BIDEN-HARRIS ADMINISTRATION LEGISLATIVE PROPOSALS TO STRENGTHEN U.S. ANTI-CORRUPTION AUTHORITIES

(APRIL 4, 2024)

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(1) Proposal to guard against money laundering of foreign crimes by making a foreign crime a predicate for money laundering if the same conduct is already a domestic predicate for money laundering

PROPOSED LEGISLATIVE LANGUAGE:

Section One. Section 1956 of Title 18, United States Code (Laundering of monetary instruments), is amended in subsection (c)(7)(B) as follows –

(1) in subparagraph (vi), by striking the word "or" immediately after the semicolon at the end;

(2) in subparagraph (vii), by adding the word "or" immediately after the semicolon at the end;

(3) by adding after subparagraph (vii) the following:

"(viii) any act or activity that would constitute specified unlawful activity under this section if the act or activity had occurred within the jurisdiction of the United States;"

SECTION-BY-SECTION ANALYSIS:

This proposal would close the gap between foreign and domestic criminal predicates for money laundering by amending 18 U.S.C. § 1956(c)(7) to make any act or activity in violation of foreign law, a "specified unlawful activity" for purposes of the federal money laundering statutes, if the conduct would have been a "specified unlawful activity" had it occurred within the jurisdiction of the United States. Currently, the United States has authority to investigate and prosecute money laundering transactions that promote or launder the proceeds of over 200 domestic predicate offenses. In contrast, if a foreign offender launders the proceeds of his crimes into the United States or through U.S. financial markets, such conduct would only give rise to money laundering if it fits within seven categories of foreign offenses enumerated in 18 U.S.C. § 1956(c)(7)(B). As a result, for example, while the United States has ample authority to investigate and prosecute money laundering offenses involving predicate offenses of fraud and corruption perpetrated by U.S. offenders, it lacks parallel authority to investigate and prosecute those who launder a foreign fraudster's proceeds into the United States, unless it involves foreign bank fraud.

With the stability of U.S. financial, commercial, and real estate markets, and with the ease of conducting U.S. financial transactions due to the global dominance of the U.S. dollar, foreign offenders and their money launderers routinely seek to launder the proceeds of their criminal activities, including kleptocracy, fraud, cybercrimes, and other offenses, into or through the United States. This amendment would empower the United States to more effectively guard against foreign money laundering by ensuring that money laundering transactions can be

investigated and prosecuted on equal footing, whether the underlying crime occurs in the United States or abroad. The proposed amendment will be particularly relevant in cases, such as those involving foreign kleptocracy, where foreign corrupt actors and their associates may be involved in a series of significant criminal activities that might be most closely analogous to a domestic fraud or another crime for which there is a U.S. analogue, but which is not enumerated as a foreign predicate for money laundering.

PROPOSAL HISTORY:

In 2022, the Administration supported a similar proposal to expand foreign predicates for money laundering, as part of a larger proposal to expand the statute of limitations for money laundering based upon foreign crimes. Congress extended the statute of limitations, but did not include additional foreign predicate offenses at that time.

LINE IN/LINE OUT COMPARISON TO CURRENT LAW:

18 U.S.C. § 1956

(c) As used in this section--

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes--

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1[1] of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means--

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving--

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978));[2]

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving--

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774);

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States; ~~or~~

(vii) trafficking in persons, selling or buying of children, sexual exploitation of children, or transporting, recruiting or harboring a person, including a child, for commercial sex acts; or

(viii) any act or activity that would constitute specified unlawful activity under this section if the act or activity had occurred within the jurisdiction of the United States;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152

(relating to concealment of assets; false oaths and claims; bribery), section 175c (relating to the variola virus), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 554 (relating to smuggling goods from the United States), section 555 (relating to border tunnels), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(l) (relating to the unlawful importation of firearms), section 924(n), 932, or 933 (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006[3] (relating to fraudulent Federal credit institution entries), 1007[3] (relating to Federal Deposit Insurance transactions), 1014[3] (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032[3] (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2252A (relating to child pornography) where the child pornography contains a visual depiction of an actual minor engaging in sexually explicit conduct, section 2260 (production of certain child pornography for importation into the United States), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), section 2332g (relating to missile systems designed to destroy aircraft), section 2332h (relating to radiological dispersal devices), section 2339A or 2339B (relating to providing material support to terrorists), section 2339C (relating to financing of terrorism), or section 2339D (relating to receiving military-type training from a foreign terrorist organization) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act

(relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, section 807 (relating to penalties) of the Foreign Narcotics Kingpin Designation Act (21 U.S.C. section 1906), any felony violation of section 15 of the Food and Nutrition Act of 2008 (relating to supplemental nutrition assistance program benefits fraud) involving a quantity of benefits having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, any felony violation of the Foreign Corrupt Practices Act, section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122) (relating to prohibitions governing atomic weapons), or section 104(a) of the North Korea Sanctions Enforcement Act of 2016 (relating to prohibited activities with respect to North Korea);

ENVIRONMENTAL CRIMES

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.);

(F) any act or activity constituting an offense involving a Federal health care offense; or

(G) any act that is a criminal violation of subparagraph (A), (B), (C), (D), (E), or (F) of paragraph (1) of section 9(a) of the Endangered Species Act of 1973 (16 U.S.C. 1538(a)(1)), section 2203 of the African Elephant Conservation Act (16 U.S.C. 4223), or section 7(a) of the Rhinoceros and Tiger Conservation Act of 1994 (16 U.S.C. 5305a(a)), if the endangered or threatened species of fish or wildlife, products, items, or substances involved in the violation and relevant conduct, as applicable, have a total value of more than $10,000;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall

be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions.--If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue.--(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in--

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

(j) Seven-year limitation.--Notwithstanding section 3282, no person shall be prosecuted, tried, or punished for a violation of this section or section 1957 if the specified unlawful activity constituting the violation is the activity defined in subsection (c)(7)(B) of this section, unless the indictment is found or the information is instituted not later than 7 years after the date on which the offense was committed.

(2) Proposal to preserve proceeds of foreign kleptocracy in support of foreign investigations

PROPOSED LEGISLATIVE LANGUAGE:

Section One. Section 981 of Title 18, United States Code (Civil forfeiture), is amended in subsection (b) as follows –

(1) in subparagraph (4)(A), by inserting " or under foreign law" after "Controlled Substances Act", and by striking the number "30" and inserting in its place "90"; and

(2) in subparagraph (4)(B), by inserting the following after the word "subsection":

"or to receive an order or evidence in support of an application to preserve property or to enforce a judgment under section 2467 of title 28, United States Code"

SECTION-BY-SECTION ANALYSIS:

This proposed amendment would significantly enhance the ability of the United States to render timely mutual legal assistance and prevent the dissipation of criminal proceeds after a person has been arrested or charged in connection with a foreign criminal investigation. Under existing law, federal courts can restrain property based upon a foreign arrest or charge for a period of 30 days, in order to preserve assets while the foreign government provides evidence for the United States to initiate an independent domestic U.S. investigation and civil forfeiture action. However, no clear corresponding authority exists to allow the United States to preserve property for the purposes of a foreign forfeiture proceeding where the foreign government has gathered sufficient evidence to arrest or charge a defendant, but has not yet been able to submit a mutual legal assistance request due to case exigencies, legal or procedural requirements, or other necessities, such as translation. This amendment would close this gap by providing parallel authority for U.S. courts to order the temporary restraint of assets following a foreign arrest or charge to permit the foreign government to prepare, translate, and submit a mutual legal assistance request and for the Attorney General to apply for an order under 28 U.S.C. § 2467 to preserve assets for adjudication in foreign forfeiture proceedings.

In complex criminal investigations, such as those involving high-level public corruption, elaborate financial frauds, and other financial crimes, it is often more efficient for a foreign criminal investigation and foreign court to adjudicate forfeiture than for the United States to initiate separate U.S. forfeiture proceedings based upon foreign crimes and foreign evidence. Especially where the primary offense conduct occurred wholly abroad, a foreign court often has more access to facts and witnesses and is often in a better position to adjudicate the facts and law leading to the foreign arrest or charge. Under 28 U.S.C. § 2467, the United States can enforce foreign restraint and forfeiture orders in connection with foreign investigations and forfeiture proceedings. However, the location of assets may not be known at the time of an arrest or charge, or an arrest may be timed to mitigate a defendant's flight risk, before restraint proceedings can be started. This amendment would temporarily prevent dissipation of assets

while a request to restrain property in connection with foreign proceedings is made and determined under 28 U.S.C. § 2467.

Providing effective mutual legal assistance in support of foreign investigations is a key obligation of numerous bilateral and multilateral treaties to which the United States is a party, including the United Nations Convention against Corruption, the United Nations Convention against Transnational Organized Crime, and various bilateral instruments, among others. International cooperation in forfeiture cases is particularly complex due to differences in legal systems and the high risk of dissipation of assets, particularly after a criminal defendant has been arrested or notified of criminal charges. Accordingly, the proposal would also expand the duration of a temporary restraint from 30 to 90 days to enable the foreign authorities to obtain appropriate legal process under foreign law, assemble supporting evidence and declarations, prepare a mutual legal assistance request, and obtain translations for transmission to the United States, as well as to permit the Attorney General to consider the sufficiency of a request, seek further information, and, if appropriate, seek judicial authorization to further preserve property during the pendency of foreign proceedings. Because 30 days is also insufficient time to receive and translate foreign evidence, conduct an investigation, and initiate a civil forfeiture action, the expansion of duration of the restraint is also necessary for circumstances in which opening an independent U.S. civil forfeiture proceeding is appropriate.

LINE IN/LINE OUT COMPARISON TO CURRENT LAW:

18 U.S.C. § 981

(b)(1) Except as provided in section 985, any property subject to forfeiture to the United States under subsection (a) may be seized by the Attorney General and, in the case of property involved in a violation investigated by the Secretary of the Treasury or the United States Postal Service, the property may also be seized by the Secretary of the Treasury or the Postal Service, respectively.

(2) Seizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure, except that a seizure may be made without a warrant if--

(A) a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims;

(B) there is probable cause to believe that the property is subject to forfeiture and--

(i) the seizure is made pursuant to a lawful arrest or search; or

(ii) another exception to the Fourth Amendment warrant requirement would apply; or

(C) the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency.

(3) Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure, a seizure warrant may be issued pursuant to this subsection by a judicial officer in any district in which a forfeiture action against the property may be filed under section 1355(b) of title 28, and may be executed in any district in which the property is found, or transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement. Any motion for the return of property seized under this section shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

(4)(A) If any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States under this section or under the Controlled Substances Act or under foreign law, the Attorney General may apply to any Federal judge or magistrate judge in the district in which the property is located for an ex parte order restraining the property subject to forfeiture for not more than ~~30~~ 90 days, except that the time may be extended for good cause shown at a hearing conducted in the manner provided in rule 43(e) of the Federal Rules of Civil Procedure.

(B) The application for the restraining order shall set forth the nature and circumstances of the foreign charges and the basis for belief that the person arrested or charged has property in the United States that would be subject to forfeiture, and shall contain a statement that the restraining order is needed to preserve the availability of property for such time as is necessary to receive evidence from the foreign country or elsewhere in support of probable cause for the seizure of the property under this subsection or to receive an order or evidence in support of an application to preserve property or to enforce a judgment under section 2467 of title 28, United States Code.

(3) Proposal to authorize the United States to use forfeited property to remediate the harms of kleptocracy, human rights violations and abuses, war crimes, and armed aggression in asset recovery actions

PROPOSED LEGISLATIVE LANGUAGE:

Section One. Section 981 of Title 18, United States Code, is amended in subsection (e) as follows –

(1) in subsection (6), by striking the word "or" immediately after the semicolon at the end;

(2) in subsection (7) by striking the period after " . . . (as defined in section 8(e)(7)(D) of the Federal Deposit Insurance Act)", and by inserting in its place "; or";

(3) by adding after subsection (7) the following:

"(8) at the discretion of the Attorney General, in consultation with the Secretary of State and the Secretary of the Treasury, for use or transfer pursuant to paragraph (1) for remediation of foreign public corruption, human rights violations or abuses, war crimes, or armed aggression, where conduct giving rise to the forfeiture involved --

(A) foreign public corruption, fraud, or other related conduct by, on behalf of, or for the benefit of a foreign public official or affecting a foreign government, such as bribery, extortion, or the misappropriation, theft, or embezzlement of public funds;

(B) human rights violations or abuses, or war crimes;

(C) acts constituting bank fraud by, on behalf of, or for the benefit of a current or former foreign public official or an associate of such person, or a violation of the Prohibition on Concealment of the Source of Assets in Monetary Transactions (31 U.S.C. § 5335);

(D) a violation of the Arms Export Control Act (22 U.S.C. § 2751 et seq.), the Export Control Reform Act of 2018 (50 U.S.C. § 4801 et seq.), or any license, order, regulation, or prohibition issued under such acts;

(E) a person or property that is the target of a prohibition issued pursuant to the International Emergency Economic Powers Act (50 U.S.C. § 1701 et seq.) in connection with corruption, human rights violations or abuses, war crimes, or armed aggression; or

(F) money laundering related to (A) through (E).''; and

(4) by inserting at the end after the words “paragraph (3), (4), or (5) of this subsection.” the following:

> “Any funds transferred pursuant to this subsection to the Department of State or the United States Agency for International Development may be considered foreign assistance under the Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.) for purposes of making available the administrative authorities contained in that Act."

Section Two: Section 853 of Title 21, United States Code, is amended in subsection (i) as follows –

(1) in subsection (4) by striking the word “and”;

(2) in subsection (5) by striking the period at the end and inserting “; and” after “pending its disposition”; and

(3) by adding after subsection (5) the following:

> “(6) use or transfer such property as remediation, as set forth in section 981(e)(8) of Title 18.”

