Sixth Amendment — Right to Counsel — Pretrial Asset Freeze Challenges — Kaley v. United States

Criminal forfeiture statutes allow the government to seize assets derived from criminal activity to compensate victims and fund law enforcement. To prevent criminals from disposing of assets before conviction, courts may freeze potentially forfeitable assets prior to trial based on a grand jury's finding of probable cause that the defendant committed a crime to which the targeted assets can be traced.[1] When assets set aside to hire a lawyer are frozen, however, this regime implicates the Sixth Amendment's right to counsel of choice.[2] Last Term, in *Kaley v. United States*,[3] the Supreme Court held that defendants have no constitutional right to challenge a grand jury's finding of probable cause of guilt for the purpose of defeating a pretrial asset freeze, even if this freeze results in an inability to hire one's attorney of choice.[4] Although this decision will likely prove harmful to defendants, it was also the Court's best available option. While allowing asset freezes without hearings diminishes the credibility of the criminal justice system, undermining the grand jury's probable cause determination would have diminished it even more. Only Congress can appropriately balance the interests at stake and recalibrate criminal forfeiture and asset freezes without causing substantial further harm.

Kerri Kaley, a sales representative offering prescription medical devices to medical facilities, sometimes received surplus devices from these facilities when newer models became available.[5] Together with other sales representatives and her husband, Brian Kaley, she sold such surplus equipment to a Florida company.[6] In January 2005, the Kaleys learned that they were being investigated for a conspiracy to transport these allegedly stolen devices across state lines.[7] The Kaleys sought counsel and, to pay legal fees, set aside a certificate of deposit purchased with a $500,000 home equity loan.[8] On February 6, 2007, a grand jury indicted the Kaleys on seven counts, and, pursuant to

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[1] The primary statute that permits such pretrial asset freezes in criminal forfeiture cases is 21 U.S.C. § 853(e). Although this statute has its home in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801–971 (2012), it is incorporated by reference into nearly every federal criminal forfeiture statute. *See, e.g.*, 18 U.S.C. § 982(b)(1) (2012); 31 U.S.C. § 5317(c)(1)(B) (2012).

[2] The Sixth Amendment guarantees the right to counsel, and the Supreme Court has called the right to choose one's counsel "the root meaning of the constitutional guarantee," United States v. Gonzalez-Lopez, 548 U.S. 140, 147–48 (2006).

[3] 134 S. Ct. 1090 (2014).

[4] *Id.* at 1094.

[5] *Id.* at 1105 (Roberts, C.J., dissenting).

[6] *Id.*

[7] United States v. Kaley (*Kaley I*), 579 F.3d 1246, 1249 (11th Cir. 2009).

[8] *Id.*

18 U.S.C. § 981(a)(1)(C), the indictment sought criminal forfeiture of all property traceable to the indicted offenses, including the certificate of deposit.[9] The magistrate judge denied the Kaleys' request for a pretrial, post-restraint evidentiary hearing.[10]

The district court affirmed these rulings, but on appeal the Eleventh Circuit found that the district court had misapplied circuit precedent regarding pretrial hearings.[11] On remand, the district court granted a hearing but restricted its scope to whether the restrained assets were involved in the offenses charged in the indictment, an issue the Kaleys did not contest.[12] The Kaleys instead argued that the protective order should be vacated because the indictment was unsupported by the underlying facts.[13] On October 24, 2010, the district court denied the Kaleys' motion to vacate the protective order and the Kaleys appealed, arguing that the asset freeze denied them their right to retain their counsel of choice.[14]

The Eleventh Circuit affirmed, agreeing with the district court that pretrial hearings challenging asset restraints are limited to the issue of the asset's traceability to the charged crime.[15] Writing for the panel, Judge Marcus[16] noted that Congress had clearly not provided for a hearing to challenge a restraining order post-indictment.[17] Although circuit precedent provided a due process balancing test under which such a hearing was sometimes required, the court observed that "the

