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No. 12-464

IN THE

Supreme Court of the United States

KERRI L. KALEY, ET VIR, *Petitioners*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

**Brief *Amicus Curiae* of
Gun Owners Foundation, U.S. Justice
Foundation, Gun Owners of America, Inc.,
Downsize DC Foundation, DownsizeDC.org,
Institute on the Constitution, Lincoln Institute
for Research and Education, Conservative
Legal Defense and Education Fund, Abraham
Lincoln Foundation, and Policy Analysis
Center in Support of Petitioners**

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners Foundation, U.S. Justice Foundation, Downsize DC Foundation, Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"), and are public charities. Gun Owners of America, Inc., DownsizeDC.org, and Abraham Lincoln Foundation are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this and other courts.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Congress does not require, and the procedure sanctioned by the Court of Appeals below now precludes, any meaningful judicial review of Department of Justice applications for asset seizures after indictment and before trial. As carefully documented by Petitioner (Pet. Br., pp. 6-29), the Department of Justice has access to, and knows how to employ, a myriad of prosecutorial powers to pressure a defendant to plead guilty, even where the merits of its case are weak, at best. Now, the Department of Justice demands even greater power over a federal defendant, by seizing his assets without a hearing, which often deprives him of his Sixth Amendment right to engage counsel of choice, and thus to mobilize a meaningful defense to the charges against him.

Until 1970, statutory criminal asset forfeiture was unknown in the federal system. Then Congress granted the Department of Justice broad powers exclusively to deal with the threats of organized crime and drug trafficking. Over time, Congress extended these same powers to be used against broad classes of criminal defendants. This same period has seen an explosion of federal crimes, almost none of which were envisioned by the Founders. Repeatedly, Congress has responded politically to the daily headlines with proposals to create new crimes, or increase the penalties for existing crimes. Recently, however, even some in Congress have realized that the dangers of the path it is on, as the House Judiciary Committee has created a Bipartisan Task Force on Over-Criminalization. Until unconstitutional laws can be

repealed and draconian penalties and powers be denied to prosecutors, defendants will regularly enter guilty pleas to avoid an even worse outcome for those who insist on the constitutional right to a jury trial.

The court of appeals insists that a defendant is protected from asset seizure by the statutory requirement of a grand jury indictment, citing Supreme Court opinions reflecting the protective role that the grand jury was originally designed to serve. Inconsistently, the court of appeals catalogues how, over the past 60 years, the constitutional right to a grand jury indictment has eroded so that it no longer serves the protective role envisioned by the Fifth Amendment. The quantum and quality of evidence required to return an indictment is so low that the grand jury has become the virtual tool of government prosecutors who can obtain at will nearly any indictment that they seek, including one containing an asset forfeiture count. Furthermore, the official grand jury charge instructs the jurors that the law is determined exclusively by Congress, binding them by oath or affirmation to return an indictment even if the grand jury believes the statute is unconstitutional.

Under the procedure sanctioned by the court of appeals, asset seizure will occur almost automatically at the request of Department of Justice attorneys. Yet, under current law, the Department of Justice is a primary beneficiary of funds forfeited. Vesting such discretionary power in attorneys in the employ of the Department of Justice violates the due process principle of impartiality articulated in the case of Tumey v. Ohio.

ARGUMENT

I. THE COURT OF APPEALS' PRECLUSION OF A MEANINGFUL RIGHT TO CHALLENGE ASSET SEIZURES IMBALANCES THE FEDERAL CRIMINAL JUSTICE SYSTEM, IMPAIRS A DEFENDANT'S RIGHT TO COUNSEL OF CHOICE, AND VIOLATES DUE PROCESS OF LAW.

Petitioners' Brief details a truly remarkable story of prosecutorial pursuit of convictions at all costs, including bringing fraud cases with no victim (Pet. Br., p. 21), and employing a novel legal theory of constructive trust as a substitute for nonexistent evidence (*id*. at 21-22). The prosecutors well know the power of asset seizure,[2] demonstrating below how a grand jury can be led to issue a superseding indictment to add a new charge to an indictment — conspiracy to commit money laundering without any evidence of concealment of the origin of the funds — simply to facilitate the seizure of additional assets which could not be traced to the crimes originally charged. *Id.*, pp. 14-15.

With this display of raw federal prosecutorial power on display, it becomes important to place the asset forfeiture power into the context of the modern

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[2] The federal government's power to seize a defendant's property before trial is variously called a "protective order," "a restraining order," "a temporary restraining order," and "an injunction" in 21 U.S.C. § 853(e). The term "seizure" is used herein.

federal criminal justice system. Until relatively recently, asset forfeiture was never considered to be a legitimate power of the federal government. Indeed, until well into the twentieth century, the federal government was never intended to have a major role in enforcing criminal law. These departures from the vision of the Founders have a perverse effect on the relationship between the federal government and its citizens.

A. Asset Forfeiture Was Disfavored by the Founders.

Criminal asset forfeiture is a relatively new power within the federal law.[3] It has some predicate in early English common and statutory law, as Justice William J. Brennan succinctly summarized:

> At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a **deodand**.... Forfeiture also resulted at common law from **conviction for felonies and treason**.... In addition, English Law provided for statutory forfeitures of offending objects used in violation of the **customs and revenue laws**.... [Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. 663, 680-82 (1974) (emphasis added, footnotes omitted).]

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[3] Some of the early origins of the asset forfeiture are discussed in Karl Wittfogel, Oriental Despotism: A Comparative Study of Total Power, Vintage Books (1981), pp. 72-78.

