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Oligarchs, Superyachts, and Due Process: How Congress Walked a Legal Tightrope on Russian Asset Forfeiture

WILLIAM O’MALLEY†

At the onset of the Ukraine conflict, the United States and its allies worked to confiscate billions in personal assets belonging to prominent Russian oligarchs and government officials.1 These assets included ostentatious possessions like yachts and luxurious abodes scattered across the world.2 Initially, legislators on Capitol Hill proposed liquidating some of these assets and transferring the proceeds to Ukraine.3 However, these proposals came under fire from scholars...
and civil liberties groups. Specifically, some argued that these proposals would give the executive branch a dangerous new forfeiture tool without constitutionally required due process safeguards.

Still, as discussed in Part I, the 117th Congress went on to consider several proposals to forfeit the personal property of Russians under sanction. Parts II.A–C will provide a legal history of due process and targeted sanctions in both domestic and international contexts. Part II.D will then shift to how Congress eventually managed to pass measured legislation that both expanded asset forfeiture powers while ensuring that new mechanisms included due process safeguards. Lastly, Part III will explain how the resulting legislation (Amendment 6596) establishes a healthy precedent that respects procedural due process rights, carries important symbolic value, and serves as a potential deterrent for future conflicts.

I. INTRODUCTION

Due process under the law represents a cornerstone of the U.S. Constitution, protecting all those who interact with the American justice system from unlawful deprivations of “life, liberty, and property.” Naturally, some questioned whether initial asset forfeiture proposals—which lacked explicit due process safeguards—could withstand scrutiny from U.S. courts, even if they did pass the 117th Congress. By the summer of 2022, after facing initial criticism, momentum behind the proposals seemingly halted. However, the

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5. See Stein, supra note 4.

6. See infra Part I.

7. See infra Part II.A–C.

8. See infra

9. See infra Part III.

10. See, e.g., U.S. CONST. amend. IV (protecting against unreasonable searches and seizures); U.S. CONST. amend. V (no deprivation of “life, liberty, or property, without due process of law”).


12. Id.
Biden Administration and Congress continued to examine legal mechanisms related to the effort.\(^{13}\)

Discussions appeared to reach a breakthrough in October 2022, when a bipartisan group of senators proposed an amendment to the annual National Defense Authorization Act (NDAA).\(^{14}\) The amendment offered what seemed like the best of both worlds: legislation targeting those closest to the Russian war effort as well as measures meant to safeguard due process.\(^{15}\) Then, as the 2022 midterms approached, partisan tensions over Ukraine aid reached new heights, and the amendment failed to make it into the final NDAA.\(^{16}\) Following this, the 117th Congress risked ending close to where it started on Russian asset forfeiture proposals.\(^{17}\) However, in the final days of 2022, the Senate managed to unanimously approve a narrowly tailored piece of legislation via its year-end omnibus bill, establishing a mechanism that allows for the transfer of certain Russian oligarchs’ personal assets to Ukraine.\(^{18}\)


15. Id. (stating that the proposed legislation “[e]nsures due process by requiring notice to the asset owner and providing judicial review, including a right to appeal”).


17. Id.

II. **LEGAL HISTORY**

A. **Due Process, Asset Forfeiture, Sanctions, and Domestic Law**

The U.S. Constitution safeguards procedural due process through, mainly, the Fourth and Fifth Amendments.¹⁹ Due process protects both substantive and procedural rights, the latter of which relates most to debates over asset forfeiture.²⁰ Specifically, procedural due process pertains to rights and legal avenues the Constitution affords to those who interact with the American justice system.²¹ Among other rights, procedural due process guarantees that defendants have the right to argue against a government action, advance those arguments with evidence, and to obtain counsel.²² The extent of due process rights belonging to non-citizens represents a fact-dependent question, but all parties who “come within the territory of the United States and developed substantial connections” with the country are entitled to constitutional protections.²³

These rights often appear in the context of asset forfeiture disputes in the United States. Criminal asset forfeiture requires an underlying criminal conviction, established beyond a reasonable doubt, before the government can take ownership of property.²⁴ Civil asset forfeiture, on the other hand, requires no such conviction.²⁵ Instead, the government must show a “substantial connection” between the property and an alleged crime—subject to a preponderance of evidence standard.²⁶ Both federal and state governments deploy civil asset forfeiture to seize assets tied to an

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¹⁹. See, e.g., U.S. CONST. amend. IV; U.S. CONST. amend. V.
²¹. Id.
²³. United States v. Verdugo-Urquidez, 494 U.S. 259, 271–73 (1990); See also Jifry v. F.A.A., 370 F.3d 1174, 1182 (D.C. Cir. 2004) (“[N]on-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.”); United States v. Noriega, 746 F. Supp. 1541, 1545 (S.D. Fla. 1990) (“The power of the Executive to deal with foreign governments is unquestionably great, but it does not extend so far as to impinge on a criminal defendant’s right to due process.”).
²⁶. Id. §983(c).
alleged crime. Among other procedures, federal asset forfeiture laws contain notice requirements, methods for appointing counsel to indigent targets of asset forfeiture, and potential defenses that property owners can use to defend against a forfeiture action—including whether the forfeiture is proportionate to the alleged crime.28

