25 53:12,14,15,24 54:4,13,14 55:5 55:16 57:4 Justice's 5:22 13:10 13:18	48:7,20 49:3 kind 47:14 kinds 8:2 9:11 31:20 know 4:15 5:7,23 6:2 8:8 10:16,24 12:14 14:1 18:17 20:12,22,23 22:22 22:23 29:6,7 31:12 35:14,18,22 37:6,23,24,24 38:9 39:20 40:4 42:5 44:21 knowing 31:9 knows 37:24
<hr/> H <hr/> happens 6:21 25:19 25:21 hard 25:15 29:1,20 harmed 49:4 health 51:6 healthcare 25:11 30:12 41:4 hear 3:3 5:23 39:1 heard 27:19,20 38:25 54:5 55:17 hearing 31:18 34:5 34:7,8,14 36:25 hearings 11:20 held 15:19 hire 7:4 19:9 20:1 21:15 29:5 36:6 history 47:12 holding 43:24 hope 31:23 36:9 horribles 56:17 hours 23:9 HOWARD 1:15 2:3,9 3:6 54:2 huge 50:3 hundreds 49:22 hypothetical 19:22	<hr/> I <hr/> idea 48:5 illegal 40:25 Illinois 17:15 imagine 27:23 immediacy 12:9 immediate 12:11 immediately 12:5 important 12:17 22:18 28:4 impose 40:18 imposes 16:9 impoverish 21:21 improved 47:15 incarceration	<hr/> J <hr/> jail 29:18 30:17 jewelry 6:12 Joint 6:8 Jones 27:14 judge 22:8 38:3,15 39:8 51:15 judgment 10:11 16:16,17,18,19,22 17:3,9 20:17 21:5 22:9,10 28:8 32:11 35:21 36:12 36:22 41:24 45:2 45:6 46:11,13 47:2 52:6 judgments 49:20 49:22,23 jury 22:5,8 Justice 1:18 3:3,8 3:21 4:1,5,11 5:3 5:12,21 6:2,15,16 6:16 7:7,13,16 8:3 8:7,14,15,20,25 9:1,7,18,23 10:2,6 10:16 11:2,6,10 11:24 12:11 13:9 13:15,23 14:9,12 14:15 15:2,3,13 16:7,14,15 17:1,5 17:8,23 18:6,12	<hr/> K <hr/> Kagan 4:11 13:9,23 17:23 18:6 33:20 35:17 45:16 47:7 52:9,25 53:12,15 Kagan's 6:16 Kaley 14:18,21 22:3 33:24 34:13 34:20,22 keep 29:17 30:17 36:13 keeping 7:25 Kennedy 5:21 6:2 7:13,16 8:3 9:1,7 14:9,15 17:5,8 32:16 33:3,8,11	<hr/> L <hr/> labors 15:22 language 45:24 Laughter 5:25 7:15 23:17 laundering 7:23 law 5:20 7:13 18:24 20:13 21:7,10 33:1 43:6 49:25 lawful 4:9 5:1 14:6 14:8 20:8 24:3 lawfully 11:21 15:19,21 laws 18:20 lawyer 3:20 4:21 15:25 21:15 23:8 23:8 29:5,22 30:20 36:17,18 37:9 lawyers 8:16 32:10 leaves 36:4 left 15:24 18:16 49:13 legal 13:5 36:11 let's 19:4 27:14 28:20 29:19 30:23 37:6 levy 18:23 liberty 12:23 13:6 29:11

<p>license 21:19,20 life-or-death 9:12 9:12 light 30:24 32:1 limit 10:17,20 12:15 51:21 54:19 limited 13:3,4 33:4 33:5 44:20 line 20:12,23 36:4 41:20 45:17 54:7 54:8,9,11,11 56:3 56:4,19 Lisa 19:22,23,23 literally 43:5 little 29:6 30:3 locality 32:19 lock 22:6 lockdown 25:25 Locking 16:23 locks 25:20 logic 4:2,6 10:6,11 11:7 logical 10:18 51:22 long 20:7 47:11 look 30:16 37:9 looking 23:14 looks 55:11 loot 14:8 lose 16:17 loses 35:22 lot 31:10 luck 7:5 Luis 1:3 3:4 4:8 18:10</p> <hr/> <p style="text-align: center;">M</p> <p>major 18:20 majority 14:21 making 9:19 13:11 33:6 malicious 32:20,21 man 43:10 man's 39:9,10 manage 23:6,19 managed 23:11 