In the United States, however, Justice Brennan explained that, except for *in rem* "forfeiture of commodities and vessels used in violations of customs and revenue laws" (*id.* at 683), criminal forfeiture was not favored:

> Deodands did not become part of the common-law tradition of this country.... Nor has forfeiture of estates as a consequence of federal criminal conviction been permitted.... Forfeiture of estates resulting from a conviction for treason has been constitutionally proscribed by Art. III, § 3, though forfeitures of estates for the lifetime of a traitor have been sanctioned.... [*Id.* at 682-83 (footnotes omitted).]

The first Congress prohibited "forfeiture of estate" for violation of any federal crime (Act of April 30, 1790, Sec. 24, 1 Stat. 112, 117), a statute that remained in effect (at least in part) until 1984, when it was repealed by the Comprehensive Forfeiture Act (Pub. L. 98-473). Until 1970, there was no federal criminal asset forfeiture of any sort. *See, e.g.*, United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977) ("Indeed, the forfeiture of a portion of an individual's property as a consequence of a criminal conviction was unknown to the federal criminal law until the passage of [18 U.S.C.] § 1963. Such a penal foray bespeaks a need for circumspection.").[4]

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[4] *Cf.* United States v. Schmalfeldt, 657 F. Supp. 385 (W.D. Mich. 1987) ("The only exception was the Confiscation Act passed by the Radical Republican Congress in 1862 which authorized President

Broad new criminal powers enacted in 1970 changed the course of federal criminal asset forfeiture. That year brought with it the Racketeer Influenced and Corrupt Organization's Act ("RICO"), section 901(a) of the Organized Crime Control Act of 1970, Pub. L. 91-452, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513. Both included powers of criminal asset forfeiture, but neither contained a power of pre-conviction seizure of assets which would be subject to forfeiture upon conviction.

Not until 1984 did amendments to these laws statutorily authorize *ex parte*, pretrial seizure of assets. *See* 18 U.S.C. § 1963(d); 21 U.S.C. § 853(e). Then, as part of the Civil Asset Forfeiture Reform Act of 2000, Congress extended criminal asset seizure and forfeiture to any criminal case where a civil or criminal forfeiture otherwise would be authorized. *See* 28 U.S.C. § 2461(c). This expansion of authority has resulted in a dramatic increase in criminal forfeiture judgments, which already had eclipsed civil forfeiture judgments in every year since 1995. *See* CRS, Crime and Forfeiture, p. 14 n.78.

Lincoln to forfeit the property of Confederate sympathizers. While the President doubted its constitutionality, the statute was ultimately upheld by the Supreme Court, not on the basis that criminal forfeitures were generally constitutional, but rather because the statute had been passed by virtue of Congress's War Powers." *Id.* at 387 (citations omitted).).

B. The Founders Never Intended the Federal Government to Have a Major Role in Criminal Justice Enforcement.

The U.S. Constitution provides direct authority for Congress to enact only a handful of federal crimes: "counterfeiting" (Art. I, Sec. 8, Cl. 6), "Piracies and Felonies committed on the high Seas, and offenses against the Law of Nations" (Art. I, Sec. 8, Cl. 10), crimes in the federal "District" (Art. I, Sec. 8, Cl. 17), and "treason" (Art. II, Sec. 4; Art. III, Sec. 3, Cl. 1). Reliance on the "necessary and proper clause" (Art. I, Sec. 8, Cl. 18) could support the creation of a limited number of categories of additional federal crimes, such as failure to pay federal taxes (Art. I, Sec. 8, Cl. 1) and postal crimes (Art. I, Sec. 8, Cl. 7).

Alexander Hamilton rejected the notion that the federal government might become "too powerful" usurping the role of the states because "one transcendent advantage belonging to the province of the State governments [is] the ordinary administration of criminal and civil justice." Federalist No. 17, G. Carey & J. McClellan, The Federalist, Center for Judicial Studies (1990), pp. 84-85. Similarly, James Madison explained that "[t]he powers reserved to the several States will extend to all the objects, which ... concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." Federalist No. 45, *supra*, p. 238.

One study demonstrated that founding-era offenses generally:

> dealt with injury to or interference with the federal government or its programs. The federal offenses of the time included treason, bribery of federal officials, perjury in federal court, theft of government property, and revenue fraud...." [Sara Sun Beale, "Federalizing Crime: Assessing the Impact on the Federal Courts," 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996).]

Congress was faithful to the Founders' vision of state enforcement of criminal law for many generations.

> For years following the adoption of the Constitution in 1789, the states defined and prosecuted nearly all criminal conduct. The federal government confined its prosecutions to less than a score of offenses. [American Bar Association, The Federalization of Criminal Law: Defending Liberty, Pursuing Justice (1998), p. 5.]

Until the Presidential Election of 1928, "[c]rime was seen as a uniquely local concern and the power to prosecute rested almost exclusively in the states whose law enforcement activities covered nearly all the activity believed worthy of criminal sanction." The Federalization of Criminal Law, *supra*, p. 6.

C. Congress Has Not Remained Faithful to Original Parameters of the Federal Criminal Justice System.

In contrast with this initial limited vision, federal criminal law has exploded to the point where it has become difficult to quantify and evaluate. So significant has this change been, that the American Bar Association ("ABA") assembled a Task Force on Federalization of Criminal Law, chaired by former Attorney General Edwin Meese III, which issued its report in 1998. American Bar Association, The Federalization of Criminal Law (1998). Based on its study, the Task Force concluded:

> So large is the present body of federal criminal law that there is no conveniently accessible, complete list of crimes. Criminal sanctions are dispersed in places other than the statutory codes (for example, rules of court) and therefore cannot be located simply by reading statutes. A large number of sanctions are dispersed throughout the thousands of administrative "regulations" promulgated by various governmental agencies under Congressional statutory authorization. Nearly 10,000 regulations mention some sort of sanction, many clearly criminal in nature, while many others are designated "civil." [The Federalization of Criminal Law, pp. 9-10 (footnotes omitted).]