Still, leading civil rights organizations in the United States have argued that these mechanisms, especially civil asset forfeiture, disproportionately impact marginalized populations and encourage overzealous policing.29 High profile court disputes and alleged abuses have attracted further skepticism toward the practice.30 Accordingly, some states have changed their laws on civil asset forfeiture, heightening the government’s burden to require clear and convincing evidence.31 Other states have abolished the procedure entirely.32

At the same time, asset restrictions against foreign actors boast a long history in the United States.33 Additionally, one may not have the same sense of sympathy toward Russian oligarchs compared to economically vulnerable populations when it comes to asset forfeiture efforts.34 Regardless of their popularity, similarly situated defendants can and have successfully challenged government actions that placed restrictions on their assets.35 For example, in United States v. Noriega,

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27. See Anne Teigen & Lucia Bragg, Evolving Civil Asset Forfeiture Laws, NAT’L CONF. ST. LEG. (Feb. 2018), https://perma.cc/XK8J-3PBL.
31. See Teigen & Bragg, supra note 27.
32. Id.
former Panamanian general Manuel Noriega challenged the federal government’s seizure of his personal assets.\textsuperscript{36} After deposing Noriega’s government in a military action, the United States directed foreign governments to freeze approximately $20,000,000 in bank accounts linked to the general.\textsuperscript{37}

Noriega challenged this seizure on due process grounds, arguing that it affected his ability to secure effective counsel.\textsuperscript{38} The court held that Noriega’s choice of counsel warranted constitutional protection and, given this, the government failed to follow required due process safeguards before depriving him of his assets.\textsuperscript{39} Specifically, the court faulted the government for failing to provide Noriega with an opportunity to be heard regarding the seizure.\textsuperscript{40} The court further reasoned that the government failed to provide evidence that the funds were tainted by illegal activity.\textsuperscript{41} Accordingly, the court ordered an additional evidentiary hearing.\textsuperscript{42} The court then noted that if the government was unable to isolate “tainted” from “untainted” assets at this hearing, the government would need to release the frozen assets.\textsuperscript{43}

Cases that discuss asset freezes and due process violations appear in more recent national security debates as well.\textsuperscript{44} In \textit{KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner}, the Treasury Department’s Office of Foreign Asset Controls (OFAC) accused an Ohio nonprofit of providing material assistance to Hamas and froze the organization’s assets, but the nonprofit challenged this designation on due process grounds.\textsuperscript{45} The District Court for the Northern District of Ohio criticized OFAC’s brief explanation for the asset restrictions, along with OFAC’s delays in providing the nonprofit a hearing.\textsuperscript{46} The court concluded that this treatment amounted to a violation of the nonprofit’s due process rights.\textsuperscript{47} The court further held

\begin{flushright}
36. \textit{Id} at 1542.
37. \textit{Id}.
38. \textit{Id}.
39. \textit{Id} at 1543.
40. \textit{Id} at 1544.
41. \textit{Id} at 1546.
42. \textit{Id}.
43. \textit{Id}.
46. \textit{Id} at 904–07.
47. \textit{Id}.
\end{flushright}
that OFAC acted in an arbitrary and capricious manner when it denied the nonprofit’s request for funds to compensate its attorneys.\footnote{Id.}

Years later, however, the District Court for the District of Columbia reached a different conclusion on similar arguments in \textit{Kadi v. Geithner}.\footnote{Kadi v. Geithner, 42 F. Supp. 3d 1, 43 (D.D.C. 2012).} Kadi, a citizen of Saudi Arabia, challenged his designation as a global terrorist and restrictions on his assets, arguing that OFAC’s conduct amounted to a due process violation.\footnote{Id. at 7.} The court, however, contrasted OFAC’s treatment of Kadi with its treatment of the nonprofit in \textit{KindHearts}.\footnote{Id. at 29 n.16.} The court reasoned that OFAC “merely listed the designation criteria” in its explanation to the nonprofit in \textit{KindHearts}, whereas here, Kadi met with OFAC “numerous times” and had opportunities to exchange information with the office concerning their actions.\footnote{Id. at 43.} Accordingly, the court dismissed Kadi’s due process challenges to the restrictions on his assets.\footnote{See Stein, supra note 4.}


\section*{B. Due Process, Targeted Sanctions, and International Law}

Due process questions have a rich and contentious history in international law, especially in the context of economic sanctions that freeze, and in some cases forfeit, assets.\footnote{See Stein, supra note 4.} Asset freezes and targeted sanctions against individuals during the U.S.-led war on terrorism, for
example, generated considerable debate. Specifically, these sanctions came under close scrutiny on procedural due process grounds, as individuals with purported links to terrorism had arguably unclear methods of challenging these restrictions. These criticisms led to further study and amendments to the measures. Additionally, countries like the United States have increasingly utilized sanctions at the national level as international bodies like the United Nations Security Council appear gridlocked, and this has led to separate but related legal issues.

1. Targeted Sanctions and the UN Security Council

As a part of its response to the global war on terrorism, the United Nations Security Council passed Resolution 1267, targeting individuals with ties to Al-Qaeda and the Taliban. Specifically, the Security Council imposed sanctions in the form of asset freezes, travel bans, and an arms embargo on individuals and corporate entities affiliated with either organization. However, the sanctions regime came under fire on due process grounds, both from legal scholars and individuals targeted under the program.

