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**Subject:** FW: Appellate Section Report: Luis v. United States (S. Ct. No. 14-419)

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**Importance:** Normal

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This is the case I was talking about with the good language.

Thanks.

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**From:** [REDACTED] (USAFLS)  
**Sent:** Friday, April 01, 2016 2:52 PM  
**To:** USAFLS-AUSAs District  
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**Subject:** Appellate Section Report: Luis v. United States (S. Ct. No. 14-419)

The Appellate Section's [REDACTED] summarizes the Supreme Court's recent decision in Luis v. United States:

Luis is pending arraignment on a \$45 million Medicare fraud. In a separate civil suit, the government sought and received an order under 18 U.S.C. 1345 freezing her assets, about \$2 million total, pending resolution of the criminal case. Luis sought to lift the freeze, insofar as it included untainted funds earned from legitimate sources, to pay her criminal defense attorney. The lower courts rejected her argument. In an opinion issued earlier this week, the Supreme Court vacated and remanded for the district court to conduct a tracing analysis and release any untainted funds, at least in the amount needed to pay for counsel.

The Court unanimously agreed with our interpretation of the statute: that Section 1345 provides for restraint of untainted assets pending trial for healthcare fraud. Writing for a four-justice plurality, Justice Breyer determined that this broad permission runs afoul of the Sixth Amendment's right to counsel of choice. The plurality distinguished the Court's precedents in Caplin & Drysdale and Monsanto because the frozen or seized assets at issue there were criminal proceeds. This distinction is meaningful, the plurality reasoned, because, under the relation back doctrine, title to proceeds and other tainted assets passes to the government upon commission of the crime and thus the assets belong to the government, not the defendant. The plurality struck a different balance with respect to untainted assets, concluding that although the government has strong interests in securing restitution and criminal penalties (which could be paid from those assets), those interests are not protected by the Constitution and the defendant's Sixth Amendment right is weightier. The plurality expressed confidence that district courts would be able to determine which assets are tainted and how much to release for legal fees.

Justice Thomas concurred in the judgment only. Relying on common law and constitutional history, he concluded there is a bright line limit on the government's power to freeze assets: if they are untainted and needed to secure counsel under the Sixth Amendment, the government may not restrain them.

Justice Kennedy (joined by Justice Alito) dissented, arguing that the Court's "unprecedented holding rewards criminals who hurry to spend, conceal, or launder stolen property by assuring them that they may use their own funds to pay for an attorney" later. The dissent essentially adopts our arguments: pointing out that the relation-back doctrine does not do the work the plurality claims, arguing that Caplin & Drysdale and Monsanto turned on the assets being forfeitable not tainted, and focusing on the fact that money is fungible and victims will be left with nothing once lawyers are paid.

Justice Kagan dissented separately, agreeing with the other dissenters that there is no viable difference between tainted and untainted assets, but raising concern with the pretrial restraint of any assets needed to pay for counsel of choice and inviting challenge to Monsanto itself.

A copy of the opinion is attached.