Since publication of the ABA study, a ramping up of interest in and scholarship on this topic has occurred.

See, e.g., John S. Baker, "Revisiting the Explosive Growth of Federal Crimes," Heritage Foundation Legal Memorandum (June 16, 2008)[5]; Brian W. Walsh, "Doing Violence to the Law: The Over-Federalization of Crime" (June 9, 2011)[6]; The Federalist Society, the OverCrim Debate.[7]

Just weeks ago, on May 5, 2013, the House Committee on the Judiciary created a Bipartisan Task Force on Over-Criminalization designed "to assess our current federal criminal statutes and make recommendations for improvements."[8] The Committee's release observed that:

> there are an estimated 4,500 federal crimes in the U.S. Code, many of which address conduct also regulated by the states. [T]he number of federal criminal offenses increased by 30 percent between 1980 and 2004. There were 452 new federal criminal offenses enacted

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[5] http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes.

[6] http://www.heritage.org/research/commentary/2011/06/doing-violence-to-the-law-the-over-federalization-of-crime.

[7] http://www.theovercrimdebate.com/.

[8] The House Judiciary Task Force has already held its first hearing and received testimony. *See, e.g.*, John G. Malcom, "Defining the Problem and Scope of Over-Criminalization and Over-Federalization" testimony before the Committee on the Judiciary (June 14, 2013). http://www.heritage.org/ research/testimony/2013/06/defining-the-problem-and-scope-of-overcriminalization-and-overfederalization.

> between 2000 and 2007, averaging 56.5 new crimes per year. Over the past three decades, Congress has been averaging 500 new crimes per decade.[9]

Politics, not policy, is the prime driver of the proliferation of crimes. "Highly publicized criminal incidents are frequently accompanied by calls for proposed Congressional responses...." Federalization of Criminal Law, at 11. Most recently, in response to the Sandy Hook Elementary School shootings, and the alleged resulting public outcry, there were no fewer than two dozen gun control bills introduced in Congress.[10] The report continued that "a major reason for the federalization trend — even when federal prosecution of these crimes may not be necessary or effective[11] — is that federal crime legislation is politically popular ... 'not because of any structural incapacity to deal with the problem on the part of state and local government.'" *Id.* at 15. As a result, "[n]ew crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." *Id.* at 14.

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[9] *See* Press Release, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization, May 5, 2013, http://judiciary.house.gov/news/2013/05082013.html.

[10] http://godfatherpolitics.com/9575/tracking-current-federal-gun-control-legislation/.

[11] *See* Rep. Steve Stockman, "Gun Free Zones Kill," The Blaze (Apr. 30, 2013), http://www.theblaze.com/contributions/applying-the-lessons-of-lubys-to-sandy-hook/.

Not only are there more federal crimes than ever before, but they often carry more severe, enhanced sentences than do their state counterparts. "Mandatory minimums" are viewed as providing "harsh, automatic prison terms for those convicted of certain federal ... crimes."[12] For example, 18 U.S.C. § 924(c)(5) provides that "any person who, during and in relation to any ... in furtherance of any ... drug trafficking ... crime ... carries armor piercing ammunition [shall] be sentenced [additionally] to a term of imprisonment of not less than 15 years...."

D. The Modern Federal Criminal Justice System Operates Oppressively against the People of the United States.

In the last reported one-year period (ending March 2012), there were 100,660 criminal defendants whose cases were "disposed of" in the federal system.[13] Of those, 8,693, or only 8.6 percent, were "Not Convicted," while 91.4 percent were "Convicted and Sentenced." *Id.* But of those who were convicted and sentenced, an amazing 89,748 — or 97.6 percent of total "convictions" — were concluded by a plea of guilty. *Id.* The percentage of convictions through guilty pleas had

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[12] http://www.famm.org/aboutsentencing/WhatAreMandatoryMinimums.aspx

[13] Administrative Office of the United States Courts, "Caseload Statistics 2012: Table D-4 Defendants Disposed of, by Type of Disposition and Offense," http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/D04Mar12.pdf.

been 94.5 percent in 2001,[14] 92.3 percent in 1997,[15] and 84 percent in 1990.[16] In 1974, the percentage of resolutions through convictions was 60.5 percent, but just 33.7 percent in 1908. Michael O. Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts," 89 HARVARD L. REV. 314 (Dec. 1975).

The only protection that the overwhelming number of defendants — whose case is never heard by a petit jury — have against unjust prosecution is that provided by the grand jury, but the grand jury no longer serves any meaningful protective purpose. *See* Section II, *infra*.

While there may be several reasons for the remarkable increase in guilty pleas, it is widely recognized that "[i]n most cases it is pressure — the promise of leniency in sentencing, a reduced charge, or the desire to avoid pretrial detention — that induces guilty pleas." Finkelstein, *supra*, p. 293. Additionally, prosecutors often over-charge crimes that they know they could never hope to prove beyond a reasonable doubt, so that they can retain bargaining power to

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[14] http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2001/jun01/d04jun01.pdf.

[15] http://catalog.hathitrust.org/Record/003435589.