Section Three: Section 881 of Title 21, United States Code, is amended in subsection (e)(1) as follows –

(1) in subsection (D) by striking the word “or” immediately after the semicolon at the end;

(2) in subsection (E)(iii) by striking the period at the end and inserting “; or” after “under section 229lj(b) of Title 22”; and

(3) by adding after subsection (E)(iii) the following:

> “(F) use or transfer such property as remediation, as set forth in section 981(e)(8) of Title 18.”

Section Four: Section 524 of Title 28, United States Code, is amended in subsection (c)(1)(E) as follows –

(1) in subsection (i) by deleting the word “and” immediately after the semicolon at the end;

(2) in subsection (ii)(II), by inserting “ and” after “in such case;” and

(3) by adding after subsection (ii)(II) the following:

> “(iii) for payments, expenditures, or disbursements as remediation of foreign public corruption, human rights violations or abuses, war crimes, or armed aggression at the discretion of the Attorney General, as set forth in section 981(e)(8) of Title 18;”.

Section Five: Section 9705 of Title 31, United States Code, is amended in subsection (a)(1) by adding after subsection (J) the following:

> "**(K)** Payment of amounts authorized by law as remediation pursuant to section 981(e)(8) of Title 18."

SECTION-BY-SECTION ANALYSIS:

Generally, forfeited funds are used to compensate victims of the crimes underlying the forfeitures, and for other law enforcement purposes. In some cases, it is easy to identify victims and the amounts of their losses. Current authorities allow the government to compensate, for example, fraud victims who are cheated out of money the government can trace and forfeit. However, certain crimes may cause a range of harms across a population, in addition to any pecuniary harm to a particular individual. Moreover, under existing law, the United States generally cannot return forfeited funds to a foreign government of a nation harmed by corruption unless the nation assisted in the recovery or can show a direct pecuniary loss. In corruption cases, the forfeiture or the concealment of the loss may, for example, have occurred during a period while a prior government was influenced or controlled by corrupt officials. Human rights violations, war crimes, or acts of armed aggression, such as those stemming from Russia's further invasion of Ukraine in 2022, or acts of officials or mercenaries involved in recent coups, may likewise cause a range of harms and atrocities across a population or class of people. Thus, although sanctions may have been imposed because of severe consequences to a civilian population, the United States may not be able use or transfer forfeited funds to remedy the effects of that underlying conduct because the offense giving rise to the forfeiture – a sanctions violation – did not cause a direct, calculable, pecuniary loss to specific individuals that would be compensable under existing U.S. law.

This proposal, particularly when considered in conjunction with the separate proposed changes to 18 U.S.C. § 1961(1) to expand money laundering prosecution and forfeiture authorities for certain war crimes and human rights violations, would allow forfeited funds to be used to remediate the effects of foreign public corruption, human rights violations or abuses, war crimes, and armed aggression. This authority would also enable the United States to more closely adhere to the principles of the United Nations Convention against Corruption and better guard against re-corruption of recovered funds where foreign corrupt actors may retain influence. Because criminal and civil forfeiture authority resides in several statutes, conforming amendments are necessary to multiple statutes governing the use of forfeited funds.

Section One would amend 18 U.S.C. § 981, a civil forfeiture statute, to: (1) define a specific class of cases for which the new authority could be used, and (2) set forth the parameters under which the Attorney General, in consultation with the Departments of State and of the Treasury, may authorize the use of the forfeited funds for remediation.

The class of cases would reach conduct or related money laundering arising from offenses investigated in foreign public corruption, fraud, or other related conduct by, on behalf of, or for the benefit of a foreign public official or affecting a foreign government, such as bribery,

extortion, or the misappropriation, theft, or embezzlement of public funds; human rights violations or abuses; war crimes; armed aggression; certain bank fraud violations or violations of the Prohibition on Concealment of the Source of Assets in Monetary Transactions (31 U.S.C. § 5335); or a violation of the Arms Export Control Act (22 U.S.C. § 2751 et seq.) or the Export Control Reform Act of 2018 (50 U.S.C. § 4801 et seq.), or any license, order, regulation, or prohibition issued under such acts. The provision would also include cases in which the conduct or money laundering involved a person or property that is the target of a prohibition issued pursuant to the International Emergency Economic Powers Act (50 U.S.C. § 1701 et seq.) in connection with corruption, human rights violations or abuses, war crimes, or armed aggression.

The proposal would authorize the Attorney General, in consultation with the Departments of State and of the Treasury, to use or transfer the forfeited funds to another federal agency in order to remediate foreign public corruption, human rights violations or abuses, war crimes, or armed aggression. Where funds are transferred to the State Department or the United States Agency for International Development, the proposal makes clear that the funds could be implemented using administrative authorities under the Foreign Assistance Act.

Section Two would amend 21 U.S.C. § 853, a criminal forfeiture statute in the drug laws whose procedures apply to many other unrelated federal offenses, including those involving money laundering based on foreign corruption. It would adopt the definition of the class of cases in the proposed amendment to 18 U.S.C. § 981, and provide similar authority for the Attorney General, in consultation with the Departments of State and of the Treasury, to use or transfer the forfeited funds as remediation.

Section Three would amend 21 U.S.C. § 881, a civil forfeiture statute, to adopt the definition of the class of cases in the proposed amendment to 18 U.S.C. § 981, and provide similar authority for the Attorney General, in consultation with the Departments of State and of the Treasury, to use or transfer the forfeited funds as remediation.

Section Four would amend 28 U.S.C. § 524(c), the statute that governs the Department of Justice Assets Forfeiture Fund, to adopt the definition of the class of cases in the proposed amendment to 18 U.S.C. § 981 and provide congruent authority for disbursements, expenditures, or payments in accordance with an Attorney General determination, made in consultation with the Departments of State and of the Treasury, to use or transfer the forfeited funds as remediation.

Section Five would amend 31 U.S.C. § 9705, the statute that governs the Department of the Treasury Forfeiture Fund, to adopt the definition of the class of cases in the proposed amendment to 18 U.S.C. § 981, and provide congruent authority for the Secretary of the Treasury to transfer funds in accordance with an Attorney General determination, made in consultation with the Departments of State and of the Treasury, to use the forfeited funds as remediation.

PROPOSAL HISTORY:

In 2022, the Administration proposed legislation to permit the Attorney General to provide forfeited assets recovered in Russian sanctions violations cases to the State Department for use to remediate the harm of Russian aggression against Ukraine. In April 19, 2023, testimony before the Senate Judiciary Committee, Deputy Attorney General Lisa O. Monaco urged expansion of

such authority to include additional offenses and to permit the U.S. government to use funds to remediate harms in other kleptocracy and human rights cases.

LINE IN/LINE OUT COMPARISON TO CURRENT LAW:

18 U.S.C. § 981(e):

(e) Notwithstanding any other provision of the law, except section 3 of the Anti Drug Abuse Act of 1986, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine--

(1) to any other Federal agency;

(2) to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property;

(3) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency--

(A) to reimburse the agency for payments to claimants or creditors of the institution; and

(B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

(4) in the case of property referred to in subsection (a)(1)(C), upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as compensatory damages in any State or Federal proceeding;

(5) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property;

(6) as restoration to any victim of the offense giving rise to the forfeiture, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity; ~~or~~

(7) In[3] the case of property referred to in subsection (a)(1)(D), to the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, or any other Federal financial institution regulatory agency (as defined in section 8(e)(7)(D) of the Federal Deposit Insurance Act)~~.~~; or

(8) at the discretion of the Attorney General, in consultation with the Secretary of State and the Secretary of the Treasury, for use or transfer pursuant to paragraph (1) for remediation of foreign public corruption, human rights violations or abuses, war crimes, or armed aggression, where conduct giving rise to the forfeiture involved --

(A) foreign public corruption, fraud, or other related conduct by, on behalf of, or for the benefit of a public official or affecting a foreign government, such as bribery, extortion, or the misappropriation, theft, or embezzlement of public funds;

(B) human rights violations or abuses or war crimes;

(C) acts constituting bank fraud by, on behalf of, or for the benefit of a current or former foreign public official or an associate of such person, or a violation of the Prohibition on Concealment of the Source of Assets in Monetary Transactions (31 U.S.C. § 5335);

(D) a violation of the Arms Export Control Act (22 U.S.C. § 2751 et seq.) or the Export Control Reform Act of 2018 (50 U.S.C. § 4801 et seq.), or any license, order, regulation, or prohibition issued under such acts;

(E) a person or property that is the target of a prohibition issued pursuant to the International Emergency Economic Powers Act (50 U.S.C. § 1701 et seq.) in connection with corruption, human rights violations or abuses, war crimes, or armed aggression; or

(F) money laundering related to (A) through (E).

The Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General, the Secretary of the Treasury, or the Postal Service pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General, the Secretary of the Treasury, or the Postal Service may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials. The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection. Any funds transferred pursuant to this subsection to the Department of State or the United States Agency for International Development may be considered foreign assistance under the Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.) for purposes of making available the administrative authorities contained in that Act.

21 U.S.C. § 853(i):

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; ~~and~~

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition~~.~~; and

(6) use or transfer such property as remediation, as set forth in section 981(e)(8) of Title 18.

21 U.S.C. § 881(e)(1):

(e) Disposition of forfeited property

(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may--

(A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of Title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); ~~or~~

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal

or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer--

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 2291j(b) of Title 22~~.~~; or

(F) use or transfer such property as remediation, as set forth in section 981(e)(8) of Title 18.

28 U.S.C. § 524(c)(1):

(E)(i) for disbursements authorized in connection with remission or mitigation procedures relating to property forfeited under any law enforced or administered by the Department of Justice; ~~and~~

(ii) for payment for--

(I) costs incurred by or on behalf of the Department of Justice in connection with the removal, for purposes of Federal forfeiture and disposition, of any hazardous substance or pollutant or contaminant associated with the illegal manufacture of amphetamine or methamphetamine; and

(II) costs incurred by or on behalf of a State or local government in connection with such removal in any case in which such State or local government has assisted in a Federal prosecution relating to amphetamine or methamphetamine, to the extent such costs exceed equitable sharing payments made to such State or local government in such case; and

(iii) for payments, expenditures, or disbursements as remediation of foreign public corruption, human rights violations or abuses, war crimes, or armed aggression at the discretion of the Attorney General, as set forth in section 981(e)(8) of Title 18;

31 U.S.C. § 9705(a)(1):

(a) In general.--There is established in the Treasury of the United States a fund to be known as the "Department of the Treasury Forfeiture Fund" (referred to in this section as the "Fund"). The Fund shall be available to the Secretary, without fiscal year limitation, with respect to seizures and forfeitures made pursuant to any law (other than section 7301 or 7302 of the Internal Revenue Code of 1986) enforced or administered by the Department of the Treasury or the United States Coast Guard for the following law enforcement purposes:

(1)(A) Payment of all proper expenses of seizure (including investigative costs incurred by a Department of the Treasury law enforcement organization leading to seizure) or the proceedings of forfeiture and sale, including the expenses of detention, inventory,

security, maintenance, advertisement, or disposal of the property, and if condemned by a court and a bond for such costs was not given, the costs as taxed by the court.

(B) Payment for--

(i) contract services;

(ii) the employment of outside contractors to operate and manage properties or to provide other specialized services necessary to dispose of such properties in an effort to maximize the return from such properties; and

(iii) reimbursing any Federal, State, or local agency for any expenditures made to perform the functions described in this subparagraph.

(C) Awards of compensation to informers under section 619 of the Tariff Act of 1930 (19 U.S.C. 1619).

(D) Satisfaction of--

(i) liens for freight, charges, and contributions in general average, notice of which has been filed with the appropriate Customs officer according to law; and

(ii) subject to the discretion of the Secretary, other valid liens and mortgages against property that has been forfeited pursuant to any law enforced or administered by a Department of the Treasury law enforcement organization. To determine the validity of any such lien or mortgage, the amount of payment to be made, and to carry out the functions described in this subparagraph, the Secretary may employ and compensate attorneys and other personnel skilled in State real estate law.

(E) Payment of amounts authorized by law with respect to remission and mitigation.

(F) Payment of claims of parties in interest to property disposed of under section 612(b) of the Tariff Act of 1930 (19 U.S.C. 1612(b)), in the amounts applicable to such claims at the time of seizure.

(G) Equitable sharing payments made to other Federal agencies, State and local law enforcement agencies, and foreign countries pursuant to section 616(c) of the Tariff Act of 1930 (19 U.S.C. 1616a(c)), section 981 of title 18, or subsection (h) of this section, and all costs related thereto.

(H) Payment for services of experts and consultants needed by a Department of the Treasury law enforcement organization to carry out the organization's duties relating to seizure and forfeiture.

(I) Payment of overtime salaries, travel, fuel, training, equipment, and other similar costs of State or local law enforcement officers that are incurred in joint law enforcement operations with a Department of the Treasury law enforcement organization.

(J) Payment made pursuant to guidelines promulgated by the Secretary, if such payment is necessary and directly related to seizure and forfeiture program expenses for--

(i) the purchase or lease of automatic data processing systems (not less than a majority of which use will be related to such program);

(ii) training;

(iii) printing; and

(iv) contracting for services directly related to--

(I) the identification of forfeitable assets;

(II) the processing of and accounting for forfeitures; and

(III) the storage, maintenance, protection, and destruction of controlled substances.

(K) Payment of amounts authorized by law as remediation pursuant to section 981(e)(8) of Title 18.

(4) Proposal to preserve assets located abroad for recovery by clarifying authority for seizure warrants

PROPOSED LEGISLATIVE LANGUAGE:

Section One: Section 853 of Title 21, United States Code (Criminal Forfeitures), is amended in subsection (f) by –

> Inserting the following after "as provided for a search warrant.":
>
> "Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure, a seizure warrant may be issued for property subject to forfeiture that may be located outside of the United States and may be transmitted to the central authority or other competent authority of a foreign country for service in accordance with any treaty or international agreement or in accordance with foreign law."

