

**United States Senate  
Committee on the Judiciary**

*Hearing*

“KleptoCapture: Aiding Ukraine through Forfeiture of Russian Oligarchs’ Illicit Assets”

226 Dirksen Senate Office Building

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Chairman Durbin, Ranking Member Grassley, and Members of the Committee:

Good morning and thank you for inviting me to testify before the Committee. I have been asked to assess the potential of the U.S. Government – and our allies and partners – forfeiting Russian oligarchs’ illicit assets and deploying those funds to aid Ukraine. In particular, I have been requested to provide my assessment of how such an effort could be orchestrated – in line with current and potentially new legislation – and what benefits and risks are present in pursuing such efforts.

As I will discuss, I believe that the most effective approach would be something similar to what I understand the Administration has proposed and is the subject of a bipartisan bill currently in development by Senators Whitehouse and Graham (the “proposed forfeiture framework”) – specifically, for Congress to augment the Executive’s existing seizure and forfeiture authorities with a highly-targeted, sunseting, standalone authorization (*i.e.*, not built on top of existing authorities such as those related to sanctions), that provides for broader in rem administrative forfeiture along with robust post-seizure due process protections for asset owners, and critically would be applied only to a limited number of cases related to the illicit assets of Russian-linked oligarchs.

I have been examining this issue since the latest Russian invasion of Ukraine began in February of this year.<sup>1</sup> My views are informed by my time at the Treasury Department’s Office of Foreign Assets Control (“OFAC”) and on the National Security Council under President Obama where I was involved in the first round of sanctions deployed against Russia following its invasion of Crimea and the Donbas in 2014. I had the opportunity to travel to Ukraine while serving in the

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<sup>1</sup> *See, e.g.*, “Could seizing Russian assets help rebuild Ukraine? Both legal and practical hurdles stand in the way,” *The Economist*, June 6, 2022.

government to hear first-hand about the challenges of Russian aggression at that time – such aggression and its implications for both Ukrainian and global security has clearly become even more serious over the last several months.

## The Need

The Russian invasion and in particular Moscow’s brutal military tactics of indiscriminate bombings, the use of cluster munitions, attacks on health care, educational, and civilian residential facilities and infrastructure, and its medieval siege strategies have left large portions of Ukraine’s industrial and agricultural heartland in ruin.<sup>2</sup> Millions of Ukrainians have fled their homes leading to a significant, expensive, and unfunded internally displaced persons (“IDPs”) and refugee crisis throughout Ukraine and into Eastern Europe and beyond.<sup>3</sup> Finally, Moscow’s outright theft of Ukrainian grain and other resources<sup>4</sup> – along with Russia’s throttling of gas flows through Ukraine which had been a consistent source of transit funds<sup>5</sup> – have left the Kiev government with limited self-sustaining resources to meet its fiscal challenges.

While calculations of the amount of damage the war has done to Ukraine differ – ranging as high as \$750 billion<sup>6</sup> – the true amount, once accounting for the physical and psychological tolls and the continued need to fund the still ongoing conflict, is by any measure immense. Moreover, the implications of Ukraine’s destruction – especially of its agricultural supply chains – have been felt far beyond the country, exacerbating economic and political crises as far afield as Sri Lanka and Somalia, and threatening the food security of millions who are geographically removed from Putin’s “special military operation.”<sup>7</sup>

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<sup>2</sup> Valerie Hopkins, et al., “100 Days of War: Death, Destruction and Loss,” *NY Times*, June 3, 2022; Ashish Valentine, “Here’s How Much it Could Cost to Rebuild Ukraine – and Who Would Pay For It,” *National Public Radio*, May 26, 2022.

<sup>3</sup> UN High Commissioner for Refugees, “Ukraine Refugee Situation,” Operational Data Portal. Available at: <https://data.unhcr.org/en/situations/ukraine>. The UNHCR estimates that as much as a third of Ukrainians have been forced to leave their homes due to fighting, leading to as many as 7 million IDPs. See: <https://www.unhcr.org/ua/en/internally-displaced-persons>

<sup>4</sup> Declan Walsh and Valerie Hopkins, “Russia Seeks Buyers for Plundered Ukraine Grain, U.S. Warns,” *NY Times*, June 8, 2022.