[16] G. Fields & J. Emshwiller, "Federal Guilty Pleas Soar As Bargains Trump Trials," *Wall Street Journal*, Sept. 23, 2012, http://online.wsj.com/article/SB10000872396390443589304577637610097206808.html.

accept guilty pleas for lower offenses.[17] *See, e.g., id.* at 294. Indeed, guilty pleas can "secure convictions that could not otherwise be obtained." *Id.* at 309. Prosecutors also "stack" charges for the same set of conduct, a practice which has been condoned by this Court, so long as each crime requires proof of an additional element that another does not.[18]

Public defenders on both state and federal levels are badly overworked, and it is "no wonder that many [public defenders can fall] into a 'meet 'em and plead 'em' routine...."[19] Of course, it does not help that the

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[17] Overcharging is no problem for federal prosecutors when it comes to a trial, since juries are permitted to find defendants guilty of so-called "lesser included offenses," despite that practice's questionable constitutionality. *See, e.g.*, J. Shellenberger & J. Strazzella, "The Lesser Included Offense Doctrine and the Constitution," 79 MARQUETTE L. REV. 3 (Spring 1996). Indeed, this Court required states to permit juries to find lesser included offenses, recognizing that this "rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged," but believing that its operation "can also be beneficial to the defendant...." Beck v. Alabama, 447 U.S. 625, 633-34 (1980).

[18] *See* Blockburger v. United States, 284 U.S. 299, 304 (1932) ("Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

[19] H. Levintova, J. Lee, and B. Brownell, "Why You're in Deep Trouble If You Can't Afford a Lawyer," *Mother Jones* (May 6, 2013). http://www.motherjones.com/politics/2013/05/public-

prosecution's budget invariably exceeds that of the defense by several orders of magnitude. *Id.* Actual guilt, however, does not correlate directly with guilty pleas, even though the judicial system generally assumes "that defendants who were convicted on the basis of a negotiated pleas of guilt would have been convicted had they elected to stand trial." Finkelstein, p. 293.

With not enough federal prosecutorial and judicial resources to try these cases, the entire system discussed above, including the asset seizure power, operates to reduce to a bare minimum the number of cases that actually go to trial. It is into this setting that the court of appeals yielded to the Department of Justice's demands for even greater power over defendants, and an even further tilt of the playing field, as even more defendants are stripped of the means to effectively defend themselves against federal prosecutors.

II. A GRAND JURY INDICTMENT IS NOT AN ACCEPTABLE SUBSTITUTE FOR A POST-INDICTMENT, PRETRIAL HEARING, PRIOR TO SEIZURE OF DEFENDANTS' ASSETS.

The case below has come to the court of appeals below on two occasions. In United States v. Kaley, 579 F.3d 1246 (11th Cir. 2009) ("Kaley I"), the court of appeals reversed the district court's order, which concluded the Kaleys were not entitled to a pretrial

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defenders-gideon-supreme-court-charts.

evidentiary hearing on their motion to vacate the restraining order freezing their property, and remanded the case for further proceedings. Upon remand, the district court determined that, although the Kaleys were entitled to a pretrial, post-restraint hearing, the only question to be addressed at such a hearing was whether the restrained assets were traceable to or involved in the conduct charged in the indictment. The Kaleys, who had sought to challenge the legal and factual sufficiency of the indictment at that hearing, again appealed.

Then, in the second opinion now before this court United States v. Kaley, 677 F.3d 1316 (2012) ("Kaley II"), the court of appeals affirmed the district court's order denying the Kaleys' right to a post-indictment, post-restraint hearing on the validity of the indictment as a predicate for the district court's *ex parte*, pre-trial order seizing the Kaley's assets.[20] In support, the court relied, in part, upon the supposed protective shield of the grand jury:

> Underlying all of these cases is the Supreme Court's recognition of the unique

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[20] The issue presented in this case involves indicted defendant's right to a hearing to vacate an *ex parte* restraining order after it is entered. Accordingly, the issue presented by the Petitioners focuses on the need for a post indictment, "pretrial, adversarial hearing at which the defendant may challenge the evidentiary support and legal theory of the underlying charges." Pet. Cert., p. ii. However, should this Court determine that such a hearing is required, that hearing should occur prior to the issuance of a restraining order, unless it were demonstrated that a defendant was in the process of concealing or dissipating his assets.

> nature of the grand jury as an **independent** body, not an arm of the prosecution. See, e.g., Calandra, 414 U.S. at 343 (noting the grand jury's responsibility to **protect citizens** against "arbitrary and oppressive governmental action" in the form of "unfounded criminal prosecutions"); Costello, 350 U.S. at 362 (summarizing the historical independence of the grand jury).... Indeed, "[t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting **independently** of either prosecuting attorney or judge." Stirone v. United States, 361 U.S. 212, 218, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). [Kaley II, 677 F.3d 1325 (emphasis added).]

The court's reasoning is flawed, evidencing an idealized, and totally unrealistic view of the modern role and function of a federal grand jury.[21]

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[21] Petitioners' Merits Brief challenges "the government's contention below that a grand jury's finding of 'probable cause' is a sufficient procedural safeguard," for asset forfeiture, but only is able to devote two pages of its brief on this topic, pp. 57-59. This *amicus* brief seeks to amplify on the many reasons why a grand jury's indictment is no substitute for a hearing prior to seizure of an individual's assets, particularly when those assets could be used to provide a robust defense of the accused.

A. A Grand Jury Finding of Probable Cause Is Insufficient to Establish the Predicate for Asset Seizure.

A grand jury indictment alone cannot establish the substantive predicate necessary for an asset seizure because it only requires a finding of "probable cause."[22] The Department of Justice's Federal Grand Jury Practice training manual explains current practice:

> A principal function of the modern federal grand jury is to decide whether to approve ("return") an indictment charging federal felony violations.... To make that decision, the grand jury must determine whether there is **probable cause** (i.e., whether it is **more likely than not**) **to believe** that a **crime has been committed**, and if the **individual charged** in the indictment committed it. [U.S. Department of Justice, Federal Grand Jury Practice (Oct. 2008), p. 9 (emphasis added).]