Section Two: Section 981 of Title 18, United States Code (Criminal Forfeitures), is amended in subsection (b)(3) by –

> striking the word "is" between the words "property" and "found", and inserting in its place "may be"; inserting "or other competent authority" immediately after the words "central authority"; striking the word "any" between the words "of" and "foreign" and inserting in its place "a"; striking the word "state" immediately after the word "foreign" and inserting in its place "country"; and inserting "or in accordance with foreign law" immediately after the words "international agreement".

SECTION-BY-SECTION ANALYSIS:

This amendment to 21 U.S.C. § 853(f) would clarify a federal district court's authority to issue a seizure warrant in criminal cases for property located abroad, and make technical corrections to existing authority under 18 U.S.C. § 981(b)(3) for the court to issue a seizure warrant to secure property located abroad that is subject to civil forfeiture. Under current law, 18 U.S.C. § 981(b)(3) provides express authority for the court to issue civil seizure warrants for service through mutual legal assistance. However, 21 U.S.C. § 853(f) does not contain such clear authorization for seizure warrants in criminal cases and instead refers to procedures for obtaining a search warrant. Foreign kleptocrats, their entities and associates, as well as other criminals, often maintain significant assets abroad. Ambiguity in the authority for the court to issue a seizure warrant for assets in a criminal case risks dissipation of assets and may necessitate the filing of multiple criminal and civil proceedings.

Section One would amend 21 U.S.C. § 853(f) to clarify authority for law enforcement to seek a judicial determination of probable cause and for the court to issue a seizure warrant in criminal cases to seize property located abroad through mutual legal assistance, consistent with the procedures currently applicable in civil forfeiture actions. Section Two of this proposal would

make a conforming change to 18 U.S.C. § 981(b)(3) to more accurately reflect the practice of foreign governments in execution of U.S. requests, which may be made to a central authority of one or more foreign countries where assets may be found for service under an international agreement or in accordance with domestic law of the foreign country.

LINE IN/LINE OUT COMPARISON TO CURRENT LAW:

21 U.S.C. § 853(f)

(f) Warrant of seizure. The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure, a seizure warrant may be issued for property subject to forfeiture that may be located outside of the United States and may be transmitted to the central authority or other competent authority of a foreign country for service in accordance with any treaty or international agreement or in accordance with foreign law. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

18 U.S.C. § 981(b)(3)

(3) Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure, a seizure warrant may be issued pursuant to this subsection by a judicial officer in any district in which a forfeiture action against the property may be filed under section 1355(b) of title 28, and may be executed in any district in which the property ~~is~~ may be found, or transmitted to the central authority or other competent authority of ~~any~~ a foreign ~~state~~ country for service in accordance with any treaty or other international agreement or in accordance with foreign law. Any motion for the return of property seized under this section shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

(5) Proposal to add certain criminal offenses involving corruption, human rights Violations and abuses, war crimes, sanctions and export control violations, and illicit foreign election contributions as "racketeering activities" under the Racketeer Influenced and Corrupt Organizations (RICO) Act and as predicates for Title III interception of wire and oral communications

PROPOSED LEGISLATIVE LANGUAGE:

Section One. Section 1961 of Title 18, United States Code (Definitions), is amended in subsection (1), by –

> inserting "section 641 (relating to theft of government money, records, or property), if the act indictable under Section 641 is felonious," before "section 659 (relating to theft from interstate shipment)", inserting "section 666 (relating to theft or bribery concerning programs receiving federal funds)," before "sections 891-894 (relating to extortionate credit transactions)", inserting "section 1028A (relating to aggravated identity theft)," before "section 1029 (relating to fraud and related activity in connection with access devices)", inserting "section 1091 (relating to acts of genocide)," before "section 1341 (relating to mail fraud)", inserting "section 2441 (relating to war crimes), section 2442 (relating to use and recruitment of child soldiers)," before "sections 175-178 (relating to biological weapons)", striking the word "or" before "(G) any act that is indictable under any provision listed in section 2332b(g)(5)(B)", and by inserting ", (H) any act that is indictable under title 50, United States Code, section 1705 (relating to criminal violations of the International Emergency Economic Powers Act) or section 4819 (relating to criminal violations of the Export Control Reform Act), (I) any act that is indictable under title 22, United States Code, section 2778 (relating to criminal violations of the Arms Export Control Act), or (J) any act that is indictable under title 52, United States Code, section 30121 (relating to unlawful campaign contributions and donations by foreign nationals) or section 30122 (relating to unlawful campaign contributions in the name of another person) if the act indictable under section 30121 or section 30122 is felonious pursuant to title 52, United States Code, section 30109(d)(1)(A)(i)" before the semicolon at the end.

Section Two. Section 2516(1) of Title 18, United States Code (Authorization for interception of wire, oral, or electronic communications), is amended –

> (1) in subsection (c), by inserting "section 1091 (relating to acts of genocide)," before "section 1114 (relating to officers and employees of the United States)", inserting "a felony violation of section 641 (relating to theft of government money, records, or property)" before "section 659 (theft from interstate shipment)", inserting "section 666 (relating to theft or bribery concerning programs receiving federal funds)," before "section 1343 (fraud by wire, radio, or television)", and inserting "section 2441 (relating to war crimes), section 2442 (relating to use and recruitment of child soldiers)," before "section 1203 (relating to hostage taking)";

(2) in subsection (t), by striking the word “or” immediately after the semicolon at the end;

(3) by re-designating subparagraph (u) as subparagraph (w);

(4) by adding after subparagraph (t) the following:

> "**(u)** any violation of section 30121 (relating to unlawful campaign contributions and donations by foreign nationals) or 30122 (relating to unlawful campaign contributions in the name of another person) of title 52, if that violation is a felony under section 30109(d)(1)(A)(i) of title 52, United States Code;"

(5) by adding after subparagraph (u) the following:

> "**(v)** any criminal violation of section 1705 of title 50 (relating to violations of the International Emergency Economic Powers Act); or"

SECTION-BY-SECTION ANALYSIS:

To assist the United States in the investigation and prosecution of transnational and domestic offenses involving corruption, human rights violations, war crimes violations, sanctions and export control violations, and illicit foreign election contributions, this proposal would add certain criminal offenses to the definition of “racketeering activity” under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961, et seq., and to the list of predicates for Title III interception of wire and oral communications under 18 U.S.C. § 2516.

Section One would add theft of government money, records, or property (18 U.S.C. § 641) (if the act indictable under section 641 is felonious), theft or bribery concerning programs receiving federal funds (18 U.S.C. § 666), aggravated identity theft (18 U.S.C. § 1028A), acts of genocide (18 U.S.C. § 1091), war crimes (18 U.S.C. § 2441), use and recruitment of child soldiers (18 U.S.C. § 2442), violations of the International Emergency Economic Powers Act (50 U.S.C. § 1705), violations of the Export Control Reform Act (50 U.S.C. § 4819), violations of the Arms Export Control Act (AECA) (22 U.S.C. § 2778), and prohibited contributions to U.S. elections by foreign nationals (52 U.S.C. § 30121) and by conduits (52 U.S.C. § 30122) (if the act is felonious under 52 U.S.C. § 30109(d)(1)(A)(i)), as racketeering activities under RICO, 18 U.S.C. § 1961(1).

The United States generally adopts an “enterprise theory” in investigations of sanctions evasion, under which impactful prosecutions are built by identifying a common criminal network with overlapping interests, actors, and assets, and working to dismantle the network in a single prosecution that speaks to the full scope of criminal activity. However, in the sanctions area, prosecutors are currently unable to use sanctions evasion as a central element to a comprehensive, and powerful, charge. Adding references to 50 U.S.C. § 1705, ECRA and ACEA in the list of predicate racketeering acts set out in 18 U.S.C. § 1961(1) would address this gap and provide an important tool in such cases. Inclusion of section 1705, ECRA, AECA would allow for sanctions evasion or evasion of export or arms control laws to be charged along with evidence of fraud, money laundering, extortion, and other predicate acts that often surround sanctions evasion schemes, but currently must be charged separately. This change would also provide a basis for extending the life of criminal activity under applicable statutes of limitations,

for example, by allowing a charge for older extortion and expropriation of property where a recent sanction evasion exists (a fact pattern that is particularly common with respect to the current Russian sanctions effort).

Inclusion of acts of genocide (18 U.S.C. § 1091), war crimes (18 U.S.C. § 2441), and use and recruitment of child soldiers (18 U.S.C. § 2442), as racketeering activities under RICO would enable the United States to also use an enterprise theory to investigate and prosecute some of the most egregious violations of human rights when committed by a U.S. resident or otherwise within the jurisdiction of U.S. courts. An enterprise approach would facilitate investigations and prosecutions of these grave violations, which are often transnational in nature and involve a series of related criminal actions by different members of a criminal organization. Importantly, because offenses enumerated in 18 U.S.C. § 1961(1) are predicate offenses for money laundering under 18 U.S.C. § 1956(c)(7)(A), addition of these offenses as racketeering activities would aid U.S. efforts to disrupt this illicit conduct through the investigation and prosecution of persons who conduct financial transactions in or through the United States that would promote such crimes or launder related criminal proceeds. Under existing law, these offenses are not predicates for money laundering or forfeiture, and the United States lacks these powerful law enforcement tools to combat this type of serious crime where perpetrators and facilitators abuse the U.S. financial system to enable their criminal acts.

In addition, while the United States can charge some domestic corruption or foreign campaign financing violations as elements of a racketeering enterprise, it may not be possible to include all related conduct because certain offenses are not listed as racketeering activities. Addition of theft of government money, records, or property (18 U.S.C. § 641) (if the act indictable under section 641 is felonious), theft or bribery concerning programs receiving federal funds (18 U.S.C. § 666), and prohibited contributions to U.S. elections by foreign nationals (52 U.S.C. § 30121) and by conduits (52 U.S.C. § 30122) (if the act is felonious under 52 U.S.C. § 30109(d)(1)(A)(i)) as racketeering activities would harmonize domestic corruption and foreign election interference offenses with other offenses already incorporated into RICO. Consequently, an enterprise theory could be employed against all members of a racketeering enterprise, including, for example, those involved in both domestic bribery offenses under 18 U.S.C. § 201 and those involved in theft of government property under 18 U.S.C. § 641 (if the act indictable under section 641 is felonious), or, similarly, those involved in illicit foreign influence efforts that include felony prohibitions on foreign contributions to U.S. elections under 52 U.S.C. § 30121.

Finally, the Department proposes a further amendment to the definition of racketeering activity to include aggravated identity theft. Ordinary identity theft (18 U.S.C § 1028) is already defined as "racketeering activity" under 18 U.S.C. §1961(1). There is no reason to omit the more severe violation of aggravated identity theft.

In addition to expanding the predicates for certain money laundering and forfeiture offenses, this proposal would also extend a powerful forfeiture tool against racketeering enterprises engaged in sanctions evasion and these additional enumerated offenses. For example, whereas current

forfeitures for violations of section 1705 are limited to the proceeds of that crime (or, potentially to certain property "involved in" the conduct if assets are used to launder the proceeds of sanctions violations), RICO forfeitures may extend to the assets of the enterprise that reach beyond specific funds and into, for example, the assets of entities or properties used to promote the enterprise's success or status.

Section Two would make corresponding additions to include as Title III predicates for interception of wire or oral communications theft of government money, records, or property (18 U.S.C. § 641), theft or bribery concerning programs receiving federal funds (18 U.S.C. § 666), acts of genocide (18 U.S.C. § 1091), war crimes (18 U.S.C. § 2441), use and recruitment of child soldiers (18 U.S.C. § 2442), violations of the International Emergency Economic Powers Act (50 U.S.C. § 1705), and prohibited contributions to U.S. elections by foreign nationals (52 U.S.C. § 30121) and by conduits (52 U.S.C. § 30122) (if the act is felonious under 52 U.S.C. § 30109(d)(1)(A)(i)). Certain offenses added as racketeering activities in Section One, including violations of the Export Control Reform Act (50 U.S.C. § 4819), violations of the Arms Export Control Act (AECA) (22 U.S.C. § 2778), and aggravated identity theft (18 U.S.C. § 1028A), are not incorporated into Section Two because they are already predicates for Title III intercepts. Given the complexity and severity of these offenses, as well as the often transnational nature of many of these investigations, judicially authorized interception of wire or oral communications would enhance the investigation and prosecution of these serious crimes.

PROPOSAL HISTORY:

In 2022, the Administration proposed modernizing the definition of racketeering activity under RICO to incorporate three of the offenses enumerated in this proposal, including criminal violations of the International Emergency Economic Powers Act (IEEPA), the Export Control Reform Act (ECRA), and the Arms Export Control Act (AECA).