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[9] *Id.* at 1249–50, 1250 n.3. The magistrate judge granted a restraining order on the Kaleys' property, pursuant to 21 U.S.C. § 853(e)(1)(A), but limited it to $140,000 after the prosecution admitted it could not trace any further funds to the Kaleys' allegedly criminal activity. *Kaley*, 134 S. Ct. at 1106 (Roberts, C.J., dissenting). Four days later, however, the grand jury returned a superseding indictment adding a charge of conspiracy to launder criminal proceeds. *Kaley I*, 579 F.3d at 1250. The original indictment, authorizing forfeiture under § 981(a)(1)(C), targeted property that "constitute[d] or [was] derived from proceeds traceable to" the alleged criminal activity. 18 U.S.C. § 981(a)(1)(C) (2012); *see also Kaley I,* 579 F.3d at 1250 & n.3. The superseding indictment of conspiracy to commit money laundering invoked a different forfeiture statute, § 982(a)(1), targeting property "involved in" the criminal offense or "traceable to such property." 18 U.S.C. § 982(a)(1); *see also Kaley I*, 579 F.3d at 1250–51, 1251 n.8. The new indictment also sought the criminal forfeiture of the entire certificate of deposit and the Kaleys' home, and the magistrate judge added these assets to the pretrial restraining order. *Kaley I*, 579 F.3d at 1250–51.

[10] *Kaley I*, 579 F.3d at 1251.

[11] *Id.* at 1251–52.

[12] United States v. Kaley (*Kaley II*), 677 F.3d 1316, 1320 (11th Cir. 2012).

[13] *Id.* at 1319.

[14] *Id.* at 1320.

[15] *Id.* at 1330.

[16] Judge Marcus was joined by Judge Fawsett of the Middle District of Florida, sitting by designation.

[17] *Kaley II*, 677 F.3d at 1321. The court noted that Congress had required a hearing if the restraining order were issued *before* the filing of an indictment, but that Congress included no such requirement regarding a post-indictment asset freeze; thus, Congress had considered providing hearings, but resolved not to require one after indictment. *See id.*

hearing's exact nature and contours" had not been defined.[18] In deciding that the hearing did not include the right to challenge the grand jury's finding of probable cause regarding guilt, the court appealed to the legislative history of 21 U.S.C. § 853 and to Supreme Court precedent as clearly establishing that courts should not "look behind" indictments[19] or challenge them in ways that would "effectively . . . [constitute] preliminary trials on the merits."[20] Doing so would not only impugn the grand jury's independence, which underlies the criminal justice system generally,[21] but also would force the government to choose between revealing its case, making only a limited evidentiary showing, or forgoing forfeiture altogether.[22] In light of these problems, and reassured by the procedural protections that defendants already possess,[23] the court held that due process does not entitle defendants to challenge the evidentiary support for the underlying charges to defeat a pretrial asset freeze.[24]

The Supreme Court affirmed. Writing for the Court, Justice Kagan[25] described the question in the case as "whether criminal defendants are constitutionally entitled at [a pretrial hearing to challenge an asset freeze] to contest a grand jury's prior determination of probable cause to believe they committed the crimes charged."[26] The Court framed the issue as determined by precedent set in *Caplin & Drysdale, Chartered v. United States*[27] and *United States v. Monsanto*.[28] In *Caplin*, the Court found that funds for legal fees were not exempted from criminal forfeiture by the Fifth and Sixth Amendments because "[a] defendant has no Sixth Amendment right to spend another person's money."[29] In *Monsanto*, decided on the same day, the Court confirmed that this commitment to ensuring that crime does not pay

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[18] *Id.* at 1322.

[19] *Id.* at 1323 (quoting S. REP. NO. 98-225, at 202 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3385) (internal quotation marks omitted).

[20] *Id.* at 1324 (quoting United States v. Calandra, 414 U.S. 338, 350 (1974)) (internal quotation marks omitted).

[21] *See id.* at 1325 (noting "the Supreme Court's recognition of the unique nature of the grand jury as an independent body, not an arm of the prosecution").

[22] *See id.* at 1328–29. The Senate Report for § 853 specifically addressed this bind and proceeded to pass the statute without providing for a hearing to challenge the grand jury's indictment. S. REP. NO. 98-225, at 195–96, *reprinted in* 1984 U.S.C.C.A.N. at 3378–79.