market 49:20,22</p>	<p>matter 1:11 18:13 20:3 38:2 43:13 57:7 mattered 35:16 matters 9:12 maximum 56:23,24 mean 4:11 5:5 8:8 12:12 18:1 19:4 28:15 29:17 35:25 36:1 43:14 49:2,9 49:21,23 meaning 12:8 45:20 53:2 means 22:14 31:14 31:15 51:12 meant 15:23 measure 40:15 measures 40:16 Mecca 12:1,12,24 mechanism 43:22 Medicaid 50:15 medical 32:24 48:14 49:4 Medicare 41:22,25 50:9,11,16,17,23 51:2 member 56:15 members 44:8 merely 22:4 merit 55:12 Miami 1:15 MICHAEL 1:17 2:6 26:11 milk 43:9 million 5:5,6,7,8 35:3,4 37:7 50:12 56:19,20 millions 49:22 mind 7:25 29:25 minutes 53:25 mischievous 32:21 mixed 31:16 moment 16:23 29:25 45:6 Mona 19:22,23,23 monetary 30:8</p>	<p>41:13 48:23 50:7 money 3:11,25 4:6 4:9,15,16,18,20 5:6,8 6:24,25 7:2 7:3,14,21,23 8:11 9:15 10:10,10 11:4,5 12:2 14:1,7 14:11,14,24,25 15:16 17:2 18:8 18:14,15,16,21 19:6,9,11 20:14 20:16,18,19 21:15 27:10,15,18 28:16 28:21,22 29:5,22 30:13,13 32:5,8,9 33:7 35:20 36:18 41:21 43:1,7,20 43:24 44:1,1,2,4,5 44:15,24,24,25 45:3,4,12 46:6 49:13 50:8 52:7 56:11 Monsanto 3:22,23 4:13,15 13:12,25 14:2,23 18:1,1,3,3 26:16,17,20 27:4 28:5 30:4,5 32:1,3 33:15 35:19,19,24 36:2,8,11,14 44:10,14,19 47:3 54:6 55:18 56:3,7 56:16 mortgage 8:21 mount 13:4 move 54:11 Muslim 11:25</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 nation 15:23 55:21 naturally 56:15 nature 44:20 necessarily 11:12 19:5 necessary 22:20 38:23 48:9</p>	<p>need 9:14 12:8,9,12 13:2 23:10,10 38:19 39:18 41:8 47:2 48:25 needed 13:3,4 16:20 38:21 53:8 56:12 needs 11:22 13:7 16:4,24 22:17 25:8,24 26:5 42:25 negated 7:10 negates 5:1 41:19 negligence 48:13 never 27:19,20 39:13 new 24:13 nice 10:17 non-tainted 47:21 notion 15:24,25 notwithstanding 26:4 November 1:9 number 22:15 29:15</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 object 39:8 40:14 40:22 objection 11:14 16:21 obligation 12:14 observation 14:18 observed 30:11 obtain 3:11 12:4 44:3 obtained 43:20 44:2 50:12 51:3 52:23 obtains 26:24 36:22 52:6 obviated 41:8 obviously 8:9 occurs 26:22 offense 34:20</p>	<p>offered 55:12 office 24:7 oh 5:7 27:18 Okay 10:5 28:24 once 10:17 36:16 39:15 41:21 one's 15:16 operation 42:21 opinion 14:21 22:3 opinions 55:18 opportunity 5:15 24:2 opposed 53:17 oral 1:11 2:2,5 3:6 26:11 order 8:10,19,23 26:24 31:6 37:7 37:19 39:21,24,25 40:24 43:8,8 48:13 51:12,13,21 54:24 55:14 56:20 57:2 orders 53:7 ordinary 9:15 organized 47:18 ought 18:4 38:12 outcome 12:25 override 32:6 33:19 owe 20:19 owned 11:21,21 22:7 owner 5:19 ownership 12:18 owns 3:18 5:2</p> <hr/> <p style="text-align: center;">P</p> <p>P 3:1 p.m 57:6 page 2:2 10:1 24:6 paid 50:2 pain 32:24 48:15 parade 56:17 parallel 43:2 part 17:21 18:23 22:22 33:23 particular 16:6</p>