In Abdelrazik v. Canada, for example, a dual Canadian-Sudanese citizen challenged his designation as a terrorist and subsequent addition to the UN’s list of targeted individuals under resolution 1267. Canada’s federal courts ultimately sided in Abdelrazik’s favor, criticizing the lack of due process protections in the 1267 sanctions regime. Specifically, the court criticized how the

59. See Barber, supra note 56.
61. See Garvey, supra note 58.
62. Id. at 556–57.
63. See Willis, supra note 57, at 690–92.
65. Id. para. 51, 156.
listing and de-listing process under 1267 lacked a clear right to a hearing.66

Notable disputes that reached the United Nations Human Rights Committee67 brought the 1267 sanctions regime under further scrutiny. Accordingly, the UN’s Office of Legal Affairs commissioned a study, written by then associate professor of law Bardo Fassbender, on targeted sanctions and due process.68 The study recommended that the Security Council provide the following guarantees to individuals targeted under a sanctions’ regime:

(a) the right of a person or entity against whom measures have been taken to be informed about those measures by the Council, as soon as this is possible without thwarting their purpose; (b) the right of such a person or entity to be heard by the Council, or a subsidiary body, within a reasonable time; (c) the right of such a person or entity of being advised and represented in his or her dealings with the Council; (d) the right of such a person or entity to an effective remedy against an individual measure before an impartial institution or body previously established.69

Appealing to principles of proportionality under international law,70 the study further concluded that sanctions against individuals should follow a balancing test of sorts.71 Specifically, “[e]very measure having a negative impact on human rights and freedoms of a particular group or category of persons must be necessary and proportionate to the aim the measure is meant to achieve.”72

66. Id.
68. See Fassbender, supra note 56.
69. Id. at 8.
70. See, e.g., Thomas M. Franck, On Proportionality and Countermeasures in International Law, 102 Am. J. Int’l L. 715 (2008); Enzo Cannizzaro, The Role of Proportionality in the Law of International Countermeasures, 12 Eur. J. Int’l L. 890 (“The concept of proportionality, while protecting the subjective interest of the wrongdoer against over-reaction, also expresses the need of the international legal order to establish a legal process regulating the nature and intensity of the response to wrongful conduct.”)
71. See Fassbender, supra note 56, para. 11.
72. Id.
2. Unilateral Targeted Sanctions and Related Legal Challenges

Unilateral targeted sanctions, sanctions imposed by individual countries, attract due process criticisms and other legal challenges.73 While this paper won’t thoroughly address this latter category of challenges in relation to Russian asset forfeiture efforts, they remain helpful to keep in mind for context. For example, unilateral sanctions can face legal exposure under investment treaties and related international agreements.74 Iran, for example, challenged U.S. sanctions in the International Court of Justice, alleging that the United States breached fair and equitable treatment commitments it made in past treaties.75 Investor-state arbitration forums have also recently scrutinized the application of U.S. asset forfeiture laws.76 Additionally, while no bilateral investment treaty exists between the United States and Russia, several Russian individuals under EU sanctions have used these treaties as potential means of relief in front of the European Court of Justice.77

The United States has met further resistance to its extraterritorial applications of its sanctions policy.78 For example, a French bank, BNP Paribas, paid billions in fines to the United States for taking part in transactions that ran afoul of U.S. sanctions on Cuba, Iran, and Sudan.79 However, France’s domestic law found no issue with the transactions, and, together with similar incidents of sanctions enforcement, the matter resulted in a rare public rift between the

75. Id.
77. See Andrew Rettman, Russian Oligarchs Spam EU Court with Sanctions Cases, EUOBSERVER (June 2, 2022), https://euobserver.com/world/155119.
United States and some of its French allies. Given that targets of U.S. sanctions maintain assets across the globe, similar jurisdictional questions will likely continue to appear in the context of efforts to seize assets of Russian oligarchs outside the territory of the United States.

Still, turning back to due process concerns, as Elena Chachko discusses in her article for the American Journal of International Law, U.S. sanctions have largely aligned, perhaps imperfectly, with international norms of due process. In her reasoning, Chachko points to the procedures that the OFAC maintains for notifying targets of Treasury Department sanctions, the explanations provided with these sanctions, and the ability of sanction targets to seek judicial review. While Chachko cautions that ambiguities in OFAC procedure may lead to exposure under international human rights law in some cases, as they did in KindHearts, “U.S. targeted sanctions practices appear in principle to be in line with current international standards.”

C. Existing Statutes and Limitations as Asset Forfeiture Tools

While the United States has frequently seized or frozen the assets of foreign nations and individuals, the forfeiture and transfer of these assets presents a distinct legal question. In the early days of the Ukraine conflict, much discussion also focused on the fate of Russian central bank assets. While these debates represent important context related to sanctions and the Ukraine conflict, this comment will attempt to focus more on the issue of forfeiture as it pertains to personal assets belonging to Russian oligarchs. To that end, several legal


83. See Chachko, supra note 73.

84. Id. at 161–62.

85. Id. at 162.


87. Id.
scholars cite the International Emergency Economic Powers Act (IEEPA)\textsuperscript{88} and the Racketeer Influenced and Corrupt Organizations Act (RICO)\textsuperscript{89} as potential asset forfeiture tools, among others.\textsuperscript{90}