<sup>5</sup> Andrian Prokip, “Russia’s Energy Transit Play, a Crooked Game,” Wilson Center – Focus Ukraine, May 23, 2022.

<sup>6</sup> Dan Bilefsky and Nick Cumming-Bruce, “Ukraine’s Prime Minister Says Rebuilding will Cost \$750 Billion,” *NY Times*, July 5, 2022.

<sup>7</sup> Fertilizer prices have increased by more than 230% since May 2020, with recent increases driving “by supply disruptions stemming from the Russia-Ukraine conflict.” Charlotte Hebebrand and David LaBorde, “Short-term Policy Considerations to Respond to Russia-Ukraine Crisis Disruptions in Fertilizer Availability and Affordability,” *International Food Policy Research Institute*, June 8, 2022. Available at: [ifpri.org/blog/short-term-policy-considerations-respond-russia-ukraine-crisis-disruptions-fertilizer](https://ifpri.org/blog/short-term-policy-considerations-respond-russia-ukraine-crisis-disruptions-fertilizer). See also, Gerry Shih, “How War in Ukraine turned Sri Lanka’s Economic Crisis into a Calamity,” *Washington Post*, April 17, 2022; “Russia’s

As a consequence, finding a way to aid Ukraine and its people both through the war and in its aftermath – with both military and non-military support – is not just a morally worthy cause but one that is critical to protecting core U.S. national security and foreign policy interests globally, as well as the health and well-being of scores of peoples around the world.

The magnitude of the damage to the Ukrainian economy and Kiev’s evident needs come at a challenging time for many Western economies which are facing diverse macroeconomic shocks as they continue to recover from COVID, a reality that has sapped global donor enthusiasm.<sup>8</sup> As a consequence, finding non-traditional sources of funds to aid Ukraine makes economic and political sense. Deploying funds that had been acquired illicitly, by parties who have implicitly or explicitly supported the Putin kleptocracy, and in a manner which would buttress the broader national security goals of fighting global illicit finance while potentially deterring future bad acts, has manifest additional benefits.

## Potential Methods

There is little question that the seizing of oligarch illicit assets is a legally possible avenue for the U.S. Government to undertake and that those funds can be directed to Ukraine. While new legislation is required to fill notable gaps in the government’s current capacities (see below), a combination of existing authorities (under the International Emergency Economic Powers Act [“IEEPA”],<sup>9</sup> asset forfeiture regulations,<sup>10</sup> and other tools) already permit seizures in limited circumstances. However, these existing methods do not give the U.S. Government the flexibility that the situation demands. Existing sanctions under IEEPA do not allow the seizing or forfeiting of assets in most circumstances and current asset forfeiture laws require judicial action for assets worth more than \$500,000 – a process that can delay action and allow asset flight.

There are diverse precedents for seizures under current law, ranging from the seizure of state assets, like those of Afghanistan, Venezuela, and Iraq, to individual actions against Russian oligarchs and other criminals.

For example, existing IEEPA authorities allow the government only to freeze, not seize, assets unless the United States itself is engaged in armed conflict. This explicitly delimited authority was deployed for the first time in 2003 when President George W. Bush promulgated Executive Order (“E.O.”) 13290 blocking (“freezing”) the property of the Government of Iraq and vesting

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Invasion of Ukraine has Pushed Somalia Towards Famine,” *National Public Radio – Morning Edition*, July 13, 2022.

<sup>8</sup> “War Fatigue, Europe Inflation Hit Ukraine Aid Response,” *Kyiv Post*, July 10, 2022.

<sup>9</sup> The International Emergency Economic Powers Act, 50 U.S.C. ch. 35 §1701 et seq.

