Questions for the Record from Senator Charles E. Grassley for Paul Stephan, University of Virginia School of Law
U.S. Senate Judiciary Committee
"KleptoCapture: Aiding Ukraine through Forfeiture of Russian Oligarchs' Illicit Assets"
July 19, 2022

1) During the hearing, it was argued that due process protections exist on a "spectrum" ranging from enemy combatants in wartime to a criminal defendant charged with a federal crime in a U.S. court. It was further stated during the hearing that the administration's proposal "lands in a responsible place between the two."
    a. Do you agree that due process protections exist on a spectrum?

I would put the point a bit differently. The Supreme Court regards the Due Process Clause as triggering a balancing test that adjusts the level of protection depending on the competing interests at stake. The best statement of that test, I think, was provided by Justice Powell in his opinion for the Court in *Mathews v. Eldridge*, 424 U.S. 329, 334-35 (1976): "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Here the private interest is the ownership of property, the public interest is the value to the government, in light of its national security objectives, of confiscating rather than just freezing the property, and the specific procedural issues would be the standards, evidentiary rules, and burden of proof associated with confiscation as well as the value of safeguards before or after the confiscation (as distinguished from freezing) of the property. I think it is relevant to the application of this balancing test that confiscation of the already frozen property can produce a substantial harm to the property's owner, who loses irrevocably the future value of the asset, and not much benefit to the government, which already has prevented the present use of the property as a means of impeding its national security objectives.

    b. How are due process protections in U.S. courts affected, if at all, by Russia's war in Ukraine?

The United States is not a party to the armed conflict between Russia and Ukraine, although it does support Ukraine in its resistance to Russia's armed aggression. Accordingly, I do not think that the war itself affects the balance of due process interests. Rather, the situation is an international emergency within the terms of the International Emergency Economic Powers Act (IEEPA). This status justifies measures such as orders for the immediate freezing of property in advance of any notice or hearing. These measures have repeatedly survived due process challenges in the courts.

    c. Are there circumstances under which courts would be willing to accept varying degrees of due process as constitutionally permissible? If so, what are those circumstances and how should they guide our understanding of due process rights in times of conflict?

Cases such as *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), reveal that the specific requirements of due process for persons in U.S. territory challenging their detention as an enemy combatant in the United States are not as stringent as those applicable to a tribunal that has the power to mete out criminal punishment and even death sentences. I would consider this an example of the balancing test laid out in *Matthews v. Eldridge*, where the individual interest (freedom from detention during the course of an armed conflict) was not as grave as freedom from criminal sanctions. The question raised by the administration's proposed legislation is not detention of persons, but rather detention and possible confiscation of property.

Were the United States in an armed conflict with the Russian Federation, I believe the Due Process Clause would permit the confiscation of property owned by Russian nationals without requiring proof of a connection between that property and the conflict. More precisely, I think a connection based on the status of the owner, without more, would suffice. Both U.S. history and widespread international practice justify forfeiture under these circumstances to eliminate any possibility of the use of the property to give aid and comfort to an enemy.

i. In your view, do the current circumstances in Ukraine constitutionally justify the extent of due process limitations contained in the administration's proposal?

In the absence of an armed conflict (a term that covers more than a state of war under Article I, Section 8, Clause 11 of the Constitution, but still has clear limits), I believe the Due Process Clause requires a clear legal statement, in advance of any confiscation, of the connection between the property and proscribed activity that would provide grounds for confiscation. Because the administration's proposal would in effect give retroactive effect through civil forfeiture to new criminal laws, I think they exceed the due process limitations justified by the current circumstances in Ukraine.

2) It was referenced on a few occasions that the current legislation satisfies due process requirements because it requires a presidential declaration of national emergency before the forfeiture powers are available to use. Is a declaration of a national emergency a relevant fact in determining whether a federal criminal statute affords adequate due process protection in U.S. courts?