[23] *See Kaley II*, 677 F.3d at 1327. The court noted that, at trial, defendants are able to mount a defense, thus "[t]he question is simply whether the Due Process Clause requires that the defendant get *two* such hearings." *Id.*

[24] *Id.* at 1326. Judge Edmondson concurred, but argued that "freezing a citizen's property at a time when he is presumed innocent" should merit greater procedural protections. *Id.* at 1330 (Edmondson, J., concurring in the result).

[25] Justices Scalia, Kennedy, Thomas, Ginsburg, and Alito joined in the opinion.

[26] *Kaley*, 134 S. Ct. at 1094.

[27] 491 U.S. 617 (1989).

[28] 491 U.S. 600 (1989).

[29] *Caplin*, 491 U.S. at 626.

applies even before conviction: freezing a defendant's assets under § 853 is constitutional so long as it is "based on a finding of probable cause to believe that the assets are forfeitable."[30]

With these principles established, the question in *Kaley* was "about who should have the last word as to probable cause."[31] To answer this question, Justice Kagan pointed to history: uniformly throughout the Court's precedent, the grand jury's finding of probable cause has been held inviolable.[32] The Court also noted that the grand jury's finding is sufficient to warrant arrest without a further hearing and concluded that the grand jury should be as inviolable with regard to property restraints as it is with regard to liberty restraints.[33] The Court recoiled from the institutional incoherence that would ensue if a judge should find a lack of probable cause to freeze assets and later "preside[] over a trial premised on [the] presence" of probable cause.[34] Moreover, because it violates ethical standards to knowingly prosecute charges without probable cause,[35] such a finding may well defeat the prosecution entirely, functionally overruling the grand jury's determination that prosecution is appropriate.[36]

Having established the precedential and practical reasons for its decision, the Court addressed the Kaleys' argument that the balancing test of *Mathews v. Eldridge*[37] militated in favor of a hearing.[38] Although it did not clarify whether *Mathews* would apply to federal criminal forfeiture at all, the Court found that even if *Mathews* did apply, its balancing test would come out against the Kaleys.[39] Regarding the governmental interest prong, the Court observed that holding a "pre-trial mini-trial" would "consume significant prosecutorial time and resources."[40] On the other hand, concerning the private interests

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[30] *Monsanto*, 491 U.S. at 615. The forfeitability of assets depends on whether there is probable cause "(1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to that crime." *Kaley*, 134 S. Ct. at 1095.

[31] *Kaley*, 134 S. Ct. at 1097. The government conceded that defendants have a constitutional right to challenge the traceability of assets targeted under § 853, so this issue was not addressed in *Kaley*. *See id.* at 1108 (Roberts, C.J., dissenting).

[32] *Id.* at 1097–98 (majority opinion).

[33] *Id.* at 1098–99.

[34] *Id.* at 1099.

[35] MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2013) (requiring a prosecutor to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause").

[36] *See Kaley,* 134 S. Ct. at 1099 n.8.

[37] 424 U.S. 319 (1976).

[38] *Kaley*, 134 S. Ct. at 1100. *Mathews* set forth the test for whether a deprivation of property is accompanied by the appropriate level of process; this test weighs (1) the risk of error through the procedures used and the probable value of additional procedural safeguards, (2) the interests of the individual, and (3) the interests of the government. *See Mathews*, 424 U.S. at 339–48.

[39] *Kaley,* 134 S. Ct. at 1101.

[40] *Id*. It would also force upon the government an unpalatable choice: present its case and prematurely expose its evidence — including otherwise confidential witnesses — to the defense, or give up the pretrial asset freeze altogether. *See id.* at 1101–02.

at stake, the Court acknowledged the "vital" nature of the Kaleys' interest in retaining their counsel of choice.[41] Finally, the Court concluded that the remaining *Mathews* prong, which assesses the risk of erroneous deprivation and the probable value of the procedural safeguard in question, cut against the Kaleys.[42] As established in *Monsanto*, the asset freeze is erroneous "only when the grand jury should never have issued the indictment."[43] Because probable cause is such a low burden, an indictment is "hard to undermine, and still harder to reverse."[44] Therefore, pretrial evidentiary hearings are too unlikely to correct an erroneous asset freeze to be constitutionally required.[45]