Enacted in 1977, the IEEPA gives the President the power to seize and forfeit foreign assets during times of national emergency.\textsuperscript{91} These laws represent an outgrowth of the Trading With the Enemy Act, first enacted during World War I.\textsuperscript{92} The IEEPA defines an emergency as “any unusual and extraordinary threat,” of foreign origin, that endangers the “national security, foreign policy, or economy of the United States.”\textsuperscript{93} Congress passed the IEEPA as one of several measures meant to explicitly describe how, and under what circumstances, a President can use emergency powers.\textsuperscript{94} President Carter became the first President to invoke the IEEPA when he exercised his powers under the Act to freeze Iranian assets during the 1979 hostage crisis.\textsuperscript{95} Following this, presidents used the Act to confiscate assets of individuals accused of human rights abuses and against countries that the United States directly engages in conflict.\textsuperscript{96}

Naturally, some argued that President Biden should use this statute to forfeit frozen Russian assets.\textsuperscript{97} However, others criticized this approach as escalatory and raised associated due process concerns.\textsuperscript{98} This fear of escalation arose, partly, due to the plain language of the statute.\textsuperscript{99} Specifically, the IEEPA permits the President to:

\begin{itemize}
\item \textsuperscript{88} 50 U.S.C. §§ 1701–1708.
\item \textsuperscript{89} 18 U.S.C. §§ 1961–1968.
\item \textsuperscript{91} 50 U.S.C. § 1702(a).
\item \textsuperscript{92} See Anton Moiseienko, Trading with A Friend’s Enemy, 116 AJIL 720, 724 (2022).
\item \textsuperscript{93} 50 U.S.C. § 1701(a).
\item \textsuperscript{96} Kendall Heath, Here’s A List of The 31 National Emergencies That Have Been In Effect For Years, ABC NEWS (Jan. 10, 2019), https://abcnews.go.com/Politics/list-31-national-emergencies-effect-years/story?id=60294693.
\item \textsuperscript{97} See, e.g., Could seizing Russian assets help rebuild Ukraine?, supra note 11.
\item \textsuperscript{98} Doug Bandow, Seizing Russian Assets Is a Bad Idea, THE CATO INST. (May 12, 2022), https://www.cato.org/commentary/seizing-russian-assets-bad-idea.
\item \textsuperscript{99} See Could seizing Russian assets help rebuild Ukraine?, supra note 11.
\end{itemize}
[W]hen the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities.

In short, applying the IEEPA to forfeit Russian assets may be interpreted by some as a declaration that the United States and Russia are “engaged in armed hostilities,” a fairly dramatic statement. However, the Biden Administration and Congress ultimately decided new legislation was needed for Russian asset forfeiture efforts.

Proponents of Russian asset forfeiture efforts further examined forfeiture powers granted under RICO statutes with a new degree of interest. Congress enacted this statute in 1970 as a tool in the fight against organized crime. The law lists an array of predicate offenses that fall within “racketeering activity” under the statute, including money laundering, embezzlement, and obstruction of justice. Although the law primarily provides a tool to fight organized crime, its applications have varied over the decades.

Several amendments to the statute have allowed for its use against offenses like drug trafficking or terrorism. Importantly, the law permits the forfeiture of any assets gained under its predicate offenses, including “property or contractual right[s] of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.” Given the law’s expansive forfeiture powers, it caught the attention of Congress and

100. 50 U.S.C. § 1702(a)(1)(C).
101. Id.; see also Could seizing Russian assets help rebuild Ukraine?, supra note 11.
102. See Fact Sheet, supra note 13.
106. See Peterson & Moreno, supra note 104.
107. See, e.g., United States v. Perez, 940 F. Supp. 540, 545 (S.D.N.Y. 1996) (“Congress rationally found that, in the aggregate, racketeering enterprises and their attendant murder, robbery, extortion, repeated nationwide, substantially affect interstate commerce.”).
the Biden Administration as they crafted legislation targeting Russian assets.\footnote{109}

However, while RICO boasts a long list of covered offenses, sanctions evasion is not one of them.\footnote{110} For this reason, in April of 2022, the Department of Justice requested that Congress redefine “racketeering” under the law to include additional offenses, including sanctions evasion.\footnote{111} The DOJ argued that this would give them a “powerful forfeiture tool” to use against Russians under U.S. sanctions.\footnote{112} However, Congress failed to enact these changes in its 117th session.\footnote{113} Similar to the IEEPA, RICO proved insufficient as a standalone forfeiture tool for Russian assets, at least without further modifications.

Other similar, but still deficient statues, like 28 U.S.C. § 2467, allow for the enforcement of foreign judgments and forfeiture of related assets in the United States.\footnote{114} The statute contains fleshed out mechanisms for these forfeitures, including due process protections for parties challenging the judgment.\footnote{115} However, for 28 U.S.C. § 2467 to succeed as an asset forfeiture tool, Ukraine would first have to successfully carry out its own prosecutions against specific property owners.\footnote{116} Only after this step could the Ukrainian government then begin a lengthy legal and administrative process in the United States.\footnote{117} The United States would then need to determine whether these prosecutions met mandated due process standards.\footnote{118} Accordingly, the statute fails as a direct and practical solution for carrying out forfeiture actions discussed here.\footnote{119}