Thus defined, the standard of probable cause is identical to the "preponderance of the evidence" standard used by petit juries in civil cases — except that a petit jury in a civil case understands that it is

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[22] In the video now shown to all federal grand jurors before they enter service, one actor playing a grand juror explains: "But it's not as if we're sending him to prison. We don't have to find beyond reasonable doubt. It's just probable cause." The People's Panel (video, at 28:11), http://www.wawd.uscourts.gov/jurors/peoples-panel.

making a final determination of the matter, apart from an appeal.

For **pre-indictment** seizures under 21 U.S.C. § 853(e)(1)(B), Congress expressly required that "there is a **substantial probability** that the United States will prevail on the issue of forfeiture, and that failure to enter the property will result in" loss of the property. (Emphasis added.) But there is no specific standard established for **post-indictment** seizures under subsection (e)(1)(A) — merely "the filing of an indictment or information ... for which criminal forfeiture may be ordered ... and alleging that the property ... would, in the event of conviction, be subject to forfeiture...." In United States v. Monsanto, 491 U.S. 600 (1989), the Supreme Court made clear that it was not deciding "whether the Due Process Clause requires a hearing before a [post indictment], pretrial restraining order can be imposed," giving rise to a split in the circuits and this Court granting certiorari in this case. *Id.,* at 615; Pet. Cert., pp. 19-20.

In taking the position that a pretrial hearing and a judicial determination of "probable cause to believe the assets are forfeitable" was not required, the court of appeals takes the position that a grand jury indictment, followed by a trial court's approval of the government's *ex parte* application, meets not only the statutory requirement that the assets are forfeitable, but the requirements of the constitutional standard of due process of law. Only if the four factors, enumerated in United States v. Bissell, 866 F.2d 1343 (11th Cir. 1989), are resolved favorably to the defendant would he be allowed to participate in any

hearing, and even then, the hearing is limited to whether the assets fit in one of the section 853(a) categories.[23] According to the court of appeals, in no circumstance would the defendant have the right to a hearing to challenge the merits of the government's case underlying the seizure. Therefore, whether a hearing is granted under Bissell or not, the court of appeals relies on the grand jury indictment to establish the predicate for seizure post indictment.

Congress clearly requires a higher standard of proof for pre-indictment seizures — "substantial probability" — well short of "beyond a reasonable doubt," but provides well more than "probable cause to believe." The question not really addressed by the court of appeals is whether, consistent with the requirements of Fifth Amendment's Due Process Clause, an indictment provides a sufficient predicate for a seizure, particularly where the seizure may deprive a defendant of counsel of his choice under the Sixth Amendment?

The court of appeals gave only lip service to the important constitutional principles involved. With respect to the Sixth Amendment, the court stated:

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[23] Other than for defendants involved in a "continuing criminal enterprise," for such assets to be forfeitable under 21 U.S.C. § 853, they must be either be: (1) the fruits of the crime ("the property constituting, or derived from, any proceeds ... as a result of such violation" 21 U.S.C. § 853(a)) or (2) the instrumentalities of the crime ("the property used ... to commit ... the commission of such violation..." (*Id.*).)

> We begin by emphasizing again that the Sixth Amendment right implicated here – the qualified **right to counsel of choice** – is a **weighty concern**. A pretrial restraining order may make unavailable assets that a criminal defendant needs to pay for his counsel of choice. As we recognized in Kaley I, this is a **serious consequence** for the defendant. "Being effectively shut out by the state from retaining the counsel of one's choice in a serious criminal case is a substantial source of prejudice...." [Kaley II, 667 F.3d at 1319 (citation omitted).]

Then the court of appeals noted that "[t]he Supreme Court has made clear ... that the right to counsel of choice does not include the right to use illegitimate forfeitable assets to pay for counsel."[24] *Id.*, 667 F.3d at 1319 n.2. (citation omitted). Thereafter, all discussion focused on the question of a right to a hearing. Never did the court consider whether mere probable cause was a sufficiently high standard to curtail the "weighty concern" with "serious consequences" — the Sixth Amendment right to counsel of one's choice.

The court never considered that public defenders are badly overworked,[25] and cannot possibly give the

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[24] *See* Wheat v. United States, 486 U.S. 153, 157, 164 (1988) (The Sixth Amendment guarantees a defendant counsel of his choice, free of conflicts of interest).

[25] H. Levintova, "Why You're in Deep Trouble if You Can't Afford a Lawyer," *Mother Jones* (May 6, 2013), http://www.mother

type of attention to cases that can private counsel.[26] The fact that a pretrial seizure would make it difficult to present a defense is certainly not a fact unknown to federal prosecutors who, in this case, sought a pretrial seizure the day after the grand jury returned its indictment. In the current system approved by the court of appeals, it is the prosecutors who decide whether to seize a defendant's assets, subject to narrow review and routine approval by district court judges or magistrates. Prosecutors cannot be expected to be neutral in such a matter, and their exercise of discretion must be subject to independent review.

Lastly, even assuming the principle that forfeitable assets should not be used to pay for counsel, this begs the question of by what standard it is determined that the assets should be deemed forfeitable. The court of appeals never explained why a decision reached by a bare majority of 13 of 24 federal grand jurors, based on mere "probable cause to believe," was a sufficient predicate for an asset seizure, especially one implicating the Sixth Amendment right to counsel.