LINE IN/LINE OUT COMPARISON TO CURRENT LAW:

18 U.S.C. § 1961. Definitions
As used in this chapter–

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 641 (relating to theft of government money, records, or property), if the act indictable under Section 641 is felonious, section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), section 666 (relating to theft or bribery concerning programs receiving federal funds), sections 891-894 (relating to extortionate credit transactions), section 932 (relating to straw purchasing), section 933 (relating to trafficking in firearms), section 1028 (relating to fraud and related activity in connection with identification

documents), section 1028A (relating to aggravated identity theft), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1091 (relating to acts of genocide), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons).,[1] sections 1831 and 1832 (relating to economic espionage and theft of trade secrets), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), section 2441 (relating to war crimes), section 2442 (relating to use and recruitment of child soldiers), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United

States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, ~~or~~ (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B), (H) any act that is indictable under title 50, United States Code, section 1705 (relating to criminal violations of the International Emergency Economic Powers Act) or section 4819 (relating to criminal violations of the Export Control Reform Act), (I) any act that is indictable under title 22, United States Code, section 2778 (relating to criminal violations of the Arms Export Control Act), or (J) any act that is indictable under title 52, United States Code, section 30121 (relating to unlawful campaign contributions and donations by foreign nationals) or section 30122 (relating to unlawful campaign contributions in the name of another person) if the act indictable under section 30121 or section 30122 is felonious pursuant to title 52, United States Code, section 30109(d)(1)(A)(i);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant

Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 2516. Authorization for interception of wire, oral, or electronic communications

(1) The Attorney General, Deputy Attorney General, Associate Attorney General,[1] or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division or National Security Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of--

(a) any offense punishable by death or by imprisonment for more than one year under sections 2122 and 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), section 2284 of title 42 of the United States Code (relating to sabotage of nuclear facilities or fuel), or under the following chapters of this title: chapter 10 (relating to biological weapons), chapter 37 (relating to espionage), chapter 55 (relating to kidnapping), chapter 90 (relating to protection of trade secrets), chapter 105 (relating to sabotage), chapter 115 (relating to treason), chapter 102 (relating to riots), chapter 65 (relating to malicious mischief), chapter 111 (relating to destruction of vessels), or chapter 81 (relating to piracy);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 37 (relating to violence at international airports), section 43 (relating to animal enterprise terrorism), section 81 (arson within special maritime and territorial jurisdiction), section 201 (bribery of public officials and witnesses), section 215 (relating to bribery of bank officials), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1032 (relating to concealment of assets), section 1084 (transmission of wagering information), section 751 (relating to escape), section 832 (relating to nuclear and weapons of mass destruction threats), section 842 (relating to explosive materials), section 930 (relating to possession of weapons in Federal facilities), section 1014 (relating to loans and credit applications generally; renewals and discounts), section 1091 (relating to acts of genocide), section 1114 (relating to officers and employees of the United States), section 1116 (relating to protection of foreign officials), sections 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511

(obstruction of State or local law enforcement), section 1581 (peonage), section 1582 (vessels for slave trade), section 1583 (enticement into slavery), section 1584 (involuntary servitude), section 1585 (seizure, detention, transportation or sale of slaves), section 1586 (service on vessels in slave trade), section 1587 (possession of slaves aboard vessel), section 1588 (transportation of slaves from United States), section 1589 (forced labor), section 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), section 1591 (sex trafficking of children by force, fraud, or coercion), section 1592 (unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor), section 1751 (Presidential and Presidential staff assassination, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1958 (relating to use of interstate commerce facilities in the commission of murder for hire), section 1959 (relating to violent crimes in aid of racketeering activity), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 1956 (laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), a felony violation of section 641 (relating to theft of government money, records, or property), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), section 666 (relating to theft or bribery concerning programs receiving federal funds), section 1343 (fraud by wire, radio, or television), section 1344 (relating to bank fraud), section 1992 (relating to terrorist attacks against mass transportation), sections 2251 and 2252 (sexual exploitation of children), section 2251A (selling or buying of children), section 2252A (relating to material constituting or containing child pornography), section 1466A (relating to child obscenity), section 2260 (production of sexually explicit depictions of a minor for importation into the United States), sections 2421, 2422, 2423, and 2425 (relating to transportation for illegal sexual activity and related crimes), sections 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 2340A (relating to torture), section 2441 (relating to war crimes), section 2442 (relating to use and recruitment of child soldiers), section 1203 (relating to hostage taking), section 1029 (relating to fraud and related activity in connection with access devices), section 3146 (relating to penalty for failure to appear), section 3521(b)(3) (relating to witness relocation and assistance), section 32 (relating to destruction of aircraft or aircraft facilities), section 38 (relating to aircraft parts fraud), section 1963 (violations with respect to racketeer influenced and corrupt organizations), section 115 (relating to threatening or retaliating against a Federal official), section 1341 (relating to mail fraud), a felony violation of section 1030 (relating to computer fraud and abuse), section 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, and assault), section 831 (relating to prohibited transactions involving nuclear materials), section 33 (relating to destruction of motor vehicles or motor vehicle facilities), section 175 (relating to biological weapons), section 175c (relating to variola virus), section 956 (conspiracy to harm persons or property overseas), a felony violation of section 1028 (relating to production of false identification documentation), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), section 1541 (relating to passport issuance without authority), section 1542 (relating to false statements in passport applications), section 1543 (relating to forgery or false use of passports),

section 1544 (relating to misuse of passports), section 1546 (relating to fraud and misuse of visas, permits, and other documents), or section 555 (relating to construction or use of international border tunnels);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title;

(g) a violation of section 5322 of title 31, United States Code (dealing with the reporting of currency transactions), or section 5324 of title 31, United States Code (relating to structuring transactions to evade reporting requirement prohibited);

(h) any felony violation of sections 2511 and 2512 (relating to interception and disclosure of certain communications and to certain intercepting devices) of this title;

(i) any felony violation of chapter 71 (relating to obscenity) of this title;

(j) any violation of section 60123(b) (relating to destruction of a natural gas pipeline), section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with dangerous weapon), or section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life, by means of weapons on aircraft) of title 49;

(k) any criminal violation of section 2778 of title 22 (relating to the Arms Export Control Act);

(l) the location of any fugitive from justice from an offense described in this section;

(m) a violation of section 274, 277, or 278 of the Immigration and Nationality Act (8 U.S.C. 1324, 1327, or 1328) (relating to the smuggling of aliens);

(n) any felony violation of section 922, 924, 932, or 933 of title 18, United States Code (relating to firearms);

(o) any violation of section 5861 of the Internal Revenue Code of 1986 (relating to firearms);

(p) a felony violation of section 1028 (relating to production of false identification documents), section 1542 (relating to false statements in passport applications), section 1546 (relating to fraud and misuse of visas, permits, and other documents), section 1028A (relating to aggravated identity theft) of this title or a violation of section 274, 277, or 278 of the Immigration and Nationality Act (relating to the smuggling of aliens); or[2]

(q) any criminal violation of section 229 (relating to chemical weapons) or section 2332, 2332a, 2332b, 2332d, 2332f, 2332g, 2332h[3] 2339, 2339A, 2339B, 2339C, or 2339D of this title (relating to terrorism);

(r) any criminal violation of section 1 (relating to illegal restraints of trade or commerce), 2 (relating to illegal monopolizing of trade or commerce), or 3 (relating to illegal restraints of trade or commerce in territories or the District of Columbia) of the Sherman Act (15 U.S.C. 1, 2, 3);

(s) any violation of section 670 (relating to theft of medical products);

(t) any violation of the Export Control Reform Act of 2018; ~~or~~

(u) any violation of section 30121 (relating to unlawful campaign contributions and donations by foreign nationals) or 30122 (relating to unlawful campaign contributions in the name of another person) of title 52, if that violation is a felony under section 30109(d)(1)(A)(i) of title 52, United States Code;

(v) any criminal violation of section 1705 of title 50 (relating to violations of the International Emergency Economic Powers Act); or

~~**(u)**~~**(w)** any conspiracy to commit any offense described in any subparagraph of this paragraph.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, human trafficking, child sexual exploitation, child pornography production, prostitution, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

(3) Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, an order authorizing or approving the interception of electronic communications by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of any Federal felony.

(6) Proposal to leverage foreign partners' ability to recover proceeds of kleptocracy

PROPOSED LEGISLATIVE LANGUAGE:

Section One: Section 2467 of Title 28, United States Code, is amended as follows:

(1) By deleting:

(a) in subsection (c)(1), "on behalf of a foreign nation";

(b) subsection (c)(2)(C) in its entirety, and replacing it with the text below;

(c) in subsection (d)(1), "on behalf";

(2) By renaming existing subsection (d)(3)(C), Limit on grounds for objection.--, "(d)(3)(D)";

(3) By inserting:

(a) in subsection (c)(2)(C), the following:

"the district court shall have personal jurisdiction over a person or entity who has filed a response to an application by the Government under this section or a person or entity residing outside of the United States if the person or entity has been served with process in accordance with rule 4 of the Federal Rules of Civil Procedure.";

(b) after subsection (c)(2)(C), the following:

"(D) the United States shall provide notice of an action to enforce a foreign forfeiture judgment in accordance with the procedures set forth in Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions to the extent that the provisions therein are not inconsistent with this section, which notice shall contain a deadline for filing a response at least 35 days after the notice is sent;

(E) any person or entity claiming an interest in property that is the subject of an application brought under this section may file a response to the application of the United States, except that such response must be filed by the date stated in a direct notice of the application or, as applicable, not later than 35 days after the date of final publication of notice of the filing of the application. Such response shall,

(i) identify the specific property being claimed;

(ii) identify the respondent;

(iii) set forth the nature and extent of the respondent's interest in the property, and the time and circumstances of the respondent's acquisition of the right, title, or interest in the property;
(iv) set forth with specificity the basis upon which the respondent asserts that the foreign forfeiture judgment should not be enforced in accordance with subsection (d)(1);
(v) be signed by the respondent under the penalty of perjury; and
(vi) be served on the government attorney who filed the application under this section;

(F) at any time, the United States may move to strike a response or any portion of a response for failing to comply with subsection (c)(2)(E) or because the respondent lacks standing. Any such motion,
(i) must be decided before any motion by the respondent to dismiss the action or dissolve any order to preserve property under this section; and
(ii) may be presented as a motion for judgment on the pleadings or as a motion to determine after a hearing or by summary judgment whether the respondent can carry the burden to establish standing by a preponderance of the evidence;"

(c) in subsection (d)(3)(B)(ii), after "by a court of competent jurisdiction in the foreign country", ", or by such judicial officer as may be authorized under foreign law,"

(d) in new subsection (d)(3)(C), "Preservation, Prevention of Criminal Use, and Sale – In addition to any other action authorized under this section, the court, on motion of the Government, may order the preservation, prevention of criminal use, or interlocutory sale of property subject to civil or criminal forfeiture under foreign law in accordance with the provisions of Rule G(7) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions."

(e) in subsection (d)(3)(D), after "No person may object to a restraining order under subparagraph (A)," "or an order for interlocutory sale under subparagraph (C)"

(f) in subsection (d), after subsection (d)(3), the following:

"(4) Effect. -- All right, title and interest in property subject to an order to enforce a forfeiture or confiscation judgment under this section shall be forfeited to the United States and shall vest in the United States upon commission of the act giving rise to the forfeiture or confiscation judgment. The Attorney General shall dispose of the forfeited property, or the proceeds of its sale, in accordance with the provisions of section 853(i) of title 21 or as otherwise provided by law."

(g) after subsection (f), the following:

"(g) Protection from Liability for Acting at Foreign Request – Notwithstanding any other provision of Federal Law, no person shall have any right of action at law or

equity against the United States, its officers, employees or any other person acting on behalf of, or at the direction of, the United States that arises from any action taken pursuant to this section, or the return or release of property restrained, seized or forfeited pursuant to this section, including, but not limited to, actions for damages, costs, interest or attorneys' fees."

(h) in subsection (d)(2), after "Process to enforce a judgment under" "subsection (a)(2)(A) of".

SECTION-BY-SECTION ANALYSIS:

This proposal would improve the United States' ability to assist international partners in their efforts to recover foreign corruption proceeds consistent with U.S. treaty obligations, such as the United Nations Convention against Corruption. As kleptocrats and other criminals commit crimes and launder money in multiple jurisdictions and across national boundaries, the United States frequently receives requests from foreign governments to assist in the recovery of proceeds and property involved in foreign corruption offenses that are the subject of foreign investigations. Under 28 U.S.C. § 2467, U.S. courts currently are authorized to provide assistance in foreign asset recovery proceedings by ordering the restraint of assets or by enforcing foreign forfeiture judgments rendered by foreign courts. However, Section 2467 contains few procedural provisions, unnecessarily complicating enforcement proceedings for both the courts and parties, as well as for disposition of recovered assets. This proposal would clarify existing U.S. law to facilitate enforcement of foreign restraint and forfeiture orders for criminal property. Because the United States routinely seeks assistance from foreign authorities in its investigations when criminal assets are located abroad, this proposal would not just facilitate foreign proceedings, but would also strengthen U.S. relationships with foreign partners responsible for executing corresponding U.S. requests for assistance.

This proposal would amend 28 U.S.C. § 2467 in several ways, including by (1) establishing notice, standing, and default procedures; (2) authorizing the Attorney General, with the concurrence of the Secretary of the Treasury and the Secretary of State, to enforce restraint orders from certain civil law jurisdictions; (3) authorizing interlocutory sale of property to safeguard the value of assets for all parties to foreign proceedings; and (4) clarifying that recovered property is forfeited to the United States and subject to authority for disposition of forfeited assets as in domestic forfeiture cases. Because U.S. enforcement proceedings are dependent upon the actions and determinations of foreign authorities and courts, the proposal also clarifies protection against attorneys' fees and costs petitions, which would be more appropriately brought under foreign law in foreign proceedings. This proposal would also make additional technical amendments.

PROPOSAL HISTORY:

In 2022, these proposed amendments to 28 U.S.C. § 2467 were included in an Administration proposal to strengthen tools to hold Russian oligarchs and elites accountable following Russia's further invasion of Ukraine.

LINE IN/LINE OUT COMPARISON TO CURRENT LAW:

28 U.S.C. § 2467

. . .

(c) Jurisdiction and venue.--

(1) In general.--If the Attorney General or the designee of the Attorney General certifies a request under subsection (b), the United States may file an application ~~on behalf of a foreign nation~~ in district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States.

(2) Proceedings.--In a proceeding filed under paragraph (1)--

(A) the United States shall be the applicant and the defendant or another person or entity affected by the forfeiture or confiscation judgment shall be the respondent;

(B) venue shall lie in the district court for the District of Columbia or in any other district in which the defendant or the property that may be the basis for satisfaction of a judgment under this section may be found; and

(C) the district court shall have personal jurisdiction over a person or entity who has filed a response to an application by the Government under this section or a person or entity ~~defendant~~ residing outside of the United States if the ~~defendant is~~ person or entity has been served with process in accordance with rule 4 of the Federal Rules of Civil Procedure.