<sup>10</sup> *See generally*, U.S. Department of Justice, Asset Forfeiture Policy Manual (2021).

that property in the Department of the Treasury to “be used to assist the Iraqi people and to the assist in the reconstruction of Iraq.”<sup>11</sup>

In August 2020, the United States unfroze assets owned by the Venezuelan government of Nicolás Maduro and provided them to the country’s opposition.<sup>12</sup> In February 2022, the Biden Administration leveraged an IEEPA-based E.O. and license<sup>13</sup> and the Federal Reserve Act<sup>14</sup> to freeze the U.S.-based assets of the Afghan Central Bank and direct those funds to its preferred owners.<sup>15</sup>

More recently still, in March 2022 the United States District Court for the District of Columbia approved a warrant to seize a multimillion dollar yacht – the *Tango* – anchored in Spanish waters and owned by a sanctioned Russian oligarch Viktor Vekselberg.<sup>16</sup> The warrant relied upon existing asset seizure regulations that permitted the seizure of assets if they were related to various identified illegalities. In this case, the U.S. Government alleged – and the U.S. District Court agreed – that there was:

“probable cause to believe that the TANGO is subject to seizure and forfeiture based on violations of 18 U.S.C. § 1349 (conspiracy to commit bank fraud), 50 U.S.C. § 1705(a) International Emergency Economic Powers Act (“IEEPA”), and 18 U.S.C. § 1956(a)(2) & (h) (money laundering & conspiracy). Specifically, 18 U.S.C. § 981(a)(1)(A) & (C) provide for forfeiture of property that is (i) “involved in” a transaction in violation of 18 U.S.C. § 1956 or ii) “constitutes” “proceeds traceable” to a specified unlawful activity (as defined in 18 U.S.C. § 1956(c)(7)(D); here, bank fraud and violations of IEEPA).”<sup>17</sup>

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<sup>11</sup> *Id.*, pg. 14.

<sup>12</sup> “U.S. Unfreezing Venezuela Assets to Help Opposition Fight COVID-19: Guaido,” *Reuters*, August 21, 2020.

<sup>13</sup> IEEPA allows the President to issue “regulations” and “definitions” to implement its authorities, which has been interpreted to include exemptions and licenses. 50 U.S.C. § 1704. In practice, each IEEPA-based E.O. that gives rise to a sanctions programs has its own set of regulations in the CFR. For example, the most recent Russian sanctions E.O.s are broadly implemented in 31 CFR Part 587, the Russian Harmful Foreign Activities Sanctions Regulations.

<sup>14</sup> “Protecting Certain Property of Da Afghanistan Bank for the Benefit of the People of Afghanistan,” Executive Order 14064, February 11, 2022.

<sup>15</sup> Scott Anderson, “What’s Happening with Afghanistan’s Assets?” *Lawfare*, February 18, 2022. I note that this solution continues to face challenges and it is not yet clear if the courts will allow its seeming elegance to stand.

<sup>16</sup> Spencer Hsu, “U.S. Seizes Superyacht of Russian Billionaire Close to Putin,” *Washington Post*, April 4, 2022.

<sup>17</sup> In the Matter of the Seizure of The Motor Yacht Tango, with International Maritime Organization Number 1010703, Case No. 22-sz-5, Application for a Warrant to Seize Property Subject to Forfeiture, U.S. District Court for the District of Columbia, March 25, 2022; U.S. Department of Justice, “\$90 Million Yacht of Sanctioned

These seizure examples are diverse and rely on a range of authorities to achieve similar (though not identical) outcomes – seizure of assets and a directing of those assets (immediately or upon liquidation) to the U.S. Government, either for deposit into a Justice Department asset forfeiture account, a general U.S. Treasury account, or onward to identified owners.

While cases like the *Tango* may suggest that the system does not need improvement, I argue that it suggests the opposite. We are aware of the vessels, aircraft, and funds that have been seized (which are few in number) – what is not public is what has managed to slip through our fingers as the current bureaucratic and legal process proved too slow and cumbersome.