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jones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts.

[26] The Administrative Office of the U.S. Courts' Office of Defender Services Training Branch does not even appear to have training materials available on asset forfeiture. http://www.fd.org/navigation/select-topics-in-criminal-defense.

B. The Grand Jury's Modern Investigative Role Does Not Protect against Improper Indictments.

The court of appeals premised its decision, that a grand jury indictment is a meaningful substitute for a hearing, on its belief the modern grand jury operates "an **independent** body, not an arm of the **prosecution**." Kaley II, 677 F.3d at 1325. While this once may have been true, it is no longer. The court of appeals somehow embraced platitudes as to grand jury independence while simultaneously enumerating the loss of grand jury protections over the past six decades:

- 1956. Where "the only evidence presented to the grand jury was in the form of **hearsay**" and the indictment was "not supported by competent evidence," the challenge would not be heard. Costello v. United States, 350 U.S. 359, 361 (1956). Kaley II, 677 F.3d at 1324 (emphasis added).

- 1958. "[T]he validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of **inadequate or incompetent evidence**. Lawn v. United States, 355 U.S. 339 (1958)." Kaley II, 677 F.3d at 1324 (emphasis added).

- 1974. "[A]n otherwise valid indictment may not be invalidated even if the grand jury has considered evidence obtained in **violation** of a

defendant's constitutional rights." United States v. Calandra, 414 U.S. 338 (1974). Kaley II, 667 F.3d at 1324 (emphasis added).

- 1988. Even in the case of demonstrated **prosecutorial misconduct**, an indictment **may** be dismissed "only if the defendant can show prejudice." Bank of Nova Scotia v. United States, 487 U.S. 250, 255-56 (1988). Kaley II, 667 F.3d at 1325 (emphasis added).

- 1992. "[A]n indictment cannot be invalidated based on the government's **failure to present** known **[substantial] exculpatory evidence** to the grand jury." United States v. Williams, 504 U.S. 36 (1992). Kaley II, 667 F.3d at 1324-25 (emphasis added).

In addition to the matters cited by the court of appeals, there are many other protections of criminal law which do not apply to federal grand juries.

- Grand juries are conducted by prosecutors *ex parte*. Rule 6(d), Federal Rules of Criminal Procedure.

- Neither witnesses nor targets may be represented by counsel. Rule 6(d)(1), Federal Rules of Criminal Procedure.

- A grand jury is not required to allow a target or subject to testify, even if he requests it. U.S. Attorney's Manual, section 9-11.152.[27]

- The Federal Rules of Evidence do not apply. "[J]urors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge." United States v. Dionisio, 410 U.S. 1, 15 (1973).

- Even prosecutorial misconduct in breaching "traditional secrecy requirements" of the grand jury does not allow a challenge to an indictment. Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989).

As a result of these changes, by a recent study, federal grand juries return indictments on more than 99.6 percent of the cases presented to them.[28] It is beyond question that the decisions of this Court, and other lower federal courts following its lead, have eroded the protections of the grand jury, fundamentally changing its nature from one which was adjudicative and protective to one which is almost purely prosecutorial in nature.

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[27] http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm#9-11.101

[28] Gregory Fouts, "Reading the Jurors their Rights: The Continuing Question of Grand Jury Independence," 79 IND. L.J. 323, 330 (Winter 2004).

> The grand jury from early federal history was, if anything, more judicial than prosecutorial.... [C]ontrary to modern myth, the dominant strand of American grand jury history ... imposed **strict evidentiary limits on grand jury evidence**, and required a **significantly higher standard** for grand jury indictment than do the modern federal courts. [T]hrough the middle of the twentieth century, the grand jury played a role far closer to a trial jury that heard half of the government's evidence than to the modern minimal, accusatory body that the Supreme Court has approved.... [Niki Kuckes, "Retelling Grand Jury History," Grand Jury 2.0: Modern Perspectives on the Grand Jury, Carolina Academic Press (2011), pp. 126-28 (emphasis added).]

To establish her point, Professor Kuckes details that, from Chief Justice Marshall's day to the time of the Costello case in 1956, the grand jury was subject to the rules of evidence. "[T]he grand jury could indict only upon such 'legal evidence' such as would be admissible at trial, and not upon hearsay." *Id.* at 137. Today, a target can be indicted without a shred of evidence which would be admissible at trial.

Further, Professor Kuckes explains that the current "probable cause" standard of proof may even be more recent in origin, replacing a "more stringent *prima facie* test" that had been used at least since the 1830's.

> In 1836 ... Chief Justice Taney instructed a federal grand jury to "present no one, unless, in your deliberate judgment, the evidence before you is sufficient, in the absence of any other proof, to justify the conviction of the party accused" — emphasizing that this rule is "all the more proper" since the grand jury will not hear the evidence in defense." [Kuckes, *supra*, p. 125.]

Professor Kuckes cites a 1947 criminal justice treatise that explains: "In finding an indictment the grand jury is acting like a trial jury, except that it hears but one side of the case." *Id.*, p. 146, n.154. Kuckes concludes, "[t]here is no Supreme Court decision announcing that the standard for indictment shall henceforth be 'probable cause.'" Perhaps the most decisive event, in this regard, was the ... standardized grand jury instructions ... in 1978." *Id.*, p. 146, n.161.