(D) the United States shall provide notice of an action to enforce a foreign forfeiture judgment in accordance with the procedures set forth in Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions to the extent that the provisions therein are not inconsistent with this section, which notice shall contain a deadline for filing a response at least 35 days after the notice is sent;

(E) any person or entity claiming an interest in property that is the subject of an application brought under this section may file a response to the application of the United States, except that such response must be filed by the date stated in a direct notice of the application or, as applicable, not later than 35 days after the date of final publication of notice of the filing of the application. Such response shall,

(i) identify the specific property being claimed;
(ii) identify the respondent;
(iii) set forth the nature and extent of the respondent's interest in the property, and the time and circumstances of the respondent's acquisition of the right, title, or interest in the property;
(iv) set forth with specificity the basis upon which the respondent asserts that the foreign forfeiture judgment should not be enforced in accordance with subsection (d)(1);
(v) be signed by the respondent under the penalty of perjury; and

(vi) be served on the government attorney who filed the application under this section;

(F) at any time, the United States may move to strike a response or any portion of a response for failing to comply with subsection (c)(2)(E) or because the respondent lacks standing. Any such motion,

(i) must be decided before any motion by the respondent to dismiss the action or dissolve any order to preserve property under this section; and

(ii) may be presented as a motion for judgment on the pleadings or as a motion to determine after a hearing or by summary judgment whether the respondent can carry the burden to establish standing by a preponderance of the evidence;

(d) Entry and enforcement of judgment.--

(1) In general.--The district court shall enter such orders as may be necessary to enforce the judgment ~~on behalf~~ of the foreign nation unless the court finds that--

. . .

(2) Process.--Process to enforce a judgment under subsection (a)(2)(A) of this section shall be in accordance with rule 69(a) of the Federal Rules of Civil Procedure.

(3) Preservation of property.--

. . .

(B) Evidence.--The court, in issuing a restraining order under subparagraph (A)--

(i) may rely on information set forth in an affidavit describing the nature of the proceeding or investigation underway in the foreign country, and setting forth a reasonable basis to believe that the property to be restrained will be named in a judgment of forfeiture at the conclusion of such proceeding; or

(ii) may register and enforce a restraining order that has been issued by a court of competent jurisdiction in the foreign country, or by such judicial officer as may be authorized under foreign law, and certified by the Attorney General pursuant to subsection (b)(2).

(C) Preservation, Prevention of Criminal Use, and Sale – In addition to any other action authorized under this section, the court, on motion of the Government, may order the preservation, prevention of criminal use, or interlocutory sale of property subject to civil or criminal forfeiture under foreign law in accordance with the provisions of Rule G(7) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

(D) Limit on grounds for objection.--No person may object to a restraining order under subparagraph (A) or an order for interlocutory sale under subparagraph (C) on any ground that is the subject of parallel litigation involving the same property that is pending in a foreign court.

(4) Effect. -- All right, title and interest in property subject to an order to enforce a forfeiture

or confiscation judgment under this section shall be forfeited to the United States and shall vest in the United States upon commission of the act giving rise to the forfeiture or confiscation judgment. The Attorney General shall dispose of the forfeited property, or the proceeds of its sale, in accordance with the provisions of section 853(i) of title 21 or as otherwise provided by law.

. . .

(f) Currency conversion.--The rate of exchange in effect at the time the suit to enforce is filed by the foreign nation shall be used in calculating the amount stated in any forfeiture or confiscation judgment requiring the payment of a sum of money submitted for registration.

(g) Protection from Liability for Acting at Foreign Request – Notwithstanding any other provision of Federal Law, no person shall have any right of action at law or equity against the United States, its officers, employees or any other person acting on behalf of, or at the direction of, the United States that arises from any action taken pursuant to this section, or the return or release of property restrained, seized or forfeited pursuant to this section, including, but not limited to, actions for damages, costs, interest or attorneys' fees.

(7) Proposal to eliminate "first brought" venue requirement

SUMMARY:
This proposal would eliminate the requirement that an extradited defendant be tried in the venue where "first brought" into the United States and to permit an extradited defendant to be tried in any applicable venue in the United States.

The venue statute governing federal offenses occurring outside of the United States does not align with the modern geographic realities of where investigations are based and where prosecutions are sought. It has also required the U.S. Government to expend significant resources to ensure that arrested individuals are first brought to the U.S. in the district where they will be prosecuted. This proposal would benefit several categories of prosecutions, including those involving bribery and other public corruption offenses committed abroad involving U.S. government employees, military personnel, contractors, or foreign nationals. Corruption of U.S. military and other government personnel abroad often compromises our national security and involves exploitation of conflict and international crises for illicit pecuniary gain. As the United States continues to step up the enforcement of these transnational criminal offenses, this proposal will ensure that those offenders will be held accountable regardless of their nationality or where they might be found (including Russian nationals).

Updates the outdated venue provision in 18 U.S.C. § 3238

- Allows criminal defendants found overseas to be transported to the United States by the most direct and cost-effective transportation mode and routing, potentially saving millions of dollars in government funds.
- Affords the Department of Justice flexibility in deciding how to arrange the transportation of a defendant to the country, without the need to design a flight plan to ensure that the first port of landing in the United States is the charging district.
- Eliminates the need to convince reluctant foreign partners to allow U.S. transport planes carrying dangerous defendants to land and refuel.
- Would no longer hold venue hostage to the vagaries of air travel; should weather patterns or mechanical difficulties cause a flight to land unexpectedly in a district other than the charging district, the charging district would no longer be divested of venue.

Eliminates need for espionage venue in 18 U.S.C. § 3239

- Deletes 18 U.S.C. § 3239, which provides a venue provision for extraterritorial espionage and related offenses, because the proposed amendment to 18 U.S.C. § 3238 would be a general venue scheme applicable to all offenses committed outside the jurisdiction of any district, including espionage and related offenses.

PROPOSED LEGISLATIVE LANGUAGE:
Chapter 211 of title 18, United States Code is amended –

(a) by amending section 3238 to read as follows:

"All offenses begun or committed upon the high seas, or elsewhere outside the jurisdiction of any particular State or district, may be tried in any district.";

(b) by striking section 3239; and

(c) by amending the chapter analysis by striking the item relating to section 3239.

SECTION-BY-SECTION ANALYSIS

The Department of Justice proposes an amendment to 18 U.S.C. § 3238 to replace outdated statutory provisions that limit the federal judicial districts in which the government may prosecute criminal actors who are located outside the United States but whose crimes cause harm to U.S. citizens or interests, *e.g.*, members of violent terrorist groups, transnational organized crime networks, drug trafficking organizations, and complex international fraud schemes. Current law and practice require that a defendant be prosecuted in the district where he or she is arrested or is "first brought" into the United States. This proposal would allow for the prosecution of defendants who commit extraterritorial offenses in any judicial district of the United States.

The realities of modern transnational crime require the Department to begin a formal investigation, sometimes including presentation of evidence before a grand jury, and file charges before the criminal defendant is physically present in the United States. One reason is that most foreign countries require formal charges to have been brought in the United States before they will assist with extradition, deportation, or another form of lawful return of offenders for trial in the United States. The filing of charges before the defendant's arrival in the United States also prevents the statute of limitations from expiring while the defendant remains outside the country.[1] Under current law, the Department is often faced with legal challenges and costly administrative burdens to make sure that defendants transported from international locations to the United States land "first" in the judicial district where the criminal charges are already pending.

This proposal would allow criminal defendants found overseas to be transported to the United States by the most direct and cost-effective transportation mode and routing. The proposal would also harmonize the general extraterritorial venue provision in 18 U.S.C. § 3238, which applies to *all* types of federal crimes, with legislative revisions that eliminated the "first brought" requirement only for certain international and maritime drug cases, *i.e.*, 21 U.S.C. § 959(d) and 46 U.S.C. § 70504(b)(2).[2]

Analysis

Article III, section 2, clause three of the U.S. Constitution gives Congress wide latitude to set venue for extraterritorial offenses:

[1] *See* Letter from the Attorney General to the Speaker of the House, contained in S. Rep. No. 88-146, 88th Cong. 1st Sess. (1963).
[2] Pub.L. 115-91, Div. A., Title X § 1012(a), National Defense Authorization Act for Fiscal Year 2018.

> All trials [except in cases of impeachment] shall be held in the State where such crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as Congress may by Law have directed.

The trial of a federal offense committed within the territory of the United States must take place within the State where the offense occurred. *See* 18 U.S.C. § 3237. Congress may otherwise designate which "Place or Places" may serve as the districts of venue for the trial of an extraterritorial offense. As the Supreme Court noted more than a century ago, the constitutional language regarding extraterritorial offenses "impose[s] no restriction as to the place of trial, except that the trial cannot occur until Congress designates the place, and may occur at any place which shall have been designated."[3]

With respect to extraterritorial offenses, 18 U.S.C. § 3238 currently provides three venue options for the criminal trial of an offense committed on the high seas or outside the jurisdiction of any particular State: (1) the trial may occur in the district where the defendant is arrested or "first brought," or (2) if such offender is not so arrested or first brought, an indictment or information may be returned in the district of the last known residence of the offender or of any one of several joint offenders, or (3) "if no such residence is known[,] . . . in the District of Columbia."

Current venue provisions trace back to a 1790 statute the First Congress enacted to punish piracy on the high seas. That statute provided that the trial of any such offense "shall be in the district where the offender is apprehended, or into which he may first be brought."[4] In 1874, Congress amended the venue statute to apply generally to all extraterritorial offenses. Like the 1790 statute, the 1874 successor fixed venue in the district where the offender was found or first brought:

> The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought.[5]

In 1963, Congress amended section 3238 to permit the defendant's indictment in the district of last known residence of the offender, or any one of two or more joint offenders, or if no such residence is known, in the District of Columbia. With this additional venue option, Department prosecutors were able to identify the appropriate district in which to begin an investigation, convene a grand jury, if necessary, and file a Complaint, Information or Indictment in the district of last known residence or in the District of Columbia *before* the offender's apprehension or return from a foreign location.

However, unlike the piracy cases that gave rise to the original version of section 3238, today, the majority of extraterritorial offenses are investigated and charged before offenders are brought into the United States, rather than upon their arrival at our shores. Moreover, because

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[3] *Cook v. United States*, 138 U.S. 157, 182 (1891).

[4] Act of April 30, 1790, 1 Stat. 114, § 8.

[5] *See* Rev. Stat. § 730 (carried forward as section 41 of the Judicial Code, 36 Stat. 1100 (1911), and subsequently recodified as 18 U.S.C. § 3238).

defendants charged with extraterritorial offenses often are not former residents of the United States, as the second clause of section 3238 contemplates, prosecutors are left with the option of conducting the investigation and filing charges in either the District of Columbia or in a district, potentially unknowable in advance, where the defendant is to be "arrested or first brought." Because the judicial district where a defendant is first brought can be arbitrary and unrelated to the particularized facts of the case, the "first brought" requirement does not function as a substantive determination as to which district is best-suited to investigate or prosecute a particular extraterritorial crime. It is, instead, an outdated construct from the age of maritime piracy, when offenders were expected to be apprehended on the high seas and brought to the nearest port for prosecution.

In practice, extraterritorial offenses are often investigated and charged in different judicial districts of the country, for a variety of reasons. For example, cases involving American citizen victims of crime committed overseas may be investigated in the districts in which law enforcement agencies have specialized experience and targeted investigative resources pertaining to a particular country or type of crime. In extraterritorial narcotics cases, investigations involving an international target may arise in a district where a cooperating defendant has provided information to law enforcement about his superiors, or the investigation may be part of a coordinated bilateral investigation conducted by law enforcement in one particular district with a foreign law enforcement partner.

Because the most significant international drug traffickers usually send their drugs to multiple parts of the country, or because their drugs end up being distributed in multiple parts of the country, there are often multiple, sometimes overlapping investigations of the same drug trafficking organizations or different parts of the same drug trafficking organization, for different crimes, addressing different harms, with different witnesses, different evidence, and perhaps different investigative agencies and prosecutors. When indictments charging the same defendants with extraterritorial offenses are pending in multiple districts, some of those overlapping cases may not be able to proceed in the charging districts because the defendants may be "first brought" to only one district, depending on the one district in which the defendant first arrives or is first brought. This proposal would provide flexibility for those cases to go forward in the districts in which they are charged, without regard for the place of the defendant's arrival. In addition to ensuring that prosecutors in districts that invest considerable time and investigative resources can preserve their ability to prosecute the cases in their districts, the proposed amendment also would allow for the arrival of the defendant in any district that makes the greatest economic and practical sense when considering transportation options, even if the defendant is not charged in the district of arrival.

Ensuring that defendants arrive in the United States in the district where they are charged often proves challenging and costly, given the attendant logistical and foreign relations concerns. For example, today, most defendants arrive in the United States by air rather than by sea. Many are transported on chartered flights. An ideal flight plan would allow the plane transporting the defendant to arrive in the district where charges are filed. However, often, this is not possible without arranging for the plane to refuel. Because the refueling location almost always needs to be outside the district where the defendant is charged, often the government must negotiate refueling stops in foreign countries, solely for the purpose of preserving venue in the district where the defendant is charged. Even when the defendant is transported on connecting commercial flights, the government must seek permission from foreign countries to transit their

territory with a charged defendant in custody. Some countries refuse to grant such permission. In addition, ideally, such transits should be kept to a minimum because they can present opportunities to disrupt the onward transportation of the defendant if he attempts to seek asylum in the transit country.

When the defendant is transported on a government plane — as is often the case with the most dangerous defendants, such as those charged with terrorism and other violent offenses — the situation is even more complicated. The number of foreign countries where (1) it is considered safe to land an USMS, DEA or FBI plane, and (2) the foreign government gives permission for U.S. Government flights transporting charged defendants to land, is limited. The Criminal Division's Office of International Affairs (OIA), the U.S. Marshals Service, DEA's Special Operations Division (SOD), the FBI's International Operations Division (IOD), and the State Department are frequently required to expend considerable good will with their foreign counterparts, including at the ministerial and ambassadorial levels, to ensure the integrity of a specific itinerary. Even more troubling is the fact that there have been issues with a few, key, foreign partners during planned, refueling stops, including curtailment of landing permission without warning during refueling activity and denial of landing permission while in the air. In addition, there is always the possibility that mechanical or weather-related issues force a flight to land in a district other than the one where the defendant is charged. We should avoid placing lives in jeopardy in order to preserve venue in the district where the charges are filed.