---	--	--	---	--

<p>35:9 55:22 particularly 23:4 party 6:23 partying 6:24 passed 47:14 path 36:2,8 Patterson 17:15 pay 4:16,19,19,21 8:17,21 26:21 28:22 38:1 48:14 48:14 49:13 56:25 57:1 paying 36:17 47:4 payment 9:2,8,9 pays 36:17 penalties 5:17 pending 48:11 penny 22:25 pension 15:20 56:11 people 21:19 29:10 29:17 36:5 43:23 48:17 50:12,25 53:17 people's 43:7 percent 37:10,13 period 10:12 permanent 12:8 permit 37:1 46:1 50:1 permits 40:1 44:21 46:21 53:7 permitted 47:14 permitting 48:4 person 40:23,24 43:15,19 50:3 52:22,23 person's 44:24 personal 19:21 personam 47:13 perspective 11:11 persuasive 20:12 petition 42:5 54:18 54:21 petitioner 1:4,16 2:4,10 3:7 35:22</p>	<p>40:8 54:3 petitioner's 5:1 pick 51:17 pile 4:14,17 plausible 51:16,20 please 3:9 26:14 point 15:3 17:2 22:12 26:15 28:7 30:18,18 41:2 46:15,25 49:14 pointed 48:3 policy 46:9 pony 56:20 Ponzi 42:21 position 7:2,17 9:1 9:4 10:11 11:7 48:9 51:15 55:6 postconviction 18:2,4 postjudgment 36:15 posttrial 26:20 pot 18:17,18 power 11:13 powerful 13:19,20 19:11 practicing 33:1 precedence 20:2 precedent 56:13 precise 31:11 prefers 3:20 prejudgment 21:3 premise 29:10 41:19 present 6:22 13:21 56:9 preserve 37:1 48:25 51:24 pretrial 5:18 16:3 24:23 34:14 46:2 46:3,21 47:16 48:4 pretty 29:1,20 prevails 32:18 prevent 9:2 10:25 32:25 36:21 42:23</p>	<p>price 56:22,24 primary 8:1 principle 5:20 11:21 12:15 19:24 26:18 27:7,9,10 27:14,15,19 28:4 28:8,15 29:15 30:4,4 33:4 49:25 prior 26:25 private 3:17 16:5 22:21 33:1 privileged 5:23 probable 7:12 17:6 17:9,11,17,18 18:5,7,8,9,10 20:15,18 22:1,2,5 26:23 28:11 33:9 33:12 34:19 41:23 43:20 problem 18:12 35:2 45:15 55:2 problematic 44:10 procedure 25:24 40:11 proceeded 37:18 proceeding 12:17 12:22 38:17,18 40:19 proceeds 4:8 27:5 process 10:25 52:7 prohibit 31:6 prohibition 10:24 31:7 prohibitions 53:7 prohibits 43:9 projected 21:5 proof 20:3 property 4:7 5:1 7:8,10 8:5 10:9 11:3 12:22 13:6 13:25 14:6 16:2 16:17 18:20,22,23 19:20 20:13,24 21:7,10,13 24:19 26:18 28:9 29:11 30:6 31:4,5,7,8,12</p>	<p>31:15 33:17 43:16 44:16 45:4,5,6 46:1,8,8,14,16,16 46:18,19,22,23 47:3,21 52:23 55:17,19 56:9 proposed 11:1 14:17 proposes 18:11 20:8 54:10 proposing 14:16 proposition 23:24 propositions 28:25 prosecution 16:8 16:10 protect 53:8 protected 11:16 protects 17:2 provable 48:24 provide 19:16 48:10 49:11 provided 10:24 11:19 34:14 50:17 provides 43:21 providing 21:18 proving 27:16 provision 47:24 48:2 53:10 provisions 40:7 53:6 punishing 46:6 punishment 5:14 5:16 7:22 8:1 22:13,16 pure 44:6 purporting 21:3 purpose 31:19,21 43:12 46:5 51:5 51:23 purposes 4:23 11:1 49:18 put 51:13 puts 4:18 putting 8:16</p>	<p>question 5:22 6:6 6:16 11:6 