Chief Justice Roberts dissented,[46] opening with a paean to the right to counsel, calling it "the most precious right a defendant has, because it is his attorney who will fight for the other rights the defendant enjoys."[47] Although this right has limitations,[48] those limitations are not normally "imposed at the unreviewable discretion of a prosecutor — the party who wants the defendant to lose at trial."[49] The dissent noted that defendants are entitled to challenge the traceability of assets despite the grand jury's finding;[50] just as the majority objected to treating probable cause differently as it affects the indictment and the freezing of assets, the dissent argued that there is no reason to treat probable cause differently *within* the issue of asset freezes.[51] The dissent further argued that such a hearing would not duplicate a trial since the government may choose to present only some of its evidence at the hearing[52] Finally, in some other pretrial collateral matters, courts permit defendants to challenge the strength of the underlying case.[53]

The dissent also disputed the majority's application of the *Mathews* test. The dissent first argued that the Kaleys' interest was critical: not only did they stand to lose their property, but if their inability to retain their chosen counsel caused them to lose at trial, they faced substantial

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41 *Id.* at 1102.

42 *See id.* at 1103–04.

43 *Id.* at 1103.

44 *Id.* at 1104.

45 *Id.*

46 Justices Breyer and Sotomayor joined the dissent.

47 *Kaley,* 134 S. Ct. at 1107 (Roberts, C.J., dissenting).

48 For example, a defendant is not entitled to counsel that he cannot afford. *See id.*

49 *Id.*

50 *Id.* at 1108.

51 *Id.* The majority responded that traceability is "a technical matter far removed from the grand jury's core competence and traditional function." *Id.* at 1099 n.9 (majority opinion).

52 *Id.* at 1109 (Roberts, C.J., dissenting).

53 *Id.* at 1109–10. In the bail context, for example, courts may reject an indictment's consequence of pretrial confinement without denigrating the grand jury's historic independence. *Id.*

prison terms as well.[54] Addressing the governmental interest prong, the dissent denied that allowing pretrial probable cause challenges would endanger the prosecution's case, especially since such hearings to challenge traceability already require the government to reveal some aspects of its case.[55] Looking to the Second Circuit's experience with pretrial probable cause challenges, the dissent noted that such hearings are rarely held, belying the majority's specter of strategic gamesmanship by defendants.[56] Finally, the dissent objected to the majority's conclusion that a pretrial hearing would be a waste of time, appealing to "[c]ommon sense" to establish that one-sided proceedings will lead to mistakes more often than adversarial ones will.[57] The dissent thus concluded that the government's interest was slight, that the Kaleys' interest was substantial, and that the requested hearings would significantly mitigate a substantial constitutional deprivation.

Kaley has closed the door that the Court's prior decisions in *Caplin* and *Monsanto* left open: in their efforts to defeat an asset restraint, defendants may no longer challenge a grand jury's finding of probable cause of guilt, as they could in some circuits before *Kaley*.[58] While *Kaley* did not venture far past the Court's prior decisions, the opinion may cause harm by reducing the perceived legitimacy of the criminal justice system and eliminating a check on prosecutorial discretion. However, granting hearings in cases like *Kaley* would itself undermine the criminal justice system by delegitimizing the grand jury's probable cause finding even as it undergirds indictments. The Court was stuck between a rock and a hard place. Congress, not the courts, is the proper institution to balance the competing interests and threats to criminal process legitimacy.

Kaley did not go far beyond *Caplin* and *Monsanto*, but that does not mean that it will do no harm. First, although these prior cases established that pretrial asset freezes were allowed even when the funds would go toward retaining counsel — holdings that together diminished defendants'

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[54] *Id.* at 1111. The majority's comparison of liberty deprivations and property deprivations was anemic, the dissent suggested, and a more apt comparison would have been between a defendant's "interest in temporary liberty pending trial, or the interest in using one's available means to avoid imprisonment for many years after trial." *Id.*

[55] *Id.* Further, if probable cause is such a low bar that a hearing would not make a difference, then surely the prosecution need not reveal all of its evidence to prevail. *See id.*

[56] *Id.* at 1112.

[57] *Id.* at 1113.