In exceptional circumstances, the Department must rely on assistance from the Department of Defense (DOD) to transport the defendant when other transportation options are impractical or unavailable. In such instances, the transportation occurs from overseas to a facility in the United States. While DOD supported transportation is, and would remain, the exception, this proposal would ensure that such transportation can occur with ease and legal certainty when not limited by venue considerations.

The U.S. Marshals Service escorts to the United States most of the defendants wanted for prosecution. The U.S. Marshals Service refers to these escorts as "removals." During Fiscal Years (FY) 2015-2022, the U.S. Marshals Service Extradition Program handled 547 removals of defendants subject to the extraterritorial venue statute to ensure they were "first brought" to the districts where charges were pending. For FY 2022, the USMS conducted 111 such venue specific removals, many of which required chartered aircraft. In FY 2022 alone, the USMS incurred $2,827,417.29 in total venue-specific removal expenses. In total, the U.S. Marshals Service estimates that it has spent approximately $18.4 million on these transports since FY 2015.

Similarly, DEA has incurred substantial costs resulting from extraordinary transportation arrangements intended to satisfy the first brought venue requirement. For example, during FY 2015 and 2016, DEA's SOD, a headquarters unit that specializes primarily in international cases against defendants charged with extraterritorial offenses, chartered eleven flights; and in FY 2017, SOD chartered eight flights to transport defendants to the districts where charges were pending. DEA spent approximately $2.7 million on these charter flights. SOD chartered two airplanes in FY 2018 at a cost of $500,000 and one in FY 2019 for $132,000. DEA has indicated that due to the impact of the Covid-19 pandemic, for FY 2020-2021, their extraditions dropped significantly overall, but costs increased dramatically. During FY 2020-2021, SOD chartered three flights, costing $881,243.

The proposed amendment to 18 U.S.C. § 3238 would lift antiquated restrictions on where the government is able to prosecute extraterritorial offenses. The proposed amendment will afford the Department flexibility in deciding how to arrange the transportation of a defendant to the United States. No longer would Department agencies have to design flight plans to ensure that the first port of landing in the United States is the charging district. Where defendants arrive by commercial aircraft, itineraries that have connecting domestic flights would be available to the agency transporting the defendant. Furthermore, in the case of defendants who pose sufficient safety concerns to militate in favor of transport by aircraft operated or contracted by U.S. law enforcement, the Department would less frequently be in the position of having to convince reluctant foreign countries to allow U.S. transport planes to land and refuel. Finally, the proposal would no longer hold venue hostage to the vagaries of air travel; should weather patterns or mechanical difficulties cause a flight to land unexpectedly in a district other than the charging district, the charging district would not be divested of venue.

The proposal would delete 18 U.S.C. § 3239, a separate venue provision for extraterritorial espionage and related offenses. Section 3239 provides for optional venue in any judicial district, which is, effectively, the same scheme as the proposed revision to section 3238. Because the proposed amendment to section 3238 would be a general venue scheme, applicable to all offenses committed outside the jurisdiction of any district, including espionage and related offenses, the separate venue provision of section 3239 becomes unnecessary.

Finally, a decision of the U.S. Court of Appeals for the Ninth Circuit in *United States v. Ghanem*, 993 F.3d 1113 (9th Cir. 2021), illustrates how the venue provision at 18 U.S.C. § 3238 can derail a significant prosecution. In *Ghanem*, the Ninth Circuit vacated the defendant's conviction for conspiring to acquire, transfer and use missiles and missile systems designed to shoot down aircraft, in violation of 18 U.S.C. § 2332g and his corresponding 30-year sentence. The defendant was extradited from Greece to face prosecution on different charges pending in the U.S. District Court for the Central District of California (CDCA). The defendant was first brought to the United States at John F. Kennedy Airport, in the Eastern District of New York (EDNY) before connecting to a flight to Santa Ana, California. A few months after his arrival in the United States, prosecutors superseded the indictment charging the section 2332g violation, after receiving Greece's permission to do so pursuant to the terms of the extradition treaty. After pleading guilty to the initial charges, the defendant went to trial on the section 2332g violation and was convicted. The Ninth Circuit held that the defendant's brief transfer through New York divested the Central District of California of venue for the section 2332g violation, even though the section 2332g violation had not been charged at the time of the defendant's arrival and possibly may not have been brought at all, had Greece denied a request for permission to proceed on the new charges. Under the Ninth Circuit holding, the section 2332g violation could be tried only in EDNY—in the district where the defendant was first brought—despite the fact that prosecutors in CDCA had been working on this complex investigation for years and were most familiar with it. Under the proposed legislation, the scenario in the *Ghanem* case would not arise. Instead, an extradited defendant could be transported via the safest and most convenient itinerary without concern that the district of arrival will impact the government's ability to file new charges, if appropriate to do so.

REDLINE

§ 3238. Offenses not committed in any district

~~The trial of all~~ All offenses begun or committed upon the high seas, or elsewhere outside ~~of~~ the jurisdiction of any particular State or district, may ~~shall~~ be tried in any ~~the~~ district. ~~in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.~~

~~§ 3239. Optional venue for espionage and related offenses~~

~~The trial for any offense involving a violation, begun or committed upon the high seas or elsewhere out of the jurisdiction of any particular State or district, of—~~

~~**(1)** section 793, 794, 798, or section 1030(a)(1) of this title;~~

~~**(2)** section 601 of the National Security Act of 1947 (50 U.S.C. 421); [1] or~~

~~**(3)** section 4(b) or 4(c) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b) or (c));may be in the District of Columbia or in any other district authorized by law.~~

(8) Proposal to enable foreign requests for assistance in criminal investigations and prosecutions

Summary: This proposal would amend 18 U.S.C. § 3512 to authorize administrative subpoena authority for the Department of Justice in responding to mutual legal assistance requests for basic subscriber information (BSI) from electronic communication service providers. Electronic evidence is critical for investigations of all types of crimes, including those related to corruption related offenses, and obtaining BSI is often the first step in an investigation involving electronic evidence. Administrative subpoena authority for the Department of Justice would (1) increase the speed at which the United States is able to execute MLA requests for BSI for our foreign partners; (2) reduce the MLA burden on U.S. government resources; and (3) contribute to judicial economy through a reduction in the number of MLA requests for BSI presented to U.S. courts. In its March 2020 final report, the Cyberspace Solarium Commission—a bipartisan commission of legislators, senior executive agency leaders, and nationally recognized experts from outside of government—also called for Congress to authorize administrative subpoenas to facilitate the MLA process. This proposal would satisfy the Commission's recommendation, and would enable faster responses to requests from foreign partners for BSI in all types of criminal cases, including those related to corruption related offenses. Finally, this proposal would also better position the United States to ratify and implement the Second Additional Protocol to the Council of Europe Convention on Cybercrime, which contains an article that would provide for a more streamlined method of international cooperation with respect to BSI. Administrative subpoena authority would allow the Department of Justice's Office of International Affairs to execute requests for BSI in a more accelerated manner as described by the article, and ratifying the protocol, which the United States signed in May 2022, would likewise enable the United States to obtain reciprocal cooperation from other Protocol parties in a more accelerated manner.

Proposed Legislative Language

Section One. Section 3512(a) of title 18 is amended by—

Adding after paragraph (2)—

"(3) Administrative Subpoenas—

(A) An appropriate official of the Department of Justice, in executing a request from a foreign authority for assistance in a criminal matter involving the investigation or prosecution of criminal offenses, or in executing a request from a foreign authority for assistance in proceedings related to the prosecution of criminal offenses, including proceedings regarding forfeiture, sentencing and restitution, may issue in writing, and cause to be served, a subpoena requiring:

(i) a provider of electronic communication service or remote computing service to disclose the information specified in section 2703(c)(2), which may be relevant to the foreign criminal matter;

(ii) a custodian of the records of that provider to provide a signed certification concerning the production and authentication of such records or information; and

(iii) that the provider not disclose the fact that a subpoena has been issued under this subsection, or the fact that the foreign request for assistance has been made, and treat the subpoena as confidential and not to be disclosed publicly, nor shared with any other person, including the subscriber or customer for a period of up to two years. The nondisclosure may be renewed beyond the two years if an appropriate official of the Department of Justice is satisfied that authorities in the foreign country have provided justification for the need to continue the nondisclosure of the subpoena and the foreign criminal matter. An appropriate official of the Department of Justice may require nondisclosure if the official determines that there is reason to believe that notification of the existence of the subpoena may result in —

(I) endangering the life or physical safety of an individual;
(II) flight from prosecution;
(III) destruction of or tampering with evidence;
(IV) intimidation of potential witnesses; or
(V) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(B) A subpoena issued pursuant to this subsection may be served in any judicial district where the person or entity resides, does business, or may be found.

(C) A subpoena issued pursuant to this subsection may be served by any person who is at least 18 years of age and is designated in the subpoena to serve it. Service upon a natural person or a legal entity may be made by personal delivery of the subpoena, by registered mail or by any available means for electronic service. Service may also be made upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpoena to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. The affidavit of the person serving the subpoena entered on a true copy thereof by the person serving it shall be proof of service.

(D) A subpoena issued pursuant to this subsection shall prescribe a return date within a reasonable period of time within which the records or information can be assembled and made available, and shall include notice of the availability of judicial review described in paragraph (F).

(E) A provider of electronic communication service or remote computing service that receives a subpoena under paragraph (A), or the officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

(i) those persons to whom disclosure is necessary in order to comply with the request;
(ii) an attorney in order to obtain legal advice or assistance regarding the request; or
(iii) other persons as permitted by the Attorney General of the United States or his designee.

(F) Judicial review.

(i) The recipient of a subpoena under this subsection may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the subpoena. The court may modify or set aside the subpoena if compliance would be unreasonable, oppressive, or otherwise unlawful.

(ii) If a recipient of a subpoena under this subsection wishes to have a court review a nondisclosure requirement imposed in connection with the subpoena, the recipient may notify the government or file a petition for judicial review in any court described in subparagraph (i).

(iii) Not later than 30 days after the date of receipt of a notification under subparagraph (ii), the government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant subpoena. An application under this subparagraph may be filed in the district court of the United States for the judicial district in which the recipient of the order does business or resides, or in the District of Columbia. The applicable nondisclosure requirement shall remain in effect during the pendency of proceedings relating to the requirement.

(iv) A district court of the United States that receives a petition under subparagraph (ii) or an application under subparagraph (iii) should rule expeditiously, and shall, subject to subparagraph (vi), issue a nondisclosure order that includes conditions appropriate to the circumstances.

(v) An application for nondisclosure or extension thereof or a response to a petition filed under subparagraph (ii) shall include a certification from an appropriate official of the Department of Justice containing a statement of specific facts indicating that the absence of a prohibition on disclosure under this subsection may result in —
(I) endangering the life or physical safety of an individual;
(II) flight from prosecution;
(III) destruction of or tampering with evidence;
(IV) intimidation of potential witnesses; or
(V) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(vi) A district court of the United States shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in —

(I) endangering the life or physical safety of an individual;
(II) flight from prosecution;
(III) destruction of or tampering with evidence;
(IV) intimidation of potential witnesses; or
(V) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(vii) In the case of contumacy by or refusal to obey a subpoena issued to any person under this subsection, an attorney for the government duly authorized by an appropriate official of the Department of Justice may invoke the aid of any district court of the United States within the jurisdiction of which the subpoenaed person or entity resides, does business or may be found, or for the District of Columbia. The court may issue an order requiring the subpoenaed person or entity to comply with the subpoena, including by requiring the subpoenaed person or entity to produce a signed certification concerning the production and authentication of such records. Any failure to obey the order of the court may be punished as a contempt of court. Any process under this subsection may be served in any judicial district in which the person or entity may be found.

(viii) In all proceedings under this subsection, subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent an unauthorized disclosure of the subpoena, foreign request, foreign criminal matter, or other information made to any person under this subsection. Petitions, filings, records, orders and subpoenas must also be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a subpoena or foreign request under this subsection.

(ix) In all proceedings under this subsection, the court shall, upon request of the government, review ex parte and in camera any government submission or portions thereof, which may include sensitive information regarding the foreign criminal matter.

(G) Notwithstanding any Federal, State, or local law, any person, including officers, agents, and employees, receiving a subpoena under this subsection, who complies in good faith with the subpoena and produces the records sought, shall not be liable in any court of any State or the United States to any customer or other person for such production or for nondisclosure of the subpoena, foreign request for assistance, or production.

(H) Nothing in this subsection shall preclude the use of judicial orders described under paragraphs (1) and (2) of this section.

Section Two. Section 3512(h) of title 18 is amended by—

Adding after paragraph (2)—

"(3) **Appropriate official of the Department of Justice.** — The term "appropriate official of the Department of Justice" means the Attorney General or his designee, including an attorney of the United States Central Authority responsible for the review and execution of foreign requests for legal assistance in criminal matters.

(4) **Electronic communication service.** — The term "electronic communication service" has the meaning given such term in section 2510.

(5) **Remote computing service.** — The term "remote computing service" has the meaning given such term in section 2711."

ANALYSIS:

Title 18 U.S.C. § 3512 authorizes Department of Justice attorneys to apply for orders necessary to execute a request from a foreign authority for mutual legal assistance (MLA) in a criminal investigation, prosecution, or related proceedings. The proposed amendment would authorize Department of Justice attorneys responsible for the execution of MLA requests to use administrative subpoenas to obtain basic subscriber information (BSI) from providers of electronic communication services and remote computing services (collectively, "service providers") in response to MLA requests.[6] The Office of International Affairs (OIA), in the Department's Criminal Division, is legally designated, by regulation, to act as the U.S. Central Authority with responsibility for implementing mutual legal assistance treaties (MLATs). As such, OIA reviews and executes foreign requests for assistance, as appropriate. Under the proposed amendment, which would also clarify that "an appropriate official of the Department of Justice" under section 3512 means the Attorney General or his designee, including an attorney in the U.S. Central Authority responsible for the review and execution of foreign MLA requests, OIA would be designated to exercise the administrative subpoena power.