12:6 13:10,18 19:8 22:23 31:14,22 32:1 33:15 34:7 34:22 36:20 38:20 44:9 45:14 49:24 52:15 54:21 55:16 questions 24:25 52:10 54:16 quick 54:15 quite 13:24 52:20 56:18</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 1:17 2:6 3:1 26:11 raise 12:6 34:8 54:17 raised 42:4 rape 48:13 rates 23:14 rationale 32:17 reach 9:16 reaches 9:17 read 10:3 30:23 31:1,9 39:24 43:5 53:16 55:18 reading 31:13 38:25 44:11 51:10 53:5,10,20 readings 51:16,19 reads 52:2 real 6:13 realize 36:12 44:7 really 9:18 15:25 22:10 32:2,15 42:7 45:1 46:20 reason 19:19 35:7 41:3 reasonable 5:10 23:2,21 27:17 28:23 29:12 52:20 reasons 9:15 51:20 rebuttal 2:8 26:8 42:11 54:2,15</p>
---	--	--	--	--

<p>received 41:21 recognized 3:10 14:5 recognizes 47:3 refer 42:12 reference 46:22 52:3 referring 8:4 43:19 reflects 48:5 Reform 51:14 refused 18:3 regard 12:23 regardless 42:8 regards 12:13 reject 57:3 rejected 13:12,20 17:25 53:23 relation-backed 44:12 56:10 relatively 47:17 release 29:3 released 22:20 releasing 37:21 relief 40:19 42:13 42:18 51:22 religious 12:14 rely 41:10 relying 20:13 remaining 7:4 54:1 remedy 47:15 remember 39:5 remind 39:4 render 21:19 rent 4:19,21 8:21 repeating 17:23 represent 14:25 41:13,13 representation 3:16 38:16 56:12 represented 3:20 12:22 14:25 15:17 17:13 22:21 25:8 31:19 37:4 38:18 represents 50:24 requesting 13:3 required 50:10</p>	<p>requires 24:1 reserve 26:7 resolved 28:5 33:15 resolves 26:19 respect 34:14,18 35:8 Respectfully 18:19 Respondent 1:19 2:7 26:12 response 40:5,6 55:16 responses 38:25 restitution 19:7,17 56:24 restrain 9:21,22 10:12 11:13 26:3 32:12,23 40:14,24 41:9,11,12 44:15 47:2,10 restrained 35:14 restraining 8:18,22 10:25 31:6 37:19 39:21,24,25 40:24 41:10 43:8,22,23 51:12,12,21 53:7 restraint 11:8,20 24:23 25:2 46:22 47:16 48:4 restraints 29:11 40:18 rests 36:11 result 43:20 44:2 retain 9:6 11:16 13:3 16:4 18:11 21:13 53:17 56:13 retirement 43:13 returned 50:11 51:4,7 revisiting 56:16 rich 6:21 7:1 right 3:11,14,14,16 4:1,7 5:20 9:5 10:9,22,23 11:16 12:2,4 14:10,24 15:12,16,17 16:17 16:24 17:12,15,19</p>	<p>19:7 20:1,16,20 21:6 27:4 28:9 29:18,24 30:2,21 33:7,22 34:5 36:3 38:2 45:19 46:14 46:18,19 50:3 56:3,21,21 rightful 4:6 rightfully 3:18 rights 3:13 7:10 13:6 16:2 17:12 20:2 25:7 26:5 57:2 road 36:2 rob 6:19 robber 4:14,17 14:7 robbery 6:25 7:4 7:14 ROBERTS 3:3,21 4:1 5:3 8:7,15,20 15:2 23:13,16 26:9 27:1 33:21 34:2,12,16 37:5 37:22 38:6 49:7 50:14,18,21 51:1 53:14,24 57:4 room 42:20 root 21:12 44:10 routine 9:16 rule 5:5 10:18,19 14:15,17 15:8 18:4 36:23 37:20 45:23 rules 19:2 23:7,21 Rumsfeld 55:10 run 30:17 31:3</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 Sally's 56:11 satisfy 16:20 saying 