Though current laws provide an array of options – and successes like the *Tango* and others are rightfully celebrated – more must be done to augment these authorities and improve their effectiveness in both denying bad actors funds and deterring further bad activities. Depending upon the current authorities used, the speed of such actions can be maddeningly slow (risking asset flight), the ease and pace of leveraging various authorities can be based upon the value of underlying assets – meaning that some assets are more quick to attach while others can escape the government’s grasp,<sup>18</sup> and the ability to direct funds to preferred beneficiaries can be imprecise (if it exists at all).<sup>19</sup> Indeed, the requirement to go to court prior to actions dealing with substantial personal property causes significant delay and doubt as to such actions – the inherent uncertainty of such actions significantly reduces the deterrent effect of the regulations while allowing certain assets the time and opportunity to be moved beyond our reach.

### **Limited Ability to Tap Other Russia-Related Assets**

In addition to illicit oligarch assets, experts have pointed to other potential sources of Russian funds that could provide monetary support to Ukraine – Russian sovereign assets (*e.g.*, the Central Bank) and assets derived from Moscow’s continued sale of oil and gas.<sup>20</sup> However, attaching Russian sovereign assets raises significant legal and practical challenges, while greatly reducing the likelihood of broad multilateral support for such an initiative.<sup>21</sup> Meanwhile focusing on

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Russian Oligarch Viktor Vekselberg Seized by Spain at the Request of United States,” Office of Public Affairs, April 4, 2022.

<sup>18</sup> *See, e.g.*, 19 U.S.C. §1607.

<sup>19</sup> Matthew Goldstein, “Seizing an Oligarch’s Assets is One Thing. Giving them to Ukraine is Another,” *NY Times*, May 8, 2022.

<sup>20</sup> “The estimated scale of frozen oligarch assets is [only] about \$30 billion” compared with the hundreds of billions of frozen state assets, and the billions of dollars of funds that continue to be derived by Moscow from Russian oil and gas sales. *See*, Philip Zelikow, “A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine,” *Lawfare*, May 12, 2022; Hiroko Tabuchi, “Russia’s Oil Revenue Soars Despite Sanctions, Study Finds,” *NY Times*, June 13, 2022.

<sup>21</sup> *See, e.g.*, Lawrence Tribe and Jeremy Lewin, “\$100 Billion – Russia’s Treasure in the U.S. Should be Turned Against Putin,” *NY Times*, April 15, 2022. While Messrs. Tribe and Lewin forcibly argue that the Executive

siphoning off funds from Russia’s oil and gas sales – as was done in the Iran context – risks the continuity of oil and gas supplies for our core European allies (and thus limits their likelihood of support) while requiring cooperation from foreign jurisdictions that have thus far proven unwilling.<sup>22</sup>

In contrast, focusing on illicit Russian oligarch assets provides a far more promising and comparatively more easily accessible pool of funds, with more limited and manageable legal and practical challenges, while also providing the significant dual benefits of fighting the scourge of corruption while encouraging multilateral cooperation.

### **Core Interests to Guide the Legislative Process – Domestic Rule of Law and Multilateral Engagement**

While it is evident that we can develop tools to more effectively and quickly seize and deploy oligarch illicit assets for Ukraine, we must remain committed to two core interests to guide us – domestic rule of law and multilateral engagement. A legislative solution that is structured carefully like the Administration’s proposed forfeiture framework – with a limited focus, strong due process protections, etc. – can accomplish its goals while preserving and furthering these interests.