MLATs are important instruments for securing information and evidence to further a country's criminal investigations and prosecutions while safeguarding the sovereignty and essential interests of the country where the information or evidence is located. However, MLATs have been criticized as being too slow and cumbersome to be effective, particularly in the context of electronic evidence. Electronic data is vulnerable to corruption, destruction or dissipation at the touch of a remote button, and thus is often needed quickly to advance an investigation. MLATs, however, make execution of requests subject to certain legal and procedural requirements that often are incompatible with swift access to electronic evidence.

[6] An amendment to 18 U.S.C. § 3512 is appropriate, as opposed to an amendment to the Stored Communications Act or 18 U.S.C. § 3486, because section 3512 authorizes the U.S. Department of Justice to provide assistance to foreign authorities and specifies types of legal process available for executing MLA requests.

Indeed, the United States faces numerous challenges in responding to the high volume of foreign requests received each year seeking electronic evidence from the United States. In particular, the application of U.S. law to the data production process is often challenging for foreign partners. Foreign MLA requests seeking electronic data from U.S. service providers often struggle to meet U.S. legal requirements for disclosure. OIA thus routinely engages the foreign authority in a consultation process – which may be lengthy, depending on the country involved – in the attempt to obtain sufficient information about the foreign investigation to meet the U.S. legal threshold.

Further complicating the process, OIA is unable to produce BSI without resorting to a court order because, due to a gap in the law, OIA lacks subpoena power to compel such production. Specifically, under the Stored Communications Act, 18 U.S.C. § 2703(c)(2), a governmental entity may obtain BSI pertaining to an account pursuant to "an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena."[7] A grand jury or trial subpoena is not appropriate in the MLA context, and no federal statute currently authorizes the use of administrative subpoenas to execute MLA requests.[8] Consequently, to secure BSI, Department of Justice attorneys executing MLA requests must seek court orders by the hundreds pursuant to 18 U.S.C. § 2703(d), which provides for court orders for subscriber *and* transactional information where the government has set forth "specific and articulable facts showing that there are reasonable grounds to believe" that the records are "relevant and material to an ongoing criminal investigation." The United States must thus obtain court orders establishing a higher legal threshold even when executing an MLA request seeking only BSI, for which the legal standard is relevance. This is an inefficient process, especially when one considers the impact of such requests on the limited resources in the district courts in the District of Columbia and the Northern District of California, where most such requests are executed.

The proposed amendment to § 3512 would authorize the Department of Justice, through OIA, to issue administrative subpoenas, in response to foreign MLA requests, to obtain BSI that may be relevant to the foreign criminal matter. Similar to administrative subpoenas authorized by 18 U.S.C. § 3486, the amendment would also authorize OIA to require the custodian of records to provide a statement concerning the production and authentication of such information.

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[7] As set forth in 18 U.S.C. § 2703(c)(2), an administrative subpoena may be used to obtain what is generally referred to as BSI, more specifically: a subscriber or customer's name; address; local and long distance telephone connection records; records of session times and durations; length of service, including start date; types of services utilized; telephone or instrument numbers; other subscriber numbers or identities, including temporarily assigned network addresses (including registration and session Internet Protocol ("IP") addresses); and means and source of payment for such services, including any credit card or bank account number.

[8] Under 18 U.S.C. § 3512(b), appropriate government attorneys may apply for a court order to be appointed as a commissioner to subpoena the production of documents or take testimony or other statements. "Commissioner's subpoenas" are not included among the subpoenas authorized for obtaining BSI under the Stored Communications Act. For the purposes of this proposal, a commissioner's subpoena process would not sufficiently expedite the execution of MLA requests for BSI because attorneys would be required to apply for a court order to be made a commissioner for each relevant request for BSI, as opposed to being able to issue a subpoena directly under the administrative subpoena process.

Typically, such statement is provided through the use of a signed certification in lieu of testimony, and often is critical for foreign prosecutors seeking to introduce the U.S. evidence in foreign court proceedings.

The proposed amendment would also authorize OIA to require nondisclosure of the legal process in compliance with MLAT-based confidentiality requests. Similar to the nondisclosure authority in 18 U.S.C. §§ 2709 and 3511, the proposed amendment provides for judicial review of the subpoena, including any nondisclosure requirement, and for notice to subpoena recipients of the opportunity to require the government to seek court approval if it wishes to maintain the nondisclosure requirement.

Authority to require nondisclosure is particularly important when obtaining BSI, which is often the first step in an investigation involving electronic evidence. For example, in an investigation of unknown suspects who have used e-mail or social media for criminal purposes, a suspect's e-mail or social media account identifier is often the only known connection to the suspect. Thus, BSI, including associated IP or e-mail addresses or telephone numbers, is often the only way to begin to identify perpetrators. In such circumstances, disclosure of the existence of the legal process to the account user could be detrimental to the criminal investigation. At least one court has recognized that investigating magistrates in civil law countries operate in secrecy, similar to U.S. grand juries, and are inherently entitled to cause production of evidence in furtherance of their investigations under conditions of non-disclosure. *See, e.g.*, *In re Letter of Request from the Government of France*, 139 F.R.D. 588, 592 (S.D.N.Y. 1991) (secrecy in executing foreign request is "essential to protect the French Court's criminal investigation"). Providing such authority here for use in appropriate circumstances is critical for the proposal's aim to assist in a more efficient and rapid execution of foreign MLA requests while also complying with treaty-based confidentiality requirements, and would contribute to judicial economy.

In its March 2020 final report, the Cyberspace Solarium Commission—a bipartisan commission of legislators, senior executive agency leaders, and nationally recognized experts from outside of government—called for Congress to authorize administrative subpoenas to facilitate the MLA process. This proposal would satisfy the Commission's recommendation.

Finally, administrative subpoena authority would also better position the United States to ratify and implement the Second Additional Protocol to the Council of Europe Convention on Cybercrime, which the United States signed in May 2022. In particular, the protocol contains an article that would provide for a more streamlined method of international cooperation with respect to BSI. Administrative subpoena authority would allow OIA to execute requests for BSI in a more accelerated manner as described by the article.

LINE IN/LINE OUT

(a) EXECUTION OF REQUEST FOR ASSISTANCE.—

(1) IN GENERAL.—

Upon application, duly authorized by an appropriate official of the Department of Justice, of an attorney for the Government, a Federal judge may issue such orders as may be necessary to execute a request from a foreign authority for assistance in the investigation or prosecution of criminal offenses, or in proceedings related to the prosecution of criminal offenses, including proceedings regarding forfeiture, sentencing, and restitution.

(2) SCOPE OF ORDERS.—Any order issued by a Federal judge pursuant to paragraph (1) may include the issuance of—

(A) a search warrant, as provided under Rule 41 of the Federal Rules of Criminal Procedure;

(B) a warrant or order for contents of stored wire or electronic communications or for records related thereto, as provided under section 2703 of this title;

(C) an order for a pen register or trap and trace device as provided under section 3123 of this title; or

(D) an order requiring the appearance of a person for the purpose of providing testimony or a statement, or requiring the production of documents or other things, or both.

(3) Administrative Subpoenas—

(A) An appropriate official of the Department of Justice, in executing a request from a foreign authority for assistance in a criminal matter involving the investigation or prosecution of criminal offenses, or in executing a request from a foreign authority for assistance in proceedings related to the prosecution of criminal offenses, including proceedings regarding forfeiture, sentencing and restitution, may issue in writing, and cause to be served, a subpoena requiring:

(i) a provider of electronic communication service or remote computing service to disclose the information specified in section 2703(c)(2), which may be relevant to the foreign criminal matter;

(ii) a custodian of the records of that provider to provide a signed certification concerning the production and authentication of such records or information; and

(iii) that the provider not disclose the fact that a subpoena has been issued under this subsection, or the fact that the foreign request for assistance has been made, and treat the subpoena as confidential and not to be disclosed publicly, nor shared with any other person, including the subscriber or customer for a period of up to two years. The nondisclosure may be renewed beyond the two years if an appropriate official of the Department of Justice is satisfied that authorities in the foreign country have provided justification for the need to continue the nondisclosure of the subpoena and the foreign criminal matter. An appropriate official of the Department of Justice may require nondisclosure if the official determines that there is reason to believe that notification of the existence of the subpoena may result in —

(I) endangering the life or physical safety of an individual;
(II) flight from prosecution;
(III) destruction of or tampering with evidence;
(IV) intimidation of potential witnesses; or
(V) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(B) A subpoena issued pursuant to this subsection may be served in any judicial district where the person or entity resides, does business, or may be found.

(C) A subpoena issued pursuant to this subsection may be served by any person who is at least 18 years of age and is designated in the subpoena to serve it. Service upon a natural person or a legal entity may be made by personal delivery of the subpoena, by registered mail or by any available means for electronic service. Service may also be made upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpoena to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. The affidavit of the person serving the subpoena entered on a true copy thereof by the person serving it shall be proof of service.

(D) A subpoena issued pursuant to this subsection shall prescribe a return date within a reasonable period of time within which the records or information can be assembled and made available, and shall include notice of the availability of judicial review described in paragraph (F).

(E) A provider of electronic communication service or remote computing service that receives a subpoena under paragraph (A), or the officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—
(i) those persons to whom disclosure is necessary in order to comply with the request;
(ii) an attorney in order to obtain legal advice or assistance regarding the request; or
(iii) other persons as permitted by the Attorney General of the United States or his designee.

(F) Judicial review.
(i) The recipient of a subpoena under this subsection may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the subpoena. The court may modify or set aside the subpoena if compliance would be unreasonable, oppressive, or otherwise unlawful.

(ii) If a recipient of a subpoena under this subsection wishes to have a court review a nondisclosure requirement imposed in connection with the subpoena, the recipient may notify the government or file a petition for judicial review in any court described in subparagraph (i).

(iii) Not later than 30 days after the date of receipt of a notification under subparagraph (ii), the government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant subpoena. An application under this subparagraph may be filed in the district court of the United States for the judicial district in which the recipient of the order does business or resides, or in the District of Columbia. The applicable nondisclosure requirement shall remain in effect during the pendency of proceedings relating to the requirement.

(iv) A district court of the United States that receives a petition under subparagraph (ii) or an application under subparagraph (iii) should rule expeditiously, and shall, subject to subparagraph (vi), issue a nondisclosure order that includes conditions appropriate to the circumstances.

(v) An application for nondisclosure or extension thereof or a response to a petition filed under subparagraph (ii) shall include a certification from an appropriate official of the Department of Justice containing a statement of specific facts indicating that the absence of a prohibition on disclosure under this subsection may result in —

- **(I)** endangering the life or physical safety of an individual;
- **(II)** flight from prosecution;
- **(III)** destruction of or tampering with evidence;
- **(IV)** intimidation of potential witnesses; or
- **(V)** otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(vi) A district court of the United States shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in —

- **(I)** endangering the life or physical safety of an individual;
- **(II)** flight from prosecution;
- **(III)** destruction of or tampering with evidence;
- **(IV)** intimidation of potential witnesses; or
- **(V)** otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(vii) In the case of contumacy by or refusal to obey a subpoena issued to any person under this subsection, an attorney for the government duly

authorized by an appropriate official of the Department of Justice may invoke the aid of any district court of the United States within the jurisdiction of which the subpoenaed person or entity resides, does business or may be found, or for the District of Columbia. The court may issue an order requiring the subpoenaed person or entity to comply with the subpoena, including by requiring the subpoenaed person or entity to produce a signed certification concerning the production and authentication of such records. Any failure to obey the order of the court may be punished as a contempt of court. Any process under this subsection may be served in any judicial district in which the person or entity may be found.

(viii) In all proceedings under this subsection, subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent an unauthorized disclosure of the subpoena, foreign request, foreign criminal matter, or other information made to any person under this subsection. Petitions, filings, records, orders and subpoenas must also be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a subpoena or foreign request under this subsection.

(ix) In all proceedings under this subsection, the court shall, upon request of the government, review ex parte and in camera any government submission or portions thereof, which may include sensitive information regarding the foreign criminal matter.

(G) Notwithstanding any Federal, State, or local law, any person, including officers, agents, and employees, receiving a subpoena under this subsection, who complies in good faith with the subpoena and produces the records sought, shall not be liable in any court of any State or the United States to any customer or other person for such production or for nondisclosure of the subpoena, foreign request for assistance, or production.

(H) Nothing in this subsection shall preclude the use of judicial orders described under paragraphs (1) and (2) of this section.

(b) APPOINTMENT OF PERSONS TO TAKE TESTIMONY OR STATEMENTS.—

(1) IN GENERAL.—

In response to an application for execution of a request from a foreign authority as described under subsection (a), a Federal judge may also issue an order appointing a person to direct the taking of testimony or statements or of the production of documents or other things, or both.

(2) AUTHORITY OF APPOINTED PERSON.—

Any person appointed under an order issued pursuant to paragraph (1) may—

(A) issue orders requiring the appearance of a person, or the production of documents or other things, or both;

(B) administer any necessary oath; and

(C) take testimony or statements and receive documents or other things.

(c) FILING OF REQUESTS.—

Except as provided under subsection (d), an application for execution of a request from a foreign authority under this section may be filed—

(1) in the district in which a person who may be required to appear resides or is located or in which the documents or things to be produced are located;

(2) in cases in which the request seeks the appearance of persons or production of documents or things that may be located in multiple districts, in any one of the districts in which such a person, documents, or things may be located; or

(3) in any case, the district in which a related Federal criminal investigation or prosecution is being conducted, or in the District of Columbia.