\footnote{110. \textit{Id.}}
\footnote{112. \textit{Id.}}
\footnote{113. Alemany & Hudson, \textit{supra} note 16.}
\footnote{114. 28 U.S.C. § 2467.}
\footnote{115. \textit{Id.}}
\footnote{116. \textit{Id.} § 2467(b)(1).}
\footnote{117. \textit{Id.}}
\footnote{118. \textit{Id.}}
\footnote{119. See \textit{id.}}
D. Proposed Legislation and Executive Branch Efforts During the 117th Congress

In April of 2022, a group of lawmakers introduced a measure that would have granted the President broad powers regarding Russian asset forfeiture. The Asset Seizure for Ukraine Reconstruction Act began with the following:

The President upon determination that Russia remains engaged in a conflict of territorial conquest in Ukraine, may, by means of instructions, licenses, or other regulations as may be promulgated, confiscate any property or accounts subject to the jurisdiction of the United States and valued over $5,000,000 of any foreign person described in subsection (b). All rights, title, and interest in any property so confiscated shall vest, upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe. Such interest or property may be held, used, administered, liquidated, or sold, by such agency or person and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.

This initial proposal spelled out what these forfeited assets would be used for, including: post-conflict reconstruction in Ukraine, humanitarian assistance, weapons for the military services, provisions to support refugees and refugee resettlement, technology to support the free flow of information, and humanitarian assistance and support for democracy in Russia. The bill concluded with a sunset provision, stating that the authority would expire two years after its enactment.

However, legislators significantly watered down the proposal after it came under scrutiny on due process grounds. Amongst other

120. H.R. 6930.
121. Id.
122. Id.
123. Id.
shortcomings, the proposed law contained no proscribed avenues for objecting to a potential forfeiture, and it failed to proscribe administrative mechanisms for the transfer of these funds to Ukraine.\textsuperscript{125} The latter of these shortcomings proved significant, as existing law had only allowed forfeited funds to go toward funding further law enforcement efforts.\textsuperscript{126}

Instead, the House of Representatives opted to pass a resolution calling for further study of the underlying legal issues involved with Russian asset forfeiture.\textsuperscript{127} In its final form, the most substantive elements of the resolution called for an “interagency working group” that would help determine the constitutionality and logistics of Russian asset forfeiture.\textsuperscript{128} The resolution passed as “a sense of Congress” by a 417 to 8 roll call vote on April 27, 2022.\textsuperscript{129} Senators Michael Bennett and Rob Portman proposed similar measures in the Senate, but they also failed to gain momentum.\textsuperscript{130}

Next, the White House called for a series of measures it developed “in close consultation with interagency partners, including the Department of the Treasury, the Department of Justice, the Department of State, and the Department of Commerce.”\textsuperscript{131} Specifically, the White House called on Congress to 1) establish a streamlined administrative authority to seize and forfeit oligarch assets; 2) enable the transfer of the proceeds of forfeited “kleptocrat” property to Ukraine to remediate harms of Russian aggression; 3) clamp down on facilitation of sanctions evasion; 4) modernize racketeering to include sanctions evasion; 5) expand the time limit to follow the money; and 6) leverage foreign partners’ ability to freeze and seize oligarch wealth.\textsuperscript{132}

\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} See id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} See Fact Sheet, supra note 13.
\textsuperscript{131} Id.
In addition to these requests, the Administration pushed forward with agency-level efforts to freeze Russian assets.\textsuperscript{133} Specifically, on March 2, 2022, the Justice Department announced the launch of the “KleptoCapture” task force.\textsuperscript{134} The task force represents an interagency effort between the Justice Department, the Federal Bureau of Investigation, United States Marshals Service, United States Secret Service, Department of Homeland Security, the Internal Revenue Service, and the United States Postal Inspection Service.\textsuperscript{135} According to testimony its director, Andrew Adams, gave to the Senate Committee on Banking, Housing, and Urban Affairs, the task force seeks “to bring any appropriate charge against any individual or entity sanctioned under the Treasury Department designations, or limited through the Commerce Department’s export controls, rolled out in response to Russian aggression.”\textsuperscript{136}

In his testimony, Director Adams went on to advocate for the forfeiture and transfer of these assets, claiming that related legislation would “improve the United States’ ability to use forfeited funds to remediate harms caused to Ukraine by Russia’s war of aggression against Ukraine.”\textsuperscript{137} Adams claimed the task force had succeeded in freezing billions of dollars in Russian central bank funds, along with the private property of individual Russians under sanction.\textsuperscript{138} Importantly, Adams stressed that, without Congress acting on requested legislative proposals, the executive branch could not transfer these assets to Ukraine.\textsuperscript{139}

In addition to launching task force KleptoCapture,\textsuperscript{140} the Department of Justice, together with the Treasury Department, launched the Russians, Elites, Proxies, and Oligarchs (REPO)
multilateral task force to assist in seizing Russian assets.\textsuperscript{141} The task force involved interagency coordination, but also international partnerships with allied nations, including the United Kingdom, France, and Germany.\textsuperscript{142} In a press release from March 16, 2022, the Department of Justice stated that the operation sought to “collect and share information to take concrete actions, including sanctions, asset freezing, civil and criminal asset seizure, and criminal prosecution.”\textsuperscript{143} The release further stated that this coordination recently resulted in a seizure worth “hundreds of millions” of dollars, including “multiple vessels controlled by sanctioned individuals and entities.”\textsuperscript{144} At the same time, the Biden Administration made clear that Congress would need to pass new legislation on the matter before the forfeiture and transfer of assets could begin.\textsuperscript{145}