[58] Although the Court held only that the Kaleys did not have a right to a pretrial hearing challenging the asset freeze, thus potentially permitting some circuits to allow such hearings, the Court's opinion rested solidly on the proposition that the grand jury's determination *may not* be undermined. *See id.* at 1099 (majority opinion) (describing as a "longstanding, unvarying rule of criminal procedure" that "[t]he grand jury's determination is conclusive"). The reasoning of *Kaley* would thus seem to preclude allowing such hearings.

right to their counsel of choice[59] — they also explicitly left open the question of whether defendants had a right to challenge the asset freeze.[60] As noted in *Kaley*, some circuit courts decided to allow such hearings.[61] Even if the asset freeze survives the pretrial hearing, the defendant's ability to appear in an adversarial setting and challenge the freeze makes clear that justice rather than fiat has determined the outcome.[62]

Moreover, the costs of denying a hearing may be more than theoretical. If the premises of the majority's opinion are valid, the absence of probable cause hearings is most likely to change the outcome in borderline cases where such hearings are most necessary. If probable cause is in fact a very low bar that almost no defendants could defend against,[63] then judges would not frequently find opportunity to rule contrary to the grand jury.[64] Thus, probable cause hearings would only make a difference when the presence of probable cause is neither certain nor ludicrous. Being on the borderline, these are also cases where access to one's chosen counsel may be most likely to make a difference in the trial's outcome.[65] By foreclosing probable cause hearings, and thus potentially depriving defendants of their chosen counsel, *Kaley* is most likely to change outcomes *only* in those cases where the fairness of the trial will be most necessary.[66]

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[59] *Caplin* has been accused of cementing perverse incentives into criminal enforcement by allowing law enforcement to retain assets seized, often as part of a plea deal, while *Monsanto* has been held responsible for "the socialization of the criminal defense bar" as defense attorneys whose clients can no longer afford to pay are replaced with public defenders. Matthew R. Lasky, *Imposing Indigence: Reclaiming the Qualified Right to Counsel of Choice in Criminal Asset Forfeiture Cases*, 104 J. CRIM. L. & CRIMINOLOGY 165, 181 (2014); *see also id.* at 178–82.

[60] *See* United States v. Monsanto, 491 U.S. 600, 615 n.10 (1989) ("We do not consider today . . . whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed.").

[61] *Kaley*, 134 S. Ct. at 1112 (Roberts, C.J., dissenting).

[62] *See* Christopher A. Bracey, *Truth and Legitimacy in the American Criminal Process*, 90 J. CRIM. L. & CRIMINOLOGY 691, 727 (2000) (book review) ("To promote 'truth' within the criminal process, one must first secure a level of legitimacy for that process so that 'truth' discovered by legal actors and acted upon by legal institutions is *perceived* as truth.").

[63] *See Kaley*, 134 S. Ct. at 1103.

[64] This possibility has been borne out in the Second Circuit, which allows such hearings. In twenty-five reported hearings, none resulted in a finding contrary to the grand jury's. *Id.* at 1104.

[65] *See* Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 721 (1992) (observing that denying a defendant the right to chosen counsel may irrevocably weaken the defense because, inter alia, it may "be so expensive to hire another attorney and pay her to familiarize herself completely with the materials that the defendant cannot afford to substitute a lawyer of equal competence for the lawyer who has been removed"); *see also* Donna Shestowsky, *Misjudging: Implications for Dispute Resolution*, 7 NEV. L.J. 487, 496–97 (2007) ("[C]lose cases are ones that are likely to maximize the observable effects of peripheral factors . . . .").

[66] *Cf.* Michael Duvall, *When Is Oral Argument Important? A Judicial Clerk's View of the Debate*, 9 J. APP. PRAC. & PROCESS 121, 121–23 (2007) (observing that the importance of oral argument, one representational skill, is not "an all-or-nothing proposition," *id.* at 121, but instead one that "significantly impacts the outcomes of only very close cases," *id.* at 123).

However, even though *Kaley* does harm, it was the best option open to the Court. Permitting a pretrial, post-restraint hearing would necessarily call into question the grand jury's finding of probable cause that the accused committed the crime. This consequence cannot be gainsaid; it would be the sole purpose of such hearings. Given this context, the Court's choice to follow Congress's clear endorsement of pretrial asset restraint without a hearing makes sense, even if it does potentially burden some criminal defendants. The Court was forced to choose between two threats to the legitimacy of the criminal justice system, one narrowly restricted to the criminal forfeiture context and one broadly implicating all indictments.