A declaration of national emergency satisfies the requirements of due process for purposes of barring any transactions in property covered by the declaration. The law currently on the books does not authorize a confiscation of covered assets, however, absent the existence of an armed conflict to which the United States is a party. Applying the *Matthews v. Eldridge* formula, a confiscation of property results in greater harm to the protected individual interest than does a ban of transactions in that property. It is not clear to me that confiscation of property materially advances a governmental interest relative to the freezing of that property. Both a freeze and confiscation prevent the use of that property to undermine U.S. national security interests. What confiscation does is cut off the owner's interest in having the property returned to full ownership and control at the end of the declared emergency. The government's interest consists entirely of the risk that this expectation of returned ownership could allow the owner to provide support to an international wrongdoer in the context of an international emergency. Under the *Matthews v. Eldridge* formula, I think that the Due Process Clause would require more protection for the owner in the case of a confiscation than in a freeze. In particular, I think it is likely that a court would regard a retroactive application of a confiscation penalty as unconstitutional.

3) The administration's proposal includes expanding the Racketeering Influenced and Corrupt Organizations (RICO) Act (18 U.S.C. § 1961) to include as predicate crimes violations of sanctions/export laws, including the International Emergency Economic Powers Act (50 U.S.C. §

1705), the Export Control Reform Act (50 U.S.C. § 4819), and the Arms Export Control Act (22 U.S.C. § 2751). Do you also favor including as RICO predicates other sanctions laws passed by Congress, including the Caesar Syria Civilian Protection Act (Pub. L. No. 116-92, 133 Stat. 2291 (2019)), the Uyghur Human Rights Policy Act (Pub. L. No. 116-145, 134 Stat. 648 (2020)), and the Hong Kong Autonomy Act (Pub. L. No. 116-149, 134 Stat. 663 (2020))?

I support a proposal to enhance enforcement of existing sanctions rules through the application of RICO. I see no reason to distinguish sanctions covered by IEEPA from other sanction regimes authorized by Congress. Rather, I regard enhanced enforcement as appropriate for sanctions based on human-rights and rule-of-law concerns, and not just for sanctions connected to an international emergency.

4) Your testimony indicated concerns with the notice requirements established in the proposed asset forfeiture legislation. Though the administration's forfeiture proposal does include some notice requirements, what are your concerns, and how could they be viewed as running afoul of core constitutional protections?

My concern is with ambiguity in the proposed 28 U.S.C. § 2467(c)(2)(D). This addresses the application of Civil Procedure Supplemental Rule G's notice requirements to the civil forfeiture proceedings that the proposal would authorize. I see no reason why Rule G(4)(b) should not apply to all civil-forfeiture proceedings. As presently drafted, the proposal does not lock down that result.

5) It was referenced during the hearing that the proposed legislation is narrowly tailored to Russian oligarchs. In what ways would it be problematic to establish varying due process protections for different classes of individuals charged with felonies in U.S. courts? How could legislation be crafted to ensure adherence to equal protection and due process rights, while allowing for flexibility in unique circumstances?

Under the administration's proposal, proposed new 50 U.S.C. § 4901 authorizes forfeiture authority only with respect to assets frozen under existing IEEPA powers as a result of Russia's "harmful foreign activities impacting Ukraine." Proposed 18 U.S.C. § 2324 criminalizes a class of corrupt transactions, but only those involving the Russian Federation and its officials. Adopting legislation that singles out Russian oligarchs and their conduct regarding Ukraine is problematic on policy and, arguably, constitutional grounds.

Unfortunately, there is nothing unique about the kleptocratic features of the current Russian regime or its behavior toward Ukraine. Russia launched an armed invasion of Georgia in 2008 and continues to threaten that country as well as Moldova, Lithuania, Estonia, and Latvia. We also can find kleptocratic features in other countries, some of which are significant potential adversaries of the United States even if they are not currently engaged in aggressive war. For example, Venezuela, a country subject to IEEPA sanctions, has credibly been accused of waging a proxy war against Colombia. As a matter of policy, adopting measures to enhance U.S. capacity to sanction rogue states generally strikes me as a better strategy than treating the current crisis as a one-off, never-to-be-repeated event.

Singling out property owners for onerous penalties on the basis of their nationality or political affiliation, without requiring a connection to conduct identified as a criminal offense under U.S. law, raises both due process and equal protection concerns. Confiscation of property is onerous, and it should be preceded by notice that the risk of forfeiture exists. Treating property owners differently depending

on which particular economic emergency they are drawn into, without taking into account their personal involvement in specified criminal conduct, raises troubling issues of differential treatment.

