Questions for the Record from Senator Charles E. Grassley for Adam M. Smith, Partner, Gibson, Dunn and Crutcher, LLP
U.S. Senate Judiciary Committee
"KleptoCapture: Aiding Ukraine through Forfeiture of Russian Oligarchs' Illicit Assets"
July 19, 2022

1) You seemed to agree with the assertions of other witnesses that the administration's streamlined forfeiture provisions could raise some constitutional concerns and be read narrowly by a reviewing court. Do you agree with these assertions, and if so, what provisions of the bill raise your concern?
    a) What can drafters do to avoid these potential constitutional concerns?

The drafters of the proposed bill appear to be aware of the Constitutional concerns that could be raised with a streamlined procedure and have included protective provisions in the draft (that I have seen) accordingly. The various protections in the proposed legislation include: limiting and linking the law solely to a defined national emergency and sunsetting the legislation entirely after a short period; requiring the Executive to meet a burden that exceeds traditional requirements under the Administrative Procedures Act; allowing for the issuance of a warrant (providing a judicial check on the process); providing for an innocent owners defense; and, providing owners of assets broad and robust protections in a manner that does not upend the purpose of the seizures – *i.e.* no pre-seizure notice which could render the statute meaningless given asset flight, but granting owners the right to speedily petition the executive and/or the judicial branch.

2) It was referenced that the U.S. is engaged in a "hybrid-war" with Russia, and that due-process protections exist on a "spectrum." Do you agree with the notion of a due process "spectrum" and if so, how does a "hybrid war" affect that spectrum based on due process and equal protection cases from the U.S. Supreme Court?

It is not clear to me that the "hybrid" nature of the war with Russia directly speaks to the questions of due process or equal protection. However, this hybrid nature – which in my understanding refers to a war that is both kinetic (waged on the battlefield) and non-kinetic (waged in boardrooms, courtrooms, stock exchanges, financial institutions, and corporations the world over) – speaks directly to the need to consider expanding our arsenal of tools to fight the war. This is why expanding the authorities under *in rem* asset forfeiture makes a good deal of sense. It is a new tool, explicitly designed for the type of war being fought in Ukraine, and limited to that theater.

3) Your testimony asserted that due process protections in the administration's proposal satisfy constitutional precedent. Please provide an overview of the precedent you are referring to.

Precedent for the exception to the general rule requiring pre-seizure notice and hearing for the seizure of real property for purposes of civil forfeiture, can be found in the three-part inquiry set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Court's analysis indicated that the government's decision to deprive a person of his/her property pending final adjudication must be reached by a process that guards against an erroneous deprivation. *Id.* at 334 The sufficiency of the process was held to depend upon three factors: the private interests affected; the risk of erroneous deprivation in light of the probable value of alternative proceedings; and the government's interest,

including the function involved and the fiscal and administrative burdens that alternative proceedings would entail. *Id.* Though it may depend on the specific assets seized, the importance of the government's interest (and its absence of alternative means to obtain the foreign policy and national security goals at issue – see Question 7 below), combined with the protections provided in the draft legislation, it is my assessment that if implemented as drafted, the three part test would almost certainly be met by the proposed legislation here.

4) Would you agree that retroactive application of a civil statute which results in punitive forfeiture could run contrary to U.S. Supreme Court precedent?

While retroactive laws are generally to be avoided, it is notable that the Supreme Court has found ex post facto *civil* liability to be far less problematic than retroactive criminal liability. As such, it is not clear to me that retroactive application of a civil statute in this case would face Supreme Court objection. Moreover, it is not evident that the application of the proposed statute would in fact be retroactive. The law would apply going forward on assets that would be properly identified by the process described in the statute. The status of potentially-targeted property may change due to the new law but that is no different than any other forward looking law which can impose new taxes or other regulations on pre-existing property or rights, without being deemed impermissibly *ex post facto*.

5) You argued in your written testimony that the Supreme Court has already approved legislation that is similar to the one proposed by the administration. However, the case you cite to concerns a pre-seizure analysis of due process and does not concern the final forfeiture of the asset. Is it your testimony that a property seizure case is analogous to a property forfeiture case? If not, is there other relevant precedent to support your assertion?

In my testimony I described *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) which remains good law as to its due process holding, but has been superseded by statute on other grounds. See *United States v. Thompson*, 990 F.3d 680, 687 (9th Cir.), cert. denied, 142 S. Ct. 616, 211 L. Ed. 2d 384 (2021). The holding of *Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663* (1974) addressed only the due process requirements at the pre-seizure stage. Although the statute at issue, Tit. 34, s 1722 (1971), provided for post-seizure forfeiture procedure, id. at n. 2., the Court did not consider the post-seizure forfeiture portion of the statute when making its due process determination. As acknowledged in *Calero-Toledo* "[n]o challenge [was] made to the District Court's determination that the form of post-seizure notice satisfied due process requirements." Id. at n. 15.

Other cases have, however, addressed the due process requirement of a post-seizure hearing more directly. After seizure has taken place, due process requires that potential claimants to be provided with the opportunity for a post-seizure hearing on the forfeitability of the property "at a meaningful time." See *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. 555, 564 (1983); *Krimstock v. Kelly*, 306 F.3d 40, 48 (2d Cir. 2002).

As noted above in my answer to Question 1, this requirement is also addressed in the proposed legislation that I have reviewed.

6) Another witness noted that expanding RICO predicate offenses would establish a "cascade effect" in which the government would be allowed more authority to forfeit criminal assets, including in money laundering cases. Do you agree with this cascading effect that would result if RICO were expanded?
    a) If so, would that assist the administration by providing additional avenues of civil and criminal forfeiture?

I am not a RICO expert and am thus not sure if a cascade effect would be created that would aid the administration in providing additional avenues for civil forfeiture.

7) With your experience in international sanctions, are there ways to further utilize other sanction statutes such as the Global Magnitsky Act to target Russian oligarchs without establishing a new isolated forfeiture statute?

Based on the underlying statutory basis for the Global Magnitsky Act – the International Emergency Economic Powers Act – there is only so much that can be done under Magnitsky (or any of the other sanctions authorities) to actually pressure oligarchs and others. IEEPA-based sanctions have been leveraged extensively in the Russia context (1000+ new designations have been made since February 2022 – almost all related to the war and/or the Putin regime). However, as noted in my testimony, the statute does not allow seizure of any assets outside the narrow confines of a situation in which the United States is in an armed conflict with the owner of the assets in question. As I discussed in my written and oral testimony, if the United States chose to pursue seizure on this basis it would have to make the finding that it was engaged in armed hostilities. That would be a risky and potentially highly escalatory determination.

Any amendments to IEEPA to expand the seizure authorities under the statute – to, for example, allow seizures in other circumstances – would implicate all sanctions programs that rely on IEEPA (which could expose those programs to unintended and unforeseen consequences, let alone additional judicial inquiry or challenge, both in the United States and abroad). In short, amending IEEPA potentially imperils sanctions programs on Iran, Syria, North Korea, and dozens of other jurisdictions and those addressing numerous other threats (including WMD proliferation and terrorism). As such, the safer and easier model is to proceed down the path suggested by the bipartisan proposal – a narrowly tailored, standalone bill that directly targets the issue, and does not extend beyond the national emergency as defined. This legislation would also have the added the benefit of increasing pressure on corrupt actors more generally while addressing the severe national security risks caused by the presence of dark money in the U.S. and global financial systems.