#### *Domestic Rule of Law*

A core element of any enhanced seizure and forfeiture strategy must be to retain an ironclad commitment to our domestic rule of law – especially with respect to the protections such law provides to disfavored and even insidious actors. A commitment to the rule of law – which, as described below appears to be embodied in the Administration’s proposed framework – is a central feature and guiding principle of our foreign and domestic policies. While this commitment has long been bipartisan, the Biden-Harris administration has made rule of law a central component of its foreign policy, including hosting a Summit for Democracy in 2021<sup>23</sup> and stressing the importance of “rule of law” as a critical tool to push back against autocracies like Putin’s Russia. Indeed, President Biden has framed the Ukrainian conflict and U.S. support for Kiev as a “a battle between democracy and autocracy, between liberty and repression, between a rules-based order

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already has sufficient powers to pursue the seizure of Russia’s sovereign assets many others have disagreed. *See, e.g.,* Paul Stephan, “Giving Russian Assets to Ukraine – Freezing is not Seizing,” *Lawfare*, April 26, 2022; Andrew Boyle, “Why Proposals for U.S. to Liquidate and Use Russian Central Bank Assets are Legally Unavailable,” *Just Security*, April 18, 2022.

<sup>22</sup> Importantly, while this model was effective in the context of Iran, it is important to remember that the Iranian policy benefited from broad international support and several UN Security Council Resolutions.

<sup>23</sup> *See, U.S. Department of State, “The Summit for Democracy,”* December 9-10, 2021. <https://www.state.gov/summit-for-democracy/>

and one governed by brute force.”<sup>24</sup> In short, fashioning law and policies guided by rule of law is who we are as a people and what makes the United States – and our democratic allies – different.

In this regard, it is important to recognize that our courts – and courts in other jurisdictions – have already approved the use of tools similar to the one proposed by the Administration here. In *Calero-Toledo v. Pearson*, for example, the Supreme Court heard a case concerning the Puerto Rican government’s seizure of a yacht involved in illicit activities that occurred without pre-seizure due process.<sup>25</sup> The owner of the yacht sued and claimed due process violations. However, the Court held that “in limited circumstances, immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible.”<sup>26</sup> The Court found that in that case the seizure served a significant governmental purposes by permitting Puerto Rico to assert in rem jurisdiction over the property in forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Further, given the type of property involved, pre-seizure notice and hearing might have frustrated the interests served by the statute given that the property could have been removed from the jurisdiction, destroyed, or concealed. Moreover, the Court found comfort that the seizure was implemented by a state actor (rather than a private party) performing “under the standards of a narrowly drawn statute.”<sup>27</sup>

The Administration’s forfeiture proposal appears to fit these requirements very well. As such, I view the modest proposed enhancement by the Administration of Executive forfeiture authorities in the Russia situation as both a needed and limited evolution in Executive authorities rather than a meaningful departure from existing precedent. The proposal fits the Administration’s broad commitment to rule of law.

### *Multilateral Efforts and Acceptance*

Efforts undertaken by KleptoCapture and the Russian Elites, Proxies, and Oligarchs (REPO) taskforce will be only as effective as the weakest link in any coalition of states applying them.<sup>28</sup> The Administration’s proposed forfeiture framework is well within international norms and provides an example to our allies and partners of a forward-leaning yet responsible exercise of governmental authority. As the United States has learned, a multilateral approach in the realm of

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<sup>24</sup> President Joseph R. Biden Jr., “Remarks by President Biden on the United Efforts of the Free World to Support the People of Ukraine,” March 26, 2022.

<sup>25</sup> See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

<sup>26</sup> *Id.* at 679.

<sup>27</sup> *Id.* at 692.

<sup>28</sup> David D. Kirkpatrick, Mona El-Naggar, and Michael Forsythe, “How a Playground for the Rich Could Undermine Sanctions on Oligarchs,” *NY Times*, March 9, 2022.

coercive economic authorities makes for stronger regulation, a more consistent message, and usually a more effective outcome.