10:8 20:13 29:1,19 33:16 41:9 47:4 51:9 52:25 53:1</p>	<p>says 4:2,15 5:9 23:9 24:19 26:20 27:21 29:2 37:9 38:5 39:20 43:15 56:18 56:23 Scalia 11:24 12:11 13:15 14:12 16:7 16:14,15 17:1 20:11,21 21:6,9 27:22 47:8,20 55:16 scheme 42:21 second 14:5,20 39:1 40:5,6 54:18 section 24:18 30:10 40:9 46:21 53:6 sections 42:17 secure 10:10 24:2 secured 18:24 seek 5:16 40:10,22 42:17,22 seeking 37:18 seen 49:19,20 sees 36:10 segregated 18:22 segregating 52:7 seizing 37:12 seizure 34:16 sense 5:4 7:7 13:18 18:14 36:3 41:3 41:15,18 45:16 51:22 sent 36:8 sentence 26:16,19 27:8 separate 4:18 12:6 31:19 39:9,17 separation 39:10 serious 31:25 32:2 49:4 services 23:11 show 28:11 33:12 48:25 showing 32:12 33:6 shown 32:4 side 30:19,19,25</p>	<p>31:1 sides 28:2 significant 12:24 SILA 1:3 similarly 46:17 simple 6:8 35:19 simpleminded 29:6 simply 7:10,11 20:18 21:22 25:20 32:12 52:2 single 21:24,25 singled 25:11 situated 46:17 situation 19:6 20:25 36:4 38:13 situations 4:12 Sixth 3:10 4:2,23 9:5,17,19 10:22 12:7,15,16,20 13:13 15:7,14,15 17:1,13,15,19,21 19:18 20:23 21:1 21:8,10,12,22 22:11 27:22 29:23 30:20 32:5 33:18 37:12,16 38:9 42:8,9 54:19 55:1 57:2 slightly 5:22 Smith 27:13 43:6 so-called 4:25 7:3 7:20 18:15 Solicitor 1:17 24:6 24:7 25:3 somebody 28:16 36:18 42:20 somebody's 16:23 soon 35:2 sorry 51:1 sort 5:4 25:24 46:14 sorts 19:2 Sotomayor 8:25 9:18,23 10:2,6,16 11:6 22:22 24:13 24:17,18 32:15</p>
---	--	--	---	--

<p>34:22,25 35:1,8 44:18 45:9,13,19 45:22,25 46:2,10 46:13 48:3 Sotomayor's 15:3 sound 36:11 sounded 55:17 speak 25:21 56:10 special 25:12 specific 32:13,17 specifically 17:25 26:17 30:11 40:17 speedy 31:18 spend 3:11 6:24 7:14 15:16 18:9 19:9 44:23,25 spends 6:24,25 7:20 spent 5:6,7 7:2 18:15,17,18 32:10 49:5 split 6:20 spousal 48:12 Srebnick 1:15 2:3,9 3:5,6,8,23 4:5,11 4:24 5:12 6:1,7 7:6,8,18 8:13,18 8:22 9:4,10,23 10:5,14,21 11:10 12:3,16 13:9,23 14:13,17 15:13 16:14,16 17:4,7 17:10 18:6,19 19:16 20:4,7,20 21:2,8,11 23:3,15 23:18 24:16,20 25:18 38:17 42:10 44:7 53:25 54:2,4 54:20 55:8 stage 55:12 stake 10:22 12:23 19:6 38:9 standard 23:20 start 28:4 started 36:2 42:19 starting 26:15</p>	<p>State 32:19 48:10 49:11 States 1:1,6,12 3:4 50:25 53:9 statute 5:9 8:23 9:24,25 11:18 21:2 24:14,21,21 25:4,13 30:10,23 31:1,13 32:13 37:17 38:3,25 39:19 40:7,10 41:19 42:3,20 44:21 46:4,24 47:9,14,15,25 48:3 50:10 51:10 51:16,21,23 52:3 52:4,11 53:5,16 53:20 54:16 55:4 55:11 statutes 52:19 statutorily 10:13 statutory 9:19,20 15:10 26:4 steal 19:22,23 stipulated 35:11,12 stipulation 6:8 stole 44:24 stop 9:8 39:18 stranger 52:18 strong 9:14 20:3 35:23 stronger 20:24 21:1 strongest 50:7 struck 25:1 subject 6:9 22:2 55:22 submission 27:2 