Relatively, on October 4, 2022, a group of senators on the Foreign Relations Committee announced that they had reached an agreement on new asset seizure legislation.\textsuperscript{146} The legislation appeared to mirror White House proposals from the summer of 2022.\textsuperscript{147} The legislation differed from previous legislative efforts in that it referenced statutes with existing processes for challenging attempted government forfeiture actions in the federal courts.\textsuperscript{148} Additionally, the proposed legislation also appeared to answer concerns first raised in the spring of 2022 by groups like the ACLU.\textsuperscript{149} Unlike initial proposals, the amendment did not receive comparable backlash on due process grounds.\textsuperscript{150}

However, according to reports from the Washington Post, the legislation instead faced resistance from an increasingly critical caucus of Republican representatives on the Hill.\textsuperscript{151} Specifically, the legislation came under fire from unnamed Republican house members in the lead up to the U.S. midterm elections, as Republican leadership

\textsuperscript{141} See U.S. Departments of Justice and Treasury Launch Multilateral Russian Oligarch Task Force, supra note 133.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{146} Senators Offer Russian Asset Seizure Legislation, supra note 14.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} See Stein, supra note 4.
\textsuperscript{150} See id.
\textsuperscript{151} Alemany & Hudson, supra note 16.
made clear it would target Ukraine related aid with heightened scrutiny. Some Democratic staff members accused their Republican counterparts of stalling the legislation as a bargaining chip for concessions on unrelated NDAA items.

Given this development, asset forfeiture efforts targeting Russian oligarchs appeared to have failed as the 117th Congress drew to a close. However, the topic received renewed attention during debates over year-end omnibus bill legislation passed by Congress. In a last-minute breakthrough, Senate Amendment 6596, unanimously passed via a voice vote, granted the Attorney General the authority to transfer forfeited personal assets of Russians under sanction to the State Department, where they could be further transferred to Ukraine under the Foreign Assistance Act of 1961. Amendment 6596 further mandated that the Attorney General provide regular reports to several Congressional Committees on successful forfeitures and transfers. The amendment also explicitly targeted certain assets of individual Russians, as opposed to frozen central bank funds which posed more complicated legal questions.

Instead of entirely novel due process procedures, like those in the failed NDAA amendment on Russian asset forfeiture, Amendment 6596 instead referenced those in existing federal laws. For example, Amendment 6596 defines “covered forfeited property” as:

[P]roperty forfeited under chapter 46 or section 1963 of title 18, United States Code, which property belonged to, was possessed by, or was controlled by a person subject to sanctions and designated by the Secretary of the Treasury or the Secretary of State, or which property was involved in an act in violation of sanctions

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153. Alemany & Hudson, supra note 16.

154. See id.

155. Paybarah, supra note 18.

156. See S. Amdt. 6596, supra note 18.

157. Id.


159. S. Amdt. 6596.
enacted pursuant to Executive Order 14024, and as expanded by Executive Order 14066 of March 8, 2022, and relied on for additional steps taken in Executive Order 14039 of August 20, 2021, and Executive Order 14068 of March 11, 2022.\footnote{160}

The amendment relies on existing law, including federal criminal and civil forfeiture laws, in granting the Attorney General this new authority.\footnote{161} In doing this, Amendment 6596 contains explicit limitations on its forfeiture powers, in contrast to initial proposals that seemingly deferred to the executive branch.\footnote{162}

III. **THE 117TH CONGRESS PASSED A MEASURED SOLUTION TO RUSSIAN ASSET FORFEITURE THAT ESTABLISHES A HEALTHY PRECEDENT UNDER BOTH DOMESTIC AND INTERNATIONAL LAW.**

Amendment 6596 represents a legally sound and reserved approach to Russian asset seizure.\footnote{163} Contrary to early criticisms, Amendment 6596 creates new administrative mechanisms for transferring assets to Ukraine while respecting due process rights under both domestic and international law.\footnote{164} Furthermore, continued inaction on the issue would have raised questions about the United States’ ability to counter future acts of aggression from authoritarian actors.\footnote{165} The resulting law represents both a practical solution to Russian asset forfeiture questions and establishes a healthy precedent, and a potential deterrent, for future conflicts.\footnote{166}

\footnote{160. Id.}
\footnote{161. Compare S. Amdt. 6596, supra note 18 (referencing existing statutes with proscribed due process protections), with H.R. 6930, supra note 3 (failing to reference procedural due process protections), and S. Amend. 6392 (failing to reference procedural due process protections).}
\footnote{162. See S. Amdt. 6596, supra note 18.}
\footnote{163. See id.}
\footnote{164. See id.}
\footnote{165. See Shane Harris et al., Road to war: U.S. Struggled to Convince Allies, and Zelensky, of Risk of Invasion, WASH. POST (Aug. 16, 2022), https://www.washingtonpost.com/national-security/interactive/2022/ukraine-road-to-war/ (reporting that the U.S. withdrawal from Afghanistan and President Trump’s treatment of NATO allies led to reduced trust between the United States and its European partners).}
\footnote{166. Marc Santora & Steven Erlanger, Taiwan and Ukraine: Two crises, 5,000 miles apart, are linked in complex ways, N.Y. TIMES (Aug. 3, 2022), https://www.nytimes.com/2022/08/03/world/europe/china-russia-taiwan-ukraine-analysis.html; S. Amdt. 6596.}
A. Amendment 6596 Explicitly Grants Ample Due Process Protections to Targets of Asset Forfeiture.

