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WHITE-COLLAR CRIME

Rough Seize Ahead: Do Asset Forfeiture Proposals Throw Due Process Overboard?

In late April 2022, riding a wave of bipartisan political support, the Biden administration and House of Representatives proposed expanding the executive branch's authority to freeze, seize, and forfeit to the people of Ukraine assets of individuals perceived to be aligned with the Russian government. These proposals seek to punish the Russian government's contemptable invasion of Ukraine, which has resulted in catastrophic levels of destruction and horrendous numbers of civilian casualties—including some caused by potential war crimes, a global refugee crisis, and a potential global food crisis. By going after the assets of those who, historically, have benefited from political allegiance to the regime of Vladimir Putin, political leaders hope to pressure Putin to reconsider his egregious actions. The goal is laudable, but pursuing it by expanding the reach of asset forfeiture—a domain that has been subject to justifiable criticism in recent years—and by expressly tying forfeitability to historic political support of a nation-state, raises some serious procedural and substantive questions.

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The proposals also include adding a new offense, making it unlawful for any person to knowingly possess proceeds directly obtained from corrupt dealings with the Russian government. Beyond the continuing refrain of overcriminalization—seeking to solve each new problem by adding yet another ill-defined federal crime to the books—this offense has the troubling aspect of criminalizing political affiliation. In law school, aspiring lawyers are taught the two basic types of crimes: malum in se (wrong by nature) and malum prohibitum (wrong by virtue of a government prohibition). The proposed asset seizure draws us down a dangerous path to what may come to be known as malum politica—wrong by politics. Congress and the Biden administration need carefully to consider whether making political affiliation a crime in this instance would set a dangerous precedent for the future. Legal advocates need to be alert to legislation or enforcement that threatens to undermine due process protections.

Guilty by Association—Literally

As part of its efforts to provide aid to Ukraine in resisting Russia's invasion, the U.S. government has sanctioned certain foreign individuals who are affiliated with the Putin regime and frozen or seized their assets. Seeking to expand upon this strategy, Congress and the Biden administration have issued proposals seeking to seize and dispose of the assets of private individuals—rather than corporations or state actors—to punish the independent conduct of a nation-state—only because of that individual's historical political support of the nation state.

On April 27, 2022, the House of Representatives passed the Asset Seizure for Ukraine Reconstruction Act with a vote of 417-8. The bill created a working group to "determine the constitutional mechanisms by which the President may take steps to seize and confiscate assets belonging to any sanctioned foreign person whose wealth is derived through support for or corruption related to the regime of Russian president Vladimir Putin." The working group must report to Congress on certain issues including "any additional

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authorities the President needs to take steps to seize and confiscate the assets." Specifically, the bill requests that the President freeze, seize, and forfeit the proceeds of assets valued over $2,000,000 belonging to "foreign persons whose wealth is derived in part through corruption linked to or political support for the regime of Russian President Vladimir Putin and with respect to which the President has imposed sanctions."

The next day, the Biden administration announced legislative proposals aimed at seizing assets of purported Kleptocrats. See The White House, FACT SHEET: President Biden's Comprehensive Proposal to Hold Russian Oligarchs and Elites Accountable (April 28, 2022). These proposals include the creation of a new criminal offense, making it unlawful for any person to knowingly or intentionally possess proceeds directly obtained from corrupt dealings with the Russian government. Id.

Expounding on the Biden administration's announcement, the DOJ detailed how a number of these proposals would expand the executive's ability to freeze, seize and forfeit an individual's assets and transfer the proceeds to the citizens of Ukraine. See DOJ, FACT SHEET: Administration Legislative Proposals in Support of Kleptocracy Asset Recovery (April 28, 2022). These proposals included the following measures: (1) amendments to multiple statutes governing the use of forfeited funds to allow the executive branch to send funds forfeited to the U.S. government to the people and government of Ukraine; (2) expansion of forfeiture authorities under the International Emergency Economic Powers Act (IEEPA) to reach property used to facilitate sanctions violations; (3) adding criminal violations of IEEPA and the Export Control Reform Act (ECRA) to the definition of racketeering activity in the RICO Act; and (4) extension of statutes of limitations for seeking forfeiture. Id.

Critically, the purpose behind each of these proposals is to punish a specific action by a state actor—Russia's invasion of Ukraine. The proposals, however, do not appear to be limited to this conduct alone—i.e., the expansion of these laws would outlast Russia's invasion. In times of war, it at least arguably may be appropriate to pass laws to expand the executive's authority to address specific hostile conduct. Such laws, however, should end with the conflict.

Assessing Due Process When Criminality Ebbs and Flows

Current legislative proposals raise due process concerns. The Fifth Amendment provides that a person may not be deprived of life, liberty, or property without due process of law. Consistent with that fundamental guarantee, due process traditionally requires that a defendant not be deprived of his property without adequate notice and opportunity for a hearing. *Fuentes v. Shevin*, 407 U.S. 67 (1972). Of course, "non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections." *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)). Where those contacts do exist—such as when the assets are in the United States—probable cause must exist to believe the assets in question are substantially connected to the underlying criminal activity. *United States v. Noriega*, 746 F. Supp. 1541, 1543 (S.D. Fla. 1990).