It is no wonder that former Deputy Attorney General Arnold I. Burns (who served under President Reagan), observed that the federal grand jury "is no longer a protection of the person who is suspected of crime, it is a vicious tool...."[29] Rather than serving the purpose indented by the founders, "[t]he grand jury process today is as far afield from it was intended to be as it could possibly be." *Id.*

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[29] Quoted in Bill Moushey, "When Safeguards Fail," *Post-Gazette* (Dec. 6, 1998), http://old.post-gazette.com/win/day7_1a.asp, whose 10-part series catalogs misconduct of federal law enforcement officials in the pursuit of convictions.

Based on the many changes to the early American grand jury model, the understanding expressed by the court of appeals that the grand jury protects defendants from improper indictments, might possibly have been previously accurate, but presently, fanciful:

> In Williams, the Court explained that the grand jury "belongs to no branch of the institutional Government, serving as a kind of **buffer or referee** between the Government and the people." Williams, 504 U.S. at 47. As the Court had previously explained, the grand jury "serves the invaluable function in our society of **standing between the accuser and the accused** ... to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Branzburg v. Hayes, 408 U.S. 665, 687 n.23 (1972) (alteration in original) [citations omitted.] [Kaley II, 677 F.3d at 1325 (emphasis added).]

Having been stripped of its essential character, the modern federal grand jury cannot be trusted to protect individuals against ill founded indictments, as had been originally intended, and certainly cannot be relied upon to provide a meaningful "due process" protection for individuals from the pre-trial seizure of their property.

C. The Grand Jury Does Not Protect the Kaleys from Unconstitutional Acts of Congress.

The court of appeals assumes a grand jury protects "citizens against 'arbitrary and oppressive government action' in the form of 'unfounded criminal prosecutions.'" Kaley II, 677 F.3d at 1325 (citations omitted). Yet a grand jury provides no protection whatsoever against an indictment for violation of an unconstitutional law. Indeed, today grand jurors are charged that in considering an indictment: "You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activity as criminal. That is to be determined by Congress and not by you."[30]

This modern approach differs from the understanding at the founding of the country, when a defendant could urge a petit jury to acquit if they believed the law with which he was charged was unconstitutional. Chief Justice John Jay advised a petit jury that "[i]t is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that court are [sic] the best judges of law. But still both objects are lawfully, within your power of decision ... you have a right to take it upon yourselves to judge of both, and to determine the law

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[30] Model Grand Jury Charge (Approved by the Judicial Conference of the United States, March 2005), ¶ 9. http://www.uscourts.gov/FederalCourts/JuryService/ModelGrandJuryCharge.aspx.

as well as the fact in controversy." Georgia v. Brailsford, 3 U.S. 1, 4 (1794).

In 1895, the power of a petit jury to judge the law was eroded when the Supreme Court ruled that federal judges were not required to inform those jurors of their inherent authority to judge the law in a case. Sparf v. United States, 156 U.S. 51 (1895). *See* Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine, Carolina Academic Press (1998), pp. 99-108. Today, the role of a petit juror is largely eviscerated, as district court judges claim for themselves the exclusive power to judge the law, seizing that power away from the petit jury. It is now standard practice to admonish petit jury against considering the constitutionality or merit of the law.[31]

A grand juror who operates consistent with the Model Charge provides no protection against "oppressive government," as expressed by the court of appeals. Moreover, under the procedure approved by the court of appeals for asset seizures, the only individual now thought to be invested with the ability to protect a defendant from an unconstitutional law — a district court judge — could very well be precluded from even considering the matter.

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[31] *See, e.g.*, Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 2003, Preliminary Instructions, p. 1 ("You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.") http://federalcriminaljuryinstructions.com/uploads/11th_Circuit_Jury_Instructions_PDF.pdf.

A district judge would be constrained to order a seizure, even if he believes the underlying criminal statute to be unconstitutional. And, if seizure of assets precludes a defendant from retaining his counsel of choice to mount a vigorous constitutional challenge to a criminal law, that district judge might never have the issue of the constitutionality of the law presented to him. Similarly, if the deprivation of counsel of choice leads to a plea bargain influenced by the asset forfeiture, a defendant could be sentenced for violation of an unconstitutional law.

D. The Rule that a Defendant May Not Challenge a Grand Jury Indictment Is Not in Jeopardy.

The court of appeals stated that a "pretrial challenge to the evidence supporting an indictment would be wholly inconsistent with the Supreme Court's repeated pronouncements in Costello v. United States, 350 U.S. 359 (1956) and its progeny." Kaley II, 677 F.3d at 1323. Costello addressed a challenge to a grand jury indictment as being based exclusively on hearsay evidence, seeking to avoid a trial before a petit jury — a very different circumstance from that presented here. There, the Court correctly observed that, if the government's theory were to prevail, "a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury [which is] not required by the Fifth Amendment." *Id.*, 350 U.S. at 363.

The rule that a grand jury indictment could not be challenged for lack of evidence relates only to trial and

has no bearing on unrelated purposes such as the seizure of a defendant's assets, and the related loss of the right to retain counsel of choice. A prosecutor has it within his power to preclude a challenge to a grand jury indictment — by foregoing a pretrial seizure of the defendant's assets. *See* Kaley II, pp. 1331 (Judge Edmondson, concurring) ("The government takes this inconvenience upon itself by making its own choice about how it will proceed....").

III. ASSET SEIZURE AT THE DISCRETION OF THE DEPARTMENT OF JUSTICE IS INCONSISTENT WITH THE RULE OF TUMEY V. OHIO.

According to the regime sanctioned by the court of appeals, pretrial seizure of a criminal defendant's assets is based solely on (i) an indictment obtained from a grand jury, which operates under the effective direction and control of the U.S. Department of Justice,[32] followed by (ii) an *ex parte* application by the Department of Justice to a federal district court. Under that system, a defendant has no right to be heard with respect to the merits of the government's charges against him either before the grand jury or the district court. Indeed, the court below would allow a defendant only a limited post-seizure right to be heard, and even then, the defendant would have the burden of showing that the property seized is not the fruit or instrumentality of the alleged criminal activity. Pet. Br., p. 24. In such a system, it is neither the grand

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[32] *See* Pet. Br., p. 56.

jury nor the district court that determines the lawfulness of the seizure; rather, it is a matter within the control of the Department of Justice.