The sanctions measures in place against Russia have demonstrated the continued importance of multilateral efforts in this regard, and the multilateral components of Russia sanctions have in many ways been unprecedented. It is true that we have not seen – and will not see – any UN Security Council resolutions mandating Chapter VII sanctions restrictions on Russia.<sup>29</sup> However, we have witnessed a historically broad coalition comprised of most of the world’s major economies that have chosen to impose sanctions against Russia. This has included sanctions imposed not just by the entire Group of 7 and the European Union, but also by major financial center states like Switzerland and Singapore – let alone offshore jurisdictions like Monaco, the Cayman Islands, and the Channel Islands – which had long been averse to imposing sanctions outside the dictates of the UN Security Council.<sup>30</sup> For this, the Biden-Harris Administration deserves significant credit.

The Administration’s forfeiture proposal recognizes the importance of multilateral support and adoption and in my mind the framework could find support among our core allies and partners. Indeed, the proposed forfeiture framework will depend on multilateral cooperation. Asset flight is a significant concern and while certain physical assets are hard to move, financial assets and high-value vehicles can move frequently and quickly. In the early days of the recent sanctions against Russia we saw numerous such moves of assets, aircraft, and vessels from more restrictive jurisdictions to countries owners believed would be more welcoming.<sup>31</sup> Consequently, the broader the coalition and the more central to global financial markets the participants, the more likely that any seizures will be successful.<sup>32</sup>

Cooperation will be especially critical given the necessity for multi-jurisdictional investigations to uncover often byzantine ownership structures that many in the Russian oligarch class have long used to obscure, hide, and move their assets from one jurisdiction to another.<sup>33</sup>

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<sup>29</sup> Article 41, UN Charter, Chapter VII provides for mandatory imposition of sanctions if agreed by the UN Security Council. However, given that Russia holds a veto on the Security Council there is no possibility that it would agree to such measures.

<sup>30</sup> See, e.g., “How the World is Seeking to Put Pressure on Russia,” *NY Times*, July 5, 2022.

<sup>31</sup> See, e.g., Alasdair Pal and Mohamed Junayd, “Maldives Shelters Sanctioned Russian Billionaires’ Yachts,” *Reuters*, April 7, 2022; Pablo Robles, Anton Troianovski, and Agnes Chang, “The New Geography of the Russian Elite,” *NY Times*, June 17, 2022.

<sup>32</sup> I note that even small, economically-limited states can prove critical in tracking down assets and allowing seizures. For example, Fiji cooperated with the United States in the seizure of a \$300 million yacht that had taken refuge in the country after sanctions. U.S. Department of Justice, “\$300 Million Yacht of Sanctioned Russian Oligarch Suleiman Kerimov Seized by Fiji at Request of United States,” Office of Public Affairs, May 5, 2022.

<sup>33</sup> See, e.g., “Russian Oligarchs: Where do they Hide their ‘Dark Money’?” *BBC News*, March 28, 2022. Available at <https://www.bbc.com/news/world-60608282>.



While the EU, for example, has amongst the world’s most robust protections of due process rights in the context of asset freezings and seizures,<sup>34</sup> the bloc does not foreclose creative or even aggressive approaches to asset seizure. In the current Russian context, the EU and its member states have moved very quickly to seize half a dozen oligarch vessels and numerous real estate properties.<sup>35</sup>

Certain EU Member States have also been independently aggressive in this area, even before the Russia situation. For example, since 1982 Italy has had a very forward leaning law against mafia-related crimes and assets, providing for seizures and confiscations of property illegally acquired by criminals and their associates.<sup>36</sup> Over the years, this law has expanded and strengthened, speeding up its application and widening its authorities. In the early 1980s, for example, under the initial *La Torre* regulations prosecutors were given the authority to seize and forfeit criminal assets outside of a formal judicial process, with far looser rules of evidence than had historically been required. This ability was strengthened in the 1990s which allowed the confiscation of “unjustified assets” associated with serious offenses such as money-laundering and extortion. The burden of proof to unwind such a confiscation was placed on the owner of the assets and not the State – due to the limited circumstances in which it could be used (similar to the “extraordinary” situation the Supreme Court found in *Calero-Toledo*<sup>37</sup>), this reversal of the traditional burden was found consistent with Italian and European law.<sup>38</sup> Other democratic states including Japan, Colombia, and other Latin American jurisdictions also have aggressive seizure rules designed to fight illicit actors and remove their ill-gotten gains.<sup>39</sup>

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<sup>34</sup> See, generally, Elena Chachko, “Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence,” *Yale Journal of International Law*, 44:1, 2019.