IEEPA gives the President broad authority to investigate, regulate, prevent or prohibit transactions in times of war or declared national emergencies. 183 A.L.R. Fed. 57 (originally published in 2003). In *IPT Co. v. U.S. Dept. of Treasury*, 1994 WL 613371 (S.D.N.Y. 1994), the U.S. District Court for the Southern District of New York held that the blocking of the plaintiff corporation's assets under the IEEPA without a pre-deprivation hearing did not violate the plaintiff's due process rights because the action amounted to only a temporary deprivation of property. Here, however, the deprivation would be permanent—raising questions about what sort of process is required to freeze, seize and forfeit the assets of Russian oligarchs.

To determine whether due process requires a hearing in a particular case, a court must examine the factors set forth in *Mathews v. Eldridge*. *United States v. E-Gold, Ltd.*, 521 F.3d 411, 415 (D.C. Cir. 2008). *Mathews* defined the relevant factors for consideration as follows: (1) the private interest that will be affected by the restraint; (2) the risk of an erroneous deprivation of such interest through the procedures used; (3) the probable value, if any, of additional or substitute procedural safeguards; and (4) the government's interest, including the burdens that the hearing would entail. *Mathews*, 424 U.S. at 335. When the government seeks to restrain assets in order to remove them from the control of a defendant, the due process clause comes into play and a pre-deprivation hearing "would normally be in order." *United States v. E-Gold, Ltd.*, 521 F.3d 411, 415 (D.C. Cir. 2008), abrogated on other grounds by *Kaley v. United States*, 571 U.S. 320 (2014). Under extraordinary circumstances—such as where a need exists for prompt action to freeze monies that could be quickly dissipated—notice and a hearing may be postponed until

after the deprivation. *In re Seizure of Approximately $12,116,153.16 & Accrued Int. in U.S. Currency*, 903 F. Supp. 2d 19, 32 (D.D.C. 2012).

Here, the proposed legislation must address whether and when individuals will be able to contest the seizure of their assets. Because the proposals seek to permanently deprive individuals of their property, a pre-deprivation hearing seems necessary. Also unclear from current proposals is whether it could be claimed that extraordinary circumstances exist that would allow for permanent disposition of an individual's assets prior to a hearing. Finally, if the proposals succeed in conferring on the President the power to seize assets of "foreign persons whose wealth is derived in part through corruption linked to or political support for the regime of Russian President Vladimir Putin," due process requires making the difficult determination of what constitutes political support, what it means to derive wealth "in part" from political support, and whether some or all of an individual's assets are derived from that support. Doing so without a pre-deprivation hearing would seem to "risk … an erroneous deprivation of such interest through the procedures used."

Next, asset forfeiture comes with a requirement that the government trace seized funds to the criminal activity. *United States v. Sum of $70,990,605*, 128 F. Supp. 3d 350, 360-61 (D.D.C. 2015). Under the rules that generally apply to domestic asset forfeitures, "the Government may not satisfy its tracing burden simply by showing that criminal funds were once deposited into a particular account: it must use accounting principles or circumstantial evidence to show that the particular funds in the account are traceable to criminal activity." Id. Under Congress's and the President's proposals, however, the government would be able to seize all wealth derived "in part" from criminal conduct.

Further, the creation of a new criminal offense—making it unlawful for any person to knowingly or intentionally possess proceeds directly obtained from corrupt dealings with the Russian government—raises serious concerns under the Ex Post Facto Clause. See *In re Seizure of Approximately $12,116,153.16 & Accrued Int. in U.S. Currency*, 903 F. Supp. 2d 19, 35 (D.D.C. 2012) ("The Ex Post Facto Clause forbids the making of a punitive law that applies retroactively … it applies to legislation that is criminal or penal in nature, rather than civil or remedial." (citations omitted)).

Congress and the Biden administration need carefully to consider whether making political affiliation a crime in this instance would set a dangerous precedent for the future. Legal advocates need to be alert to legislation or enforcement that threatens to undermine due process protections.

Finally, Congress should be careful when drawing a line between conduct that is criminal and conduct that is merely politically unfavorable. Prior to Russia's invasion of Ukraine—beginning with its invasion of Crimea—many nations accepted Russian oligarchs—and their money—into society. If tomorrow Putin withdrew from Ukraine and promised to make reparations—conditioned on the United States agreeing to release the assets of its oligarchs, likely, many of those targeted by the U.S. government would no longer be so targeted. This raises the question: If the oligarchs' assets weren't subject to seizure a few years ago, and those assets might not be subject to seizure in the near future, why should they be subject to seizure now? Although rarely a successful basis for striking down legislation, substantive due process forbids "egregious government misconduct," involving state officials guilty of "grave unfairness" so severe that it constitutes either "a substantial infringement … prompted by personal or group animus." *George Wash. Univ. v. District of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C.Cir.1988).