Amendment 6596’s proscribed due process protections easily satisfy initial criticisms of Russian asset forfeiture and provide a stark contrast to past seizures scrutinized by domestic courts and international bodies.167 The amendment provides clear avenues for challenging forfeiture actions via existing federal statutes.168 In addition to providing the ability to challenge a forfeiture, these laws explicitly require the government to meet certain evidentiary and notice requirements.169 Amendment 6596 sufficiently answers a wide array of due process concerns raised by earlier proposals and their critics.170

For example, in one article, Doug Bandow, a former Special Assistant to President Reagan, criticized initial Russian asset forfeiture proposals as “allowing the president to do whatever he wanted with property taken” and as an “attempt to willy-nilly steal the property of Russians.”171 Other voices accused early asset forfeiture proposals of punishing mere political association with a nation-state, in contrast to pursuing a law enforcement objective.172 Attorneys Robert Anello and Richard Albert argued that early asset forfeiture proposals sought to “seize the assets of individuals based solely on animus towards those individuals’ political affiliations.”173 They further warned that “the expansion of these laws would outlast Russia’s invasion.”174 However, asset forfeitures under Amendment 6596, as long as they’re carried out as the law mandates, would bear little resemblance to will-nilly theft.

As a preliminary matter, here, targeted property must belong to individuals under Treasury or State Department sanctions, or

169. 18 U.S.C. § 983(c)(1) (establishing “burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture”).
170. See S. Amdt. 6596.
173. Id.
174. Id. at 1
otherwise violate executive orders issued pursuant to the IEEPA.\footnote{175}{See S. Amdt. 6596 at §1708(a).} Additionally, the government may only forfeit assets after securing a criminal conviction or by demonstrating, by a preponderance of evidence, that the assets have a substantial link to a federal crime.\footnote{176}{Id.; 18 U.S.C. § 981.} Furthermore, Amendment 6596 explicitly states that these powers will expire in May of 2025.\footnote{177}{See S. Amdt. 6596, §1708(c)(2).} In short, the Amendment falls quite short of granting the executive branch a new unchecked ability to seize property based on mere political affiliations with a nation-state.\footnote{178}{Id.; see also Putin’s Playbook: The Kremlin’s Use of Oligarchs, Money and Intelligence in 2016 and Beyond: Hearing Before the Comm. on Intelligence, 116th Cong. 22 (2019) (statement of Heather A. Conley, Sr. VP for Europe, Eurasia, & the Arctic, Dir. Europe Program, Ctr. for Strategic & Int’l Studies) (describing how Russian oligarchs are leveraged to further the Kremlin’s geopolitical objectives).}

As discussed in Fassbender’s study on due process and targeted sanctions, the United Nations previously came under criticism for sanctions on alleged supporters of terrorism.\footnote{179}{Fassbender, supra note 56, at 4–5.} In response, the Fassbender study theorized areas of improvement for targeted sanctions, or sanctions targeting individuals and their assets.\footnote{180}{Id. at 8.} After taking customary and public international law into account, Fassbender concluded that a “universal minimum” standard of due process includes:

> Firstly, the right of every person to be heard before an individual governmental or administrative measure which would affect him or her adversely is taken, and secondly the right of a person claiming a violation of his or her rights and freedoms by a State organ to an effective remedy before an impartial tribunal or authority.

In short, there’s hardly any gap between Amendment 6596, which references forfeiture statutes with clear notice requirements and other due process safeguards, and Fassbender’s proposed safeguards for those under targeted sanctions.\footnote{181}{Id. at 15.}

Fassbender’s study further noted that “[e]very measure having a negative impact on human rights and freedoms of a particular group or category of persons must be necessary and proportionate to the aim
the measure is meant to achieve.”182 Here, Amendment 6596 responds to Russian militarism in Ukraine, and associated violations of international law, with forfeiture actions against property with sufficient links to federal crimes.183 Surely, in the face of Russia’s illegal military actions, it would not be proportional to allow the most visible enablers of the Russian state to carry on business as usual, or, even worse, to fuel the war effort.184

Given Russia’s flagrant violations of international law in the Ukraine conflict, it owes reparations to victims of its actions.185 Since Russia will likely fail to do this on its own in the near future, members of the international community should strive to provide certain Russian assets within their jurisdiction to Ukraine, in accordance with principles adopted by the UN General Assembly.186 In sum, Amendment 6596 helps provide reparations to victims of Russia’s aggression, while still abiding by recognized due process standards, clearly falling within Fassbender’s balancing test for proportionality.187

Of all the principles discussed by Fassbender, Amendment 6596 may face its sharpest criticism when it comes to whether U.S. courts can serve as truly impartial administrators of justice concerning property of Russian oligarchs.188 Targets of U.S. sanctions may not find a federal judge, appointed by the same executive branch that imposes sanctions, particularly neutral.189 At the same time, the separation of

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182. See Fassbender, supra note 56, at 7.
186. Id. paras. 16–17.
187. See Fassbender, supra note 56, at 7.
188. Id. at 8.
powers underpins the U.S. system of governance. In other words, significant distance exists between the branches of government carrying out forfeiture actions and the courts that would review them.