6) You testified that significantly expanding federal criminal jurisdiction for certain offenses as currently written in the proposal could lead to unintended consequences that are unnecessary for achieving the end goal. Would you please elaborate on these concerns and how it could affect the integrity of the proposal?

As I indicated in my written statement, the administration proposes the enactment of a new criminal offense, 18 U.S.C. § 2324, that would criminalize conduct entailing the "violation of any foreign law" whenever that conduct also would have violated specified U.S. law but for the absence of U.S. jurisdiction over the offense. The proposal symmetrically adds a comparable predicate offense to the money laundering statute through a new 18 U.S.C. § 1956(c)(7)(H). By rendering specified conduct as criminal, as well as a predicate offense for money laundering purposes, in the absence of any connection to the United States, these provisions represent an assertion of universal jurisdiction over such crimes. No other nation in the world regards the exercise of universal jurisdiction in these circumstances as appropriate.

I noted in my testimony that some academic commentators and a handful of lower courts regard the assertion of universal criminal jurisdiction by the United States, outside a few designated areas of conduct that the international community has condemned as crimes against all humanity, as a violation of constitutional due process. *See*, *e.g.*, Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 Harv. L. Rev. 1217 (1992); *United States v. al-Maliki*, 787 F.3d 784, 791-792 (6th Cir. 2015); *United States v. Weingarten*, 632 F.3d 60, 70-71 (2d Cir. 2011). I disagree with this position, and the Fourth Restatement on foreign relations law, in which I had a hand, did not endorse it. Restatement (Fourth) of the Foreign Relations Law of the United States § 403 cmt. *a* & reporters' note 1 (Am. L. Inst. 2018). Whether or not these proposals are constitutionally problematic, however, they represent an unprecedented extension of federal criminal jurisdiction over financial transactions that have no substantial nexus to the United States.

Incorporating foreign law into the definition of a U.S. criminal offense presents real challenges. In some jurisdictions, especially those with kleptocratic characteristics, the law on the books bears little or no relation to actual criminal enforcement. Legal requirements there can exist only as a pretext to give government officials a means to extort shake-down payments. This is especially true with respect to financial regulation in such countries. On their face, the proposed criminal provisions would seem to criminalize a range of behaviors that do not come within the definition of corruption or fraud under other federal criminal statutes, such as the Foreign Corrupt Practices Act or the Wire Fraud Statute. Yet those existing provisions already cast a very broad net.

The reference in proposed 18 U.S.C. § 2324 to any "economic or financial advantage obtained from or through the Government of the Russian Federation" as a ground for criminal punishment seems especially open-ended. It would, one might think, apply to former German Chancellor Gerhard Schröder, who has been employed by Russian state-owned enterprises and obtained many advantages from the Putin regime since leaving the German chancellorship in 2005. It also would seem to pick up people and firms who cooperate with the Russian government under threat of extortion.

I do not understand why these new crimes are necessary, other than to expose a broad class of Russian-owned assets found in the United States to the possibility of civil forfeiture. But if the retroactive application of these criminal provisions for civil forfeiture purposes violates the Fifth Amendment, as I believe it does, the rationale for this statute disappears. Its adoption would serve as an invitation to

other jurisdictions with adversarial relations with the United States to expose U.S. nationals and businesses to their criminal laws without any nexus between those businesses and the adversary state.

Another unforeseen consequence of criminalizing the receipt of any financial or economic advantage from a particular regime with which the United States is not at war, and then extending civil forfeiture to assets associated with such advantages, would be the undermining of norms of international law for which the United States has fought for more than a century. Under the test consistently propounded by the United States, confiscation of the property of a foreign national in a discriminatory manner constitutes a breach of international law. Singling out property belonging to persons caught up in a particular international emergency by virtue to their ties to the offending government, without requiring any connection between those persons and the emergency itself, seems on its face discriminatory. It was exactly what Cuba did in 1960. It singled out U.S.-owned property for expropriation. In response, the United States charged the Castro regime with violating international law. We backed up those charges by adopting the so-called Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), so as to allow U.S. victims to bring suit in U.S. courts against Cuban entities who benefited from these expropriations. Adoption of these parts of the administration's proposal, with their exclusive focus on Russia, would seriously undermine a campaign that has been at the heart of U.S. foreign policy for many years across administrations of all political orientations.