submit 3:16 submitted 57:5,7 subsection 40:10 40:12,17,21 46:23 subset 11:22 substantial 53:9 substantive 45:14 substitute 5:10 24:19 25:2 26:17</p>	<p>46:1,14,16,23 47:23 substituted 5:11 substitution 5:4 subsume 53:10 subsumed 52:13 suffer 29:11 suffering 32:25 48:15 sufficient 22:6 suggest 4:25 10:7 54:24 55:24 suggested 22:24 56:8 suggesting 52:12 suggestion 30:22 30:23 39:23 suggests 56:14 suit 40:15 superfluity 52:18 support 23:10 suppose 10:21 19:4 19:5 36:1 Supreme 1:1,12 sure 20:25 28:19 29:22 55:17 surely 8:20 26:22 sustained 19:19 swallow 19:17</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 tag 56:22 taint 6:3 55:20,23 56:2,10 tainted 3:24 4:3 5:24 6:5 7:3,21 11:3 13:25 15:4,7 18:7,15 20:15,16 24:10,15 25:14 27:3,5 31:5,7,16 41:13,20 44:5,20 44:23 45:12 46:7 46:8,16,22 47:10 54:7 55:22,25 56:5</p>	<p>taints 55:21 take 15:22 16:2,19 20:14,16,17 27:17 28:22 29:4 33:16 39:15 44:22 51:15 56:11 taken 28:16 takes 16:9 20:1 33:21 42:21 talk 25:21 talked 4:13 talking 14:15 16:5 27:10 28:6 31:12 33:8 49:3 talks 25:23 targeting 47:18 technical 35:12 temporary 39:24 40:15,16,19 42:12 51:12,22 tenable 51:10 52:2 tens 49:22 Thank 3:8 26:9,13 53:24 54:4 57:4 theory 42:24 44:5 55:20,23 56:2,10 56:10 thing 13:14 31:17 things 8:8 31:23 37:6 40:9,21 think 9:10 10:12 11:5,11 13:10,23 15:3,13 23:3,16 26:15 28:3 29:2,9 29:16,17,19,20 30:3,15,15 31:13 31:25 32:2 33:15 34:6 35:7,17,25 36:13 37:15 38:14 39:18 40:3,8 41:18 42:4 44:8 45:15,21 46:19,24 47:3,25 48:5,22 49:2,16,24 50:4,7 51:19 52:1,11,14 52:16,17,20 53:12</p>	<p>53:15,19 54:5 thinks 23:1 thought 5:21 17:24 34:12,13 threatens 13:5 three 45:23 51:16 time 3:12,14 5:18 16:3 22:8 26:7 28:7 47:11,20 54:15 tiny 37:11 title 3:19 25:23 33:16 today 6:10 9:16 10:23 24:25 56:18 told 35:10 totally 14:3 39:12 touch 5:8 touchstone 36:14 tough 49:21 trace 41:7 traceability 14:20 traceable 6:11 14:23 20:9 traced 6:12 tracing 34:23 35:2 transactions 8:3 travels 12:24,24 treated 4:22 55:25 treatment 25:12 treats 18:24 trial 12:9 26:25 28:18 48:12 triggered 17:16,17 55:1 trip 12:1 TRO 31:14,14,15 31:17 39:8,8,15 39:19 TROs 31:11 troubled 42:2 true 24:16,20 45:8 45:11,12 46:10,12 52:17 trumps 47:5 trust 41:25 50:11</p>
--	---	---	---	---

<p>50:15,16,17,23 51:2 try 18:23 19:14 27:14,24 28:14,20 29:19 30:2 52:4 trying 45:3 50:5 51:5 Tuesday 1:9 tuition 8:16 9:2,8 37:23 38:8 turned 38:20 turns 38:10 twin 6:18 two 4:12,22 6:18 14:19 17:12 19:15 21:13 24:12 25:15 31:20,23 38:25 40:7 42:16 54:15 type 34:5 types 33:4 49:17</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S.C 9:24,25 ultimate 12:18,25 40:14,22 42:18 uncle 6:21 7:1 uncomfortable 36:1,10 underlying 46:25 48:5 understand 10:3 