The Shifting Winds of Malum Politica

Also troubling is the focus on prosecuting individuals while dealing more gently with the institutional actors, when—while pushing for more expansive authority to seize the assets of individuals—the Biden administration is significantly less eager to target the assets of the Russian state itself. See Alan Rappeport and David Sanger, *Seizing Russian Assets To Help Ukraine Sets Off White House Debate*, N.Y. Times (May 31, 2022) (describing internal White House debate over legality of seizing Russian Central Bank assets held in the United States). This difference in treatment is striking: Russia invaded Ukraine. To pay for Russia's despicable conduct, the United States will pass laws to seize and dispose of assets belonging to individuals who were at one time aligned with the Putin regime (whether or not these individuals encouraged, assisted, or profited from the invasion). The United States will not, however, seize the assets of the Russian state—the perpetrator of the conduct the laws seek to remediate. Instead,

the United States will seize the assets of individuals based solely on animus towards those individuals' political affiliations.

On one hand, it is easy to understand why the Biden administration and many members of Congress would rather seize the assets of oligarchs than the assets of the Russian state—seizing yachts and luxury real estate makes for good headlines. See, e.g., DOJ, $300 Million Yacht of Sanctioned Russian Oligarch Suleiman Kerimov Seized by Fiji at Request of United States (May 5, 2022); Hannah Towey, *Luxury real estate is 'at the top of the list' as the Justice Department investigates Russian money laundering, DOJ official says*, Insider (May 7, 2022). It is also much easier to negotiate with a hostile foreign government if you haven't just taken their money.

If, however, U.S. prosecutions are seen as an instrument of political pressure or retribution, then faith in the independence of U.S. law enforcement will be harmed. While the U.S. government's record of using economic sanctions as a foreign policy tool is longstanding and well-established, such sanctions are typically general and do not discriminate among people based on political affiliation. See *Clancy v. Off. of Foreign Assets Control of U.S. Dep't of Treasury*, 559 F.3d 595, 605 (7th Cir. 2009) (upholding sanctions prohibiting unauthorized travel to Iraq where "[t]he regulations here do not discriminate among people based on their political affiliation. Rather, they impose a "general ban" … affecting all citizens."). Engaging in prosecutions of individuals based on political affiliation risks gaps in due process and an erosion of confidence in the rule of law.

Elsewhere, we have questioned the Trump administration's use of criminal prosecutions of individuals as a tool to advance foreign policy. See Robert J. Anello and Kostya Lantsman, *Should Trump's Foreign Policy Affect Criminal Prosecutions?*, 29 Business Crimes Bulletin No. 9 (May 2019). There, we noted that the increasing frequency of politically-charged prosecutions of foreign nationals, as opposed to taking actions against foreign corporations and nation-states, risks undermining confidence in the U.S. justice system. Id. Prosecution of individuals for such purposes raises significant due process concerns and could undermine the public's faith in the independence and fairness of the criminal justice system. See id. Passing laws based on malum politica—where individuals risk losing their assets for past conduct that has only recently become disfavored (at least under U.S. law)—runs contrary to traditional notions of due process.

Keeping an Eye on the Horizon

Until quite recently, asset seizure and forfeiture has been subject to a rare consensus of bipartisan criticism. See, e.g., Democratic Platform Committee, 2016 Democratic Party Platform 14 (2016) (declaring that the Party would "reform the civil asset forfeiture system to protect people and remove perverse incentives for law enforcement to 'police for a profit'"); Republican Party, Republican Platform 2016 15 (2016) (noting that civil asset forfeiture "has become a tool for unscrupulous law enforcement officials, acting without due process, to profit by destroying the livelihood of innocent individuals, many of whom never recover the lawful assets taken from them" and calling "on Congress and state legislatures to enact reforms to protect law-abiding citizens against abusive asset forfeiture tactics"); David Benjamin Ross, Comment, Civil Forfeiture: A Fiction that Offends Due Process, 13 Regent U. L. Rev. 259, 276-77 (2000/2001) (arguing that civil forfeiture is an unconstitutional "practice [that] offends traditional notions of due process").

At times, the politics of the moment has overrun the rule of law. History often is a harsh critic of those times when we allow the political tides to sweep aside normal notions of justice and due process. Oligarchs—many of whom obtained their wealth through connections with the Putin regime—are easy scapegoats for Russia's horrendous conduct. Criminal laws, however, are meant to prohibit conduct that society deems wrong at all times, not simply based on the ebbs and flows of politics. Our commitment to due process is best reflected in how our legal system treats the unpopular.

The Russian government, with its brazen military aggression and perpetration of atrocities in Ukraine, has—rightly—drawn near-universal condemnation. Passing laws imposing criminal and other serious sanctions based on political affiliation, however, should raise questions with anyone concerned with politicizing enforcement of the law and the protections of due process in our country.