<sup>35</sup> European Commission – Statement, “Russian Elites, Proxies, and Oligarchs Task Force Joint Statement,” Brussels, June 29, 2022.

<sup>36</sup> P. Arlacchi, “Effects of the New Anti-Mafia Law on the Proceeds of Crime and on the Italian Economy,” United Nations Office on Drugs and Crime, Bulletin -1984. Available at: [https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin\\_1984-01-01\\_4\\_page008.html](https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1984-01-01_4_page008.html)

<sup>37</sup> *Supra* note 25, at 680.

<sup>38</sup> See, e.g., Giulliano Turone, Legal Frameworks and Investigative Tools for Combating Organized Transnational Crime in the Italian Experience, 134<sup>th</sup> International Training Court, Visiting Experts’ Papers. Available at [https://unafei.or.jp/publications/pdf/RS\\_No73/No73\\_10VE\\_Turone.pdf](https://unafei.or.jp/publications/pdf/RS_No73/No73_10VE_Turone.pdf)

<sup>39</sup> See, e.g., Justin McCurry, “Yakuza gangs face fight for survival as Japan cracks down on organized crime,” *The Guardian*, January 5, 2012; Parker Asmann, “Asset Forfeiture in Latin America: A Moral Dilemma,” *InSight Crime*, July 20, 2017. Available at: <https://insightcrime.org/news/analysis/asset-forfeiture-latin-america-moral-dilemma/>

## **The Way Forward**

The proposed forfeiture framework presents a promising way forward. It clearly provides an easier and speedier solution than that which is already available. It also speaks to the key to the sustainability, international adoption, and impact of any new legislation: the success of any seizure and forfeiture program will not be based solely on the scope of potential asset capture, but also on the due process protections it provides.

As the proposed framework acknowledges, in order to pass Constitutional muster and to encourage multi-jurisdictional acceptance (and adoption) of similar rules, the legislation should include several layers of guardrails. For example, the proposed framework is explicitly restricted to the illicit assets of Russian oligarchs and related actors – this would tie any solution to the situation at hand in Ukraine and allow courts to be comfortable with the cabined nature of the exceptions and the true national security implications of the situation. It also carefully defines the national security issues at stake, the illicit nature of any goods to be seized, and demonstrates that the solution posed is appropriate and that there are no reasonable lesser measures that could achieve similar outcomes without implicating traditional due process rights.<sup>40</sup> Similarly, that the proposed framework includes a sunset provision further underlines the unique circumstances Congress is seeking to address.

## **The Challenges and Dangers of Using or Amending IEEPA**

A deceptively simple solution to allow the ability to seize oligarch assets could be to either use IEEPA’s current authorities or amend IEEPA. Either approach has significant peril and important limitations.

As noted above IEEPA currently allows for seizures of certain assets only in limited contexts and the vesting of those assets to the U.S. Government – under IEEPA this can only happen when the United States is in armed hostilities against an adversary. If the Administration wanted to trigger this authorization under IEEPA by determining that the United States and the Russian Federation were in armed conflict, there could be potentially serious escalatory and other collateral consequences. Moreover, while such a determination would allow the seizures and vesting of certain Russian state-linked assets (which would have some of the negative consequences discussed above), it is not clear that such a determination would allow the pursuit of oligarch assets.

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<sup>40</sup> Recent IEEPA-related cases such *Tiktok Inc. v. Trump*, 507 F. Supp. 3d 92 (D.D.C. 2020) and *U.S. Wechat Users Alliance v. Trump*, 488 F. Supp. 3d 912 (N.D. Cal. 2020) saw courts rule that the Administration likely overstepped its authorities due to the unique First Amendment (rather than Fourth Amendment) implications of its activities. However, the district courts’ stated expectations in those cases that the Executive could be compelled to find lesser, equally effective means to achieve its goals without implicating Constitutional rights were rendered very broadly and could extend to the rights at issue with oligarch asset seizures.