15:5,6,8 42:3,13 42:14 understands 52:17 understood 28:13 33:10 48:8 54:7 undisputedly 6:10 14:22 union 32:19 48:10 United 1:1,6,12 3:4 50:25 53:9 unlawfully 28:17 unquantified 35:13 untainted 4:4 5:19 6:5,11 9:22 10:7,9 10:12,19 11:5,8</p>	<p>14:4,14,22 15:5,9 18:16 20:9 24:10 24:15,23 25:14 27:3 31:17 33:24 33:25 35:10,13 41:20 44:22 45:3 45:5,12 54:8 55:24 unusual 29:4 use 3:17 4:8,16 7:4 10:23 11:9,23 12:2 13:7 14:25 18:11 19:21 20:8 21:13 22:25 25:19 26:21 29:21 54:14 56:12 uses 4:18,20 usually 33:12</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4 17:15 valid 4:7 value 26:3 31:8 41:1 43:16 52:3 various 40:18 50:6 verdict 20:6 versus 44:4 victim 19:19 21:24 48:14 50:8,25 51:4,5 victims 19:13 20:2 22:17 24:24 25:6 32:9 41:25 49:4 50:19,22 view 25:4 51:9,11 vintage 16:1 violate 4:2 violated 55:9 violation 26:22 43:6,21 44:2 virtue 21:21 vs 55:11</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>want 7:13 17:8 25:15 30:22 36:24</p>	<p>39:6 40:4 54:14 54:15 wanted 28:14 wanting 4:8 wants 4:16 11:9 29:21 Washington 1:8,18 way 6:17 31:2 33:22 39:3 53:16 54:19 ways 8:2 22:12,14 we'll 28:22,22 51:16 we're 16:5 22:18,19 23:15 36:5 37:12 39:7 41:9 we've 39:15 week 52:18 welcome 56:16 wholly 8:5 wife 43:9 wily 7:20 win 35:21 wins 16:8 28:7 wish 53:17 wishes 42:11 woman 11:25 word 25:19 56:1 words 13:13 39:24 work 8:8 31:20 37:6,22 world 43:10 worry 38:19 40:2 worth 35:3,4 Wouldn't 12:1 write 21:22 22:10 wrong 36:8 wrote 23:25</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,7 16:8</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Y 16:11,13 yeah 4:14 14:9 year 12:1 47:22</p>	<p>years 21:15 24:8,10 45:23 yesterday 5:24</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zero-sum 32:8</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 40:13 56:19,20 10 1:9 5:5,7 37:7 10,000 6:19 39:11 39:12 100,000 37:9 43:7 43:10,11 11:07 1:13 3:2 12:07 57:6 1345 9:24,25 25:16 25:18 30:10 38:16 1345(b) 53:6 14-419 1:4 3:4 15,000 39:12 161 6:9 1791 17:21 18 9:24,25 25:23 1970 47:13 1984 47:15,25 1989 54:7 1999 54:23</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 10:1 40:13,21 42:16,24 52:12,13 2(A) 52:21 2015 1:9 20th 16:1 220 21:15 25 24:8 26 2:7 24:10</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 39:25</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>42 24:6 45 35:3,4 50:12</p>	<hr/> <p style="text-align: center;">5</p> <hr/> <p>5 5:6,8 5,000 6:20,22,24 7:4 54 2:10</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>60,000 37:25</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>853 24:14,22,22 25:17 44:19 45:23 45:25 46:21</p> <hr/> <p style="text-align: center;">9</p> <hr/>
---	---	---	---	---