Finally, to date, the Department of Justice has utilized Amendment 6596 against individuals tied to fairly egregious sanctions violations. For example, the Department of Justice successfully brought forfeiture proceedings against Konstantin Malofeyev, a Putin confidante who first came under Treasury Department sanctions for his role in Russia’s invasion of Crimea. The Department alleged that Malofeyev attempted to illegally transfer funds, frozen after Malofeyev’s role in Russia’s annexation of Crimea, from a U.S. bank to a business partner. Malofeyev not only violated sanctions when he sought to transfer the funds, but he was further alleged to have illegally employed this U.S.-based partner and planned to use the frozen funds to further the Kremlin’s interests abroad. After Malofeyev chose not to contest the forfeiture action brought against him months earlier, U.S. District Court Judge Paul Gardephe ruled that the government may proceed with forfeiting the funds. Shortly thereafter, Attorney General Merrick Garland announced that DOJ and the State Department would transfer the funds to Ukraine.

Malofeyev’s case, and other ongoing disputes, are dissimilar to cases that previously attracted due process criticisms. As opposed to Sayadi v. Belgium, where plaintiffs had no clear mechanism for challenging restrictions on their assets, the statutes referenced in

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190. See Daniel Epps, *Checks and Balances in the Criminal Law*, 74 Vand. L. Rev. 1, 3 (2021) (“At least in theory, a defendant can be punished only when several different political institutions perform their designated functions.”).

191. Id.


193. Id.

194. Id.

195. Id.

196. Id.


Amendment 6596 provide several. In addition to explicitly allowing the owner of a property to challenge a forfeiture action, these statutes detail elements of “innocent owner” and proportionality defenses that parties can present in court. Additionally, unlike OFAC’s conduct in KindHearts, Amendment 6596 imposes substantial evidentiary and notice requirements on the government. Specifically, instead of merely listing criteria underlying an offense, the government here would need to demonstrate a substantial link between a targeted property and a crime before a forfeiture takes place.

In short, Amendment 6596 provides a narrowly targeted, but still novel, legal framework for the forfeiture and transfer of certain assets that are—even under the more flexible standards of civil asset forfeiture—substantially linked to an enumerated list of federal offenses. The Amendment also leaves much for Congress to fine tune in the months, and likely years, ahead—a fact that should please critics of early asset forfeiture proposals.

B. Amendment 6596 has important symbolic value and could potentially serve as a deterrent.

Amendment 6596 shows that the United States can take unilateral efforts to promote accountability for grievous injustices while still abiding by both its own founding principles and international standards. Oppressive governments in Russia and China continue to push a narrative that democracies, specifically the United States and its allies, are too dysfunctional to adapt to challenges posed by the modern world. Congress has provided plenty of fodder

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201. 18 U.S.C. § 983(d).
202. Id. § 983(g).
205. 18 U.S.C. § 983(a)–(j).
206. S. Amdt. 6596.
208. See S. Amdt. 6596; see also Fassbender, supra note 56.
for these attacks in the past, ranging from increasingly routine government shutdowns to attacks on the integrity of U.S. elections.\textsuperscript{210} Similar partisan dysfunction occasionally appeared in this debate. Specifically, while due process critiques slowed initial proposals, partisan jockeying nearly doomed progress on Russian asset forfeiture efforts in the final weeks of the 117th Congress.\textsuperscript{211}

For context, Congress’s debate on Amendment 6596 played out as allied nations moved ahead with their own proposals on Russian asset forfeiture.\textsuperscript{212} In April of 2022, for example, Canada enacted laws that granted its national government the power to forfeit seized personal assets of sanctioned Russians.\textsuperscript{213} In November of the same year, Canadian prosecutors announced the first round of prosecutions under that law.\textsuperscript{214} The European Commission also published its own framework on Russian asset forfeiture,\textsuperscript{215} recommending the forfeiture of property belonging to Russians under sanction.\textsuperscript{216} In other words, Congressional inaction on the issue would have provided a stark and awkward contrast to the United States’ own allies.\textsuperscript{217} Furthermore, as countries like China and Russia further demonstrate their intentions to seize territory with military force, individuals tied to acts of military aggression should know that their assets will not be safe during the outbreak of an armed conflict.\textsuperscript{218} Thus, along with abiding by recognized precepts of domestic and international law, Amendment 6596 shows U.S. rivals that it can and

\begin{itemize}
\item 211. Alemany & Hudson, supra note 16.
\item 213. Id.
\item 214. Id.
\item 216. Id.
\end{itemize}
will seize assets from those who materially support illegal acts of militarism.219

IV. CONCLUSION

The 117th Congress faced a novel and thoroughly challenging set of legal questions as it weighed proposals to forfeit certain Russian assets.220 While the process was far from seamless, Congress succeeded in passing a measured and legally sound approach to the issue.221 The resulting law will both serve short-term goals related to the Ukraine conflict, while setting a positive precedent for future conflicts.222

220. See supra Part I.
221. See supra Part II.
222. See supra Part III.