Vesting discretionary power to seize assets in the Department of Justice threatens a defendant's ability to afford to engage counsel of his choice, unfairly making the prosecution less difficult, and a plea bargain more likely. And petitioners identify a further reason why the Department of Justice cannot be entrusted with this power — under current asset forfeiture law, "'the Government has a direct pecuniary interest in the outcome of the proceeding.'" Pet. Br., p. 56 (citing United States v. James Daniel Good Real Property, 510 U.S. 43, 55-56 (1993)). Petitioners' argument is reinforced by this Court's ruling in Tumey v. Ohio, 273 U.S. 510 (1927).

At the beginning of federal asset forfeiture in 1970, monies received from forfeitures were deposited into the general fund of the United States Treasury and were expended by Congress through the appropriations process. This was changed by the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, which created several new forfeiture funds. The two primary funds are the Department of Justice Asset Forfeiture Fund ("DOJ Fund") and the Department of the Treasury Forfeiture Fund. The DOJ fund held assets totaling $5.97 billion as of September 30, 2012.[33] These two funds are expected to receive over $2 billion

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[33] Department of Justice, Assets Forfeiture Fund and Seized Asset Deposit Fund, Annual Financial Statements, Fiscal Year 2012 (Jan. 2013), p. 25.

more in fiscal year 2014. *See* Congressional Research Service, "Crime and Forfeiture," No. 97-139, p. 21 (May 13, 2013).[34]

The DOJ Fund is directed by statute to pay certain categories of expenses, including: forfeiture related expenses; rewards to informants; liens and mortgages against forfeited property; remission and mitigation in forfeiture cases; equipping vehicles for law enforcement use; purchasing evidence of other crimes; paying state and local taxes on forfeited property; and overtime, travel, and training for state and local law enforcement who assist the federal government. 28 U.S.C. § 524(c). *See* CRS, "Crime and Forfeiture," pp. 22-23. Once these types of expenses are paid, DOJ has been given complete discretion to expend the surplus in the DOJ Fund "for any Federal law enforcement, litigative/prosecutive, and correctional activities, or any other authorized purpose of the Department of Justice." 28 U.S.C. § 524(c)(8)(E).

Although this Court has not had occasion to consider the consequences and possible corrupting effect of the Department of Justice's clear self-interest in assets forfeited, it has previously ruled on the principle involved. In Tumey v. Ohio, 273 U.S. 510 (1927), the Court addressed a state statute which empowered a village mayor to function as a judge with respect to minor offenses, including determining guilt and the amount of the fine. Some of the fines

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[34] http://www.fas.org/sgp/crs/misc/97-139.pdf.

generated were paid to the mayor personally, and some to the village over which he presided. Tumey is generally cited for the proposition that due process requires an impartial judge without a personal pecuniary interest in the outcome, [34] but the Court's concerns extended equally to the corrupting effect of the benefit flowing to the village. The Court posed the question, "With his interest, as mayor, in **the financial condition of the village**, and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trail or a fair sentence from one who would have so strong a **motive to help his village** by conviction and a heavy fine?" Tumey at 533 (emphasis added). The Court found that the question answered itself, viewing the judge's interest in the financial prosperity of his employer, the village, was just as problematic as the judge's personal self-interest. Thus, the judge was disqualified both "because of his direct pecuniary interest in the outcome, and because of his official **motive** to convict and to graduate the fine **to help the financial needs of the village**." *Id.* at 535 (emphasis added).

For the same reason that the mayor was disqualified from ruling on guilt or innocence and imposing a fine in a traffic case, Department of Justice lawyers cannot be entrusted with broad authority to

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[34] *See Jeremiah* 1:53 ("Neither can they judge their own cause, nor redress a wrong, being unable...."); Federalist No. 10 ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."); 28 U.S.C. § 455.

trigger the seizure of assets which become the *de facto* property of their direct employer. These are matters to which the Department of Justice should be sensitive, but has not been. Then-Attorney General, Justice Robert Jackson, on the day he addressed U.S. Attorneys in the Great Hall of the U.S. Department of Justice on April 1, 1940, addressed the role of the federal prosecutor, giving these cautions:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.... The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial.... A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.[35]

The extent of prosecutorial power which troubled Justice Jackson in 1940 has been vastly increased since then, and the court of appeals has now approved yet another exponential increase in the prosecutor's powers over the people. This case demonstrates, once again that Justice Jackson's call for prosecutorial fair

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[35] http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-federal-prosecutor/

play and humility has proven inadequate to constrain the government's quest for additional power. A system which invests the federal prosecutor with vast powers to do good is always accompanied by a concomitant power to do great evil.[36] Justice would be far better served if the powers of federal prosecutors were carefully defined and strictly limited.

Nothing short of a full consideration of the merits of the government's case by a district court judge, even after indictment, will satisfy the requirements of due process, prior to the exercise of the draconian power to seize the assets of a federal defendant.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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[36] "The power to do good is also the power to do harm; those who control the power today may not tomorrow; and, more important, what one man regards as good, another may regard as harm." M. Friedman, Capitalism and Freedom (Univ. of Chicago Press: 2009), p. 3.

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