The grand jury, which is constitutionally guaranteed as a check on unfettered prosecution,[67] is a legitimizing institution even in spite of widespread criticisms that it does not sufficiently protect defendants.[68] Consider how tarnished the criminal justice system would appear if the grand jury were eliminated altogether, leaving the prosecutor with the bare, unsupervised power to indict any individual on any offense.[69] Even if grand juries do not sufficiently limit prosecutorial discretion,[70] it is important to note that *Kaley* did not implicate the grand jury's practices; thus, strengthening protections for defendants was not before the Court, only the respect to be given its determination was.[71] Regardless of the challenge's outcome, providing a hearing to challenge the grand jury's determinations communicates that the grand jury cannot be trusted to determine probable cause accurately.[72] And

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[67] *See* U.S. CONST. amend. V.

[68] For example, Professor Niki Kuckes suggests that the grand jury extends prosecutorial power rather than protecting defendants. *See* Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 7–33 (2004). She argues that the grand jury is not competent to rein in the prosecutor, who is the only lawyer in the room, *see id.* at 30–31, and who has full discretion over the evidence to be considered, *see id.* at 21–23, but it does allow the prosecutor to issue subpoenas and "strengthen[] her hand in plea negotiations," *id.* at 23.

[69] Although only about half of the states require grand jury indictments to prosecute certain serious crimes, those states that do not instead rely on prosecutors filing an "information," a charging document that can be challenged in court by a defendant. *See* John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 341, 354–55 (2005).

[70] Although most scholars seem to adopt this position, the grand jury's powerlessness is not the only explanation for its readiness to indict. *See generally, e.g.*, Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319 (2012) (arguing that grand jury indictments primarily reflect societal condemnation of many crimes). Professor Josh Bowers notes that grand juries are typically only required for felony prosecutions and thus rarely consider cases where the conduct in question is morally divisive. *Id.* at 326–27. Countering the image of the captured grand jury, he describes several cases where grand juries refused to indict "presumably based on what they perceived to be a lack of blameworthiness." *Id.* at 325; *see also* Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 49–50 (2002) (describing grand juries rejecting indictments in "borderline cases," *id.* at 49).

[71] *See Kaley*, 134 S. Ct. at 1094.

[72] *But see* Douglas P. Currier, Note, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment — A Basis for Curbing Prosecutorial Misconduct*, 45 OHIO ST. L.J. 1077, 1097

this effect is not limited to cases of asset freezes: the same probable cause finding underlies the indictment itself.[73] However narrowly the right to such a hearing is granted, its implication that the grand jury cannot be trusted spreads like oil on water. Although the Court is limited to deciding the cases before it,[74] and thus obliged to deliver justice to the individual parties thereto, it must also be cognizant of a decision's effects on the judicial system and society as a whole.[75]

The Court is constrained by precedent and, while it may overturn legislation as unconstitutional, it is not well-positioned institutionally to develop a policy from scratch that will adequately accommodate both systemic and individual needs. Given the choice between approving what may constructively amount to a denial of chosen counsel and allowing challenges to the probable cause determinations that permeate the criminal justice system, the Court elected to take the path that limited the scope of the damage. Congress, though, has latitude to reassess the costs and benefits of criminal forfeiture and asset restraints and to craft new policy without regard for its previous decisions. Even if pretrial asset restraints preventing defendants from affording their counsel of choice are not Sixth Amendment violations, such restraints still burden this constitutional right. To the extent that they are justified by practical or policy justifications, these restraints must be allowed. But just because a practice is constitutional does not mean that it is per se advisable as a policy matter in all cases.[76] Rather than allow criminal forfeiture to grow unchecked,[77] Congress should revisit the topic to ensure that criminal forfeiture and asset freezes strike a balance between defendants' rights and the needs of law enforcement.

The best way to do so would be to retract criminal forfeiture to cover only the serious crimes it was designed to address. One primary goal of expanding criminal forfeiture was to starve major conspiracies like drug

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(1984) (arguing that courts supervising the grand jury would "enhance the image of the grand jury as an independent and credible institution since a court would dismiss indictments which resulted from hearings involving prosecutorial misconduct"). This argument is self-defeating, however, insofar as it attempts to bolster the grand jury's independence by subjecting it to judicial veto.