To the extent the current situation could not be shoehorned into the current statute, IEEPA could of course be amended to broaden the scope of its seizing authorities such that oligarch (and other criminal) assets could be seized. There are some benefits to such an approach, including that IEEPA has been amended in the past, and that there are broad jurisprudential and enforcement structures underpinning IEEPA. However, there are at least two significant risks to leveraging IEEPA in such a manner.

First, while precedent provides a potential path to amending IEEPA, it could also give rise to unconsidered consequences that – if challenged in the courts or otherwise – could potentially risk the legitimacy and strength of IEEPA-related measures as a whole. IEEPA itself – the principal statutory authority for sanctions – could be placed at risk, and with it a core plank of foreign policy and national security as applied to dozens of areas of concern.<sup>41</sup>

Moreover, as a technical matter, using IEEPA may not allow the administration to easily move against all of the assets it may seek. For instance, the Berman Amendments to IEEPA limits the ability of the President to impose restrictions (including freezings and seizings) on “informational materials” which includes works of art.<sup>42</sup> Court decisions concerning the breadth of this limitation impose at least some doubt as to whether the seizure of art – a common store of value for Russian oligarchs<sup>43</sup> – would be allowed.<sup>44</sup> At the very least it could encourage litigation and delay – the very thing such legislation should try to avoid.

As a consequence, a more promising strategy for Congress than focusing on IEEPA would be to pursue legislation that is freestanding and outside the bounds of IEEPA. The limitations of doing so in the context of sanctions legislation are clear – IEEPA has a pre-existing delegation, enforcement, and regulatory structure. This explains why Congressional sanctions legislation is usually promulgated pursuant to IEEPA authorities.<sup>45</sup> IEEPA makes sanctions legislation “plug and play.” In the context of enhancing seizure and forfeiture authorities, however, such pre-existing structures are less needed and the challenges of not using existing authorities (like IEEPA) are significantly reduced, if they are present at all. There are also evident benefits of not being subjected to IEEPA’s restrictions concerning informational materials and being potentially

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<sup>41</sup> Sanctions promulgated pursuant to IEEPA are a core feature of U.S. foreign policy as applied to critical situations as varied as Russia, China, Iran, and North Korea.

<sup>42</sup> “The authority granted to the President by [IEEPA] does not include the authority to regulate or prohibit, directly or indirectly...the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds.” 50 U.S.C. § 1701(a).

<sup>43</sup> See, e.g., “Sanctioned: The Role of Russian Oligarchs in the Art Market,” *DW*, March 18, 2022; Oliver Basciano, “‘It’s Artwashing’: Can Galleries Wean Themselves off Russian Oligarch Loot?” *The Guardian*, March 17, 2022.

<sup>44</sup> See, e.g., *Tiktok Inc. v. Trump*, 507 F. Supp. 3d 92, 115 (D.D.C. 2020) in which the court underlined that the informational materials exemption is broad and that any governmental effort to restrict the flow of such materials, which includes artwork, must “find support in the text of the statute.”

<sup>45</sup> See, e.g., The Ukraine Freedom Support Act of 2014, Pub.L. 113–272.

constrained by certain more aggressive recent jurisprudence that could constrain the scope under which IEEPA can be properly used.

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Given the discussion above, I return to where I began: the most effective approach would be for Congress to augment the Executive’s existing seizure and forfeiture powers with a new authority which is standalone, targeted specifically at the illicit assets of Russian oligarchs (and not generally applicable), provides robust, post-seizure due process, authorizes more expansive administrative in rem forfeiture, and includes a sunset after a limited period.

The Administration’s proposal appears to meet these standards.

Thank you again for this opportunity to testify. I look forward to answering your questions.