[73] *See Kaley*, 134 S. Ct. at 1097.

[74] *See* Ramsey v. United Mine Workers of Am., 401 U.S. 302, 308 n.5 (1971).

[75] *Cf., e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) (justifying stare decisis by appealing to the burden judges would face without such a principle).

[76] *See, e.g.*, Ronald D. Rotunda, Comment, *Computerized Highways and the Search for Privacy in the Case Law*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 119, 122 (1995) ("Because the government may constitutionally be able to place a beeper on a vehicle without obtaining a warrant does not mean that there should never be any legislative or regulatory limits to the collection and retention of data . . . .").

[77] Criminal forfeiture has undeniably grown beyond its origins. Although there is little reliable data on criminal forfeiture specifically, total forfeiture proceeds have risen meteorically over past forty years. *See* MARIAN R. WILLIAMS ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 27–34 (2010) (noting "more than $1 billion in combined forfeiture proceeds reports for 2000 and 2003," *id.* at 30).

trafficking operations and organized crime of their ill-gotten gains.[78] By preventing profits from being reinvested into the conspiracy, forfeiture would starve the beast.[79] However, as more and more "tough on crime" statutes have proliferated, criminal forfeiture may be as likely to impact the low-level drug possessor, or the unsophisticated seller of unwanted medical devices,[80] as it is to strike at the heart of criminal networks.[81] When a statutory regime extends beyond its useful effects, Congress should reevaluate society's needs and revise accordingly.[82]

Reducing the number of crimes that trigger forfeiture would limit the legitimacy costs of asset freezes while preserving the grand jury's credibility. All parties agree that there is a significant cost to defendants under the current regime.[83] Defendants subject to asset freezes may be constructively denied their chosen counsel, tainting the fairness of the entire trial.[84] Although allowing hearings as the Kaleys requested would result in disproportionate damage to the legitimacy of the criminal justice system, Congress would do well to ensure that criminal forfeiture and asset freezes are only available when their benefits outweigh their costs, as in major criminal enterprise prosecutions.

Only Congress can fundamentally change the nature of the criminal forfeiture regime without significant harmful effects. The *Kaley* Court had few options, none good, and chose the least destructive. By recalibrating the criminal forfeiture statutes to minimize burdens on constitutional rights, though, Congress can reenshrine criminal forfeiture as a reasonable tool for public policy. Congress has the power to develop a system that serves justice without eviscerating defendants' rights. Now it is Congress's responsibility to do so.

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[78] *See* Karla R. Spaulding, *"Hit Them Where It Hurts": RICO Criminal Forfeitures and White Collar Crime*, 80 J. CRIM. L. & CRIMINOLOGY 197, 199–200 (1989) (noting that RICO's criminal forfeiture provision was "aimed at curbing the criminal activity of organized crime," *id.* at 200).

[79] *See* S. REP. NO. 91-617 (1969) (describing the purpose of criminal forfeiture as "remov[ing] the leaders of organized crime from their sources of economic power").

[80] As the dissent noted, the prosecution could not identify a single victim who laid claim to the allegedly stolen property. *See Kaley*, 134 S. Ct. at 1106–07 (Roberts, C.J., dissenting).

[81] *See* Richard E. Finneran & Steven K. Luther, *Criminal Forfeiture and the Sixth Amendment: The Role of the Jury at Common Law*, 35 CARDOZO L. REV. 1, 45 (2013) (noting that criminal forfeiture is available for most major federal felonies).

[82] *Cf.* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.) (reducing the sentencing disparity between crack and powder cocaine from 100:1 to 18:1).

[83] *See, e.g.*, *Kaley*, 134 S. Ct. at 1102 (acknowledging the Kaleys' "vital interest"); *id.* at 1110–11 (Roberts, C.J., dissenting) (noting the Kaleys' "urgent interest," *id.* at 1111).

[84] *See id.* at 1107 (Roberts, C.J., dissenting) (averring that a violation of the right to chosen counsel constitutes "one of the very few kinds of errors that 'undermine the fairness of a criminal proceeding as a whole'" (quoting United States v. Davila, 133 S. Ct. 2139, 2149 (2013)).