(d) SEARCH WARRANT LIMITATION.—

An application for execution of a request for a search warrant from a foreign authority under this section, other than an application for a warrant issued as provided under section 2703 of this title, shall be filed in the district in which the place or person to be searched is located.

(e) SEARCH WARRANT STANDARD.—

A Federal judge may issue a search warrant under this section only if the foreign offense for which the evidence is sought involves conduct that, if committed in the United States, would be considered an offense punishable by imprisonment for more than one year under Federal or State law.

(f) SERVICE OF ORDER OR WARRANT.—

Except as provided under subsection (d), an order or warrant issued pursuant to this section may be served or executed in any place in the United States.

(g) RULE OF CONSTRUCTION.—

Nothing in this section shall be construed to preclude any foreign authority or an interested person from obtaining assistance in a criminal investigation or prosecution pursuant to section 1782 of title 28, United States Code.

(h) DEFINITIONS.—As used in this section, the following definitions shall apply:

(1) FEDERAL JUDGE.— The terms "Federal judge" and "attorney for the Government" have the meaning given such terms for the purposes of the Federal Rules of Criminal Procedure.

(2) FOREIGN AUTHORITY.— The term "foreign authority" means a foreign judicial authority, a foreign authority responsible for the investigation or prosecution of criminal

offenses or for proceedings related to the prosecution of criminal offenses, or an authority designated as a competent authority or central authority for the purpose of making requests for assistance pursuant to an agreement or treaty with the United States regarding assistance in criminal matters.

(3) **Appropriate official of the Department of Justice.** — The term "appropriate official of the Department of Justice" means the Attorney General or his designee, including an attorney of the United States Central Authority responsible for the review and execution of foreign requests for legal assistance in criminal matters.

(4) **Electronic communication service.** — The term "electronic communication service" has the meaning given such term in section 2510.

(5) **Remote computing service.** — The term "remote computing service" has the meaning given such term in section 2711.

(9) Suspension of Limitations to Permit the United States to Obtain Foreign Evidence

This proposal would revise Section 3292 of Title 18 U.S. Code on the suspension of the running of a statute of limitations in criminal cases to obtain foreign evidence to provide greater clarity and uniformity of application. It would also create a new Section 3292A to apply the same suspension to civil forfeiture cases.

Summary: This proposal would revise Section 3292 of Title 18 of the U.S. Code, which governs the suspension of the running of a statute of limitations in a criminal case while investigators obtain evidence from foreign jurisdictions, to provide greater clarity and uniformity of application of the section. Clarifications to Section 3292 would support a wide range of criminal cases that depend on obtaining foreign evidence, including FCPA and other corruption related offenses. Because foreign providers and other companies often possess critical pieces of information needed to advance these investigations, obtaining this critical evidence frequently entails prolonged coordination with foreign governments. The proposed amendments to Section 3292 will help ensure that U.S. investigators and prosecutors have clear guidance on how to calculate the statute of limitations while they work with those foreign governments to obtain the evidence. These amendments will also ensure that investigators and prosecutors have appropriate time needed to collect this extremely important foreign evidence in U.S. corruption related cases.

This provision would also insert a new statutory provision, proposed 18 U.S.C. § 3292A, after existing Section 3292, to toll the statute of limitations while the government seeks evidence located abroad in support of civil forfeiture in rem actions, including cases brought under the Department's Kleptocracy Asset Recovery Initiative as well as sanctions evasions cases, including those brought by Task Force KleptoCapture.

PROPOSED LEGISLATIVE LANGUAGE:

(a) AMENDMENT.—Section 3292 of title 18 is amended—

(1) in subsection (a)—
(A) in paragraph (1) by—
(i) striking "Upon application of the United States filed before return of an indictment indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations as set forth in (a)(2), if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country."
(ii) inserting "An official request to obtain evidence of an offense located in a foreign country shall suspend the running of the statute of limitations if the district court before which a grand jury is or may be impaneled to

investigate the offense finds, upon application of the United States filed before return of an indictment, by a preponderance of the evidence: that (A) an official request has been made for such evidence; (B) it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country; and (C) the request was made prior to the expiration of the statute of limitations."

(B) in paragraph (2) by—

inserting at the end of the paragraph "The suspension of the statute of limitations under (a)(1) shall be effective irrespective of the date on which the statute of limitations would have expired absent operation of this section."

(2) in subsection (b) by—

(A) striking "Except as provided in" and inserting "Subject to the operation of" at the beginning of the paragraph;

(B) striking "under this section";

(C) striking "on the date on which the foreign court or authority takes";

(D) inserting "six months after" after "request is made and end" and before "final action on the request";

(E) inserting at the end of the paragraph "If the United States makes multiple official requests, the period of suspension shall begin on the date on which the first official request was made and end six months after the last date of final action."

(3) in subsection (c) by—

(A) striking "—(1)";

(B) striking "; and" and inserting "." after "years";

(C) striking "(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section."

(4) In subsection (d) by—

(A) inserting "(1)" after "(d)" and before "As used";

(B) inserting the following new paragraph after paragraph (d)(1) —

"(2) As used in this section, the term "final action" means the receipt by the United States of the last response from the foreign court or authority either producing all requested evidence in the form requested or indicating that the official request has been, or will not be, fully executed."

(b) In General.—Chapter 213 of title 18, United States Code, is amended by inserting after section 3292 the following:

"§ 3292A. Suspension of limitations to permit United States to obtain foreign evidence in civil forfeiture in rem actions

(a)(1) An official request to obtain evidence of an offense located in a foreign country shall suspend the running of the statute of limitations for seeking forfeiture in rem if a district court before which a complaint seeking such forfeiture could be filed finds, upon application of the

United States, by a preponderance of the evidence: that (A) an official request has been made for such evidence; (B) it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country; and (C) the request was made prior to the expiration of the statute of limitations.

(2) The court shall rule upon such application not later than thirty days after the filing of the application. The suspension of the statute of limitations under subsection (a)(1) shall be effective irrespective of the date on which the statute of limitations would have expired absent operation of this section.

(b) Subject to the operation of subsection (c) of this section, a period of suspension shall begin on the date on which the official request is made and end six months after final action on the request. If the United States makes multiple official requests, the period of suspension shall begin on the date on which the first official request was made and end six months after the last date of final action.

(c) The total of all periods of suspension under this section with respect to an offense shall not exceed three years.

(d) (1) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

(2) As used in this section, the term "final action" means the receipt by the United States of the last response from the foreign court or authority either producing all requested evidence in the form requested or indicating that the official request has been, or will not be, fully executed."

(c) Clerical Amendment.—The table of sections at the beginning of chapter 213 of title 18, United States Code, is amended by inserting after the item relating to section 3292 the following new item:

"3292A. Suspension of limitations to permit United States to obtain foreign evidence in civil forfeiture in rem actions.".

Analysis

In 1984, Congress enacted Section 3292 of Title 18, U.S. Code, to allow for suspension of the running of a statute of limitations to obtain and review evidence located in a foreign country.[9] Proponents noted that the "[e]xtension of the applicable statute of limitations to give

[9] H. Rep. 98-907, *Admissibility of Foreign Business Records*, at 2 (July 25, 1984); 130 Cong. Rec. 1008 (Senate discussion of amendments to S. 1762, Comprehensive Crime Control Act and specifically Foreign Evidence Improvements Act (Jan. 31, 1984); *Foreign Evidence Rules Amendment: Hearings on H.R. 5406, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong. (Apr. 25, 1984).

the government a better chance to unwind the web of foreign bank accounts and shell corporations used by . . . criminals to hide their ill-gotten gains and the transactions through which they obtained them, would be an extremely valuable tool to United States law enforcement authorities."[10] Following its enactment, Section 3292 has been interpreted in diverging and contradictory ways by courts and prosecutors. The proposed amendments resolve these differences to provide uniformity and legal certainty in the application of this statute.

One significant issue has turned on whether the statute only suspends, rather than also revives, the statute of limitations. The Circuits are divided on this issue. The Second Circuit held in *United States v. Kozeny*, 541 F.3d 166 (2d Cir. 2008), that because the statute only suspends the statute of limitations, the government is precluded from filing an application if the original limitations period has run.[11] The Third and Ninth Circuits reasoned differently, finding that a Section 3292 order could revive an otherwise-expired statute of limitations. *United States v. Hoffecker*, 530 F.3d 137, 163 n.4 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 652 (2008); *United States v. Bischel*, 61 F.3d 1429 (9th Cir. 1995).[12]

The current statute has also raised questions about whether a grand jury must be impaneled before the government can utilize it.[13] In addition, the current statute does not expressly say whether the filing of an official request must precede the expiration the statute of limitations, a point that several courts have observed.[14]

In addition, courts have had to determine whether the evidence must be located abroad at the time the government makes its application. Indeed, in *United States v. Atiyeh*, 402 F.3d 354, 363 (3d Cir. 2005), the Third Circuit overturned a district court decision granting the

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[10] *Hearings on H.R. 5406* (Testimony of Mark Richard, at 27).

[11] District courts outside the Second Circuit have reached the same conclusion. *See, e.g.*, *United States v. Brody*, 621 F. Supp. 2d 1196 (D. Utah 2009); *United States v. Afshari*, No. CR 01-209(C)-DOC, 2009 WL 1033798, at *3 (C.D. Cal. Apr. 14, 2009); *United States v. Swartzendruber*, No. 3:06-cr-136, 2009 WL 485144, at *7 (D.N.D. Feb. 25, 2009).

[12] *See also, e.g.*, *United States v. Khoury*, No. 4:08-CR-0763, 2019 WL 6687715, at *6 (S.D. Tex. Dec. 6, 2019), *adhered to on denial of reconsideration on other grounds*, No. 4:08-CR-763, 2020 WL 883370 (S.D. Tex. Feb. 24, 2020); *United States v. Neill*, 940 F. Supp. 332, *vacated on other grounds*, 952 F. Supp. 831 (D.D.C. 1996).

[13] *DeGeorge v. U.S. Dist. Court for the Cent. Dist. of California*, 219 F.3d 930, 937, 939-41 (9th Cir. 2000); *see also United States v. Hagege*, 437 F.3d 943, 955-56 (9th Cir. 2006). *DeGeorge* also squarely addresses the defendants' claims that the statute unfairly permits the government to seek an order under Section 3292 *ex parte*, 219 F.3d at 939-41, and holds that the nature of the grand jury process permits the government to make an application in such a manner. *See also United States v. Lyttle*, 667 F.3d 220, 225 (2d Cir. 2012); *United States v. Hoffecker*, 530 F.3d at 168; *United States v. Boh*, 281 F. App'x 430, 434 (6th Cir. 2008); *United States v. Wilson*, 322 F.3d 353, 362 (5th Cir. 2003); *United States v. Torres*, 318 F.3d 1058, 1061 (11th Cir. 2003).

[14] *See United States v. Jenkins*, 633 F.3d 788, 798-99 (9th Cir. 2011); *Hoffecker*, 530 F.3d at 163 n.4; *United States v. Atiyeh*, 402 F.3d 354, 366 (3d Cir. 2005); *Bischel,* 61 F.3d at 1431-32; *United States v. Csolkovitz*, No. 08–cr–20474, 2012 WL 395450, at *4 (E.D. Mich. 2012); *Brody*, 621 F. Supp. 2d at 1202.

government's application for suspension after it had already received the evidence from foreign countries. The *Atiyeh* decision constrains the government from making an application based on foreign evidence in the government's possession received in response to an official request, though not yet translated or reviewed. These practical concerns led the Ninth Circuit to reach a different conclusion in a decision pre-dating *Atiyeh*. In *United States v. Miller*, 830 F.2d 2073, 1076 (9th Cir. 1987), the Ninth Circuit reasoned that "[t]he statute makes better sense if it is read . . . to let the government file the application after it has sifted the foreign evidence sought[,]" and allowing for the suspension of the statute of limitations even though the evidence was no longer located in the foreign country but was already in the United States.

Courts and prosecutors have also wrestled with how to count the period of suspension. By its terms, the statute did not intend to provide the government with an automatic three-year suspension, but courts have inconsistently applied the first and second paragraphs of subsection (c) of the current statute.[15] In addition, some courts have questioned the application of the six-month period, even when the government and the defendant agreed on its application.[16]

Integral in these calculations of the suspension period has been the interpretation of the foreign court's or authority's "final action," which serves as the point at which the suspension ends. A number of courts that have considered the meaning of "final action" have generally coalesced around the concept of "final disposition."[17] One court introduced a distinct concept,

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[15] *United States v. Meador*, 138 F.3d 986, 993 (5th Cir. 1998) ("Under the government's view, any response to its official request is not complete and thus not final until it decides it is final, subject to only the three-year limit on the suspension period in § 3292(c)(1). This reading would rend the statutory scheme detailed in § 3292. If Congress wished to provide the government with a blanket three-year suspension period to collect evidence from foreign countries, it could have done so."); *Neill*, 940 F. Supp. at 337 ("While Subsection 3292(c) sets an absolute three-year limit beyond which the limitations period may no longer be suspended, it does not suspend every period for three years merely because an official request has been made."); *United States v. Daniels*, No. C 09–00862 MHP, 2010 WL 2680649, at *2 n.2 (N.D. Cal. July 6, 2010) (even though both the government and defense counsel assumed that each successive legal assistance request to a different country triggered a maximum six-month suspension period, rejecting this approach and stating that the plain language of the statute requires that *all* foreign authorities have taken final action before the original statute of limitations would have run in order for the six-month suspension period to be triggered).

[16] *Atiyeh*, 402 F.3d at 365 (no 6 months if final action); *Hagege*, 437 F.3d at 955 (permitting 6 months only if "final action" takes place before statute of limitations expires); *Bischel*, 61 F.3d at 1434-35 (explaining application of 3 years or 6 months); *United States v. Baldwin*, 414 F.3d 791, 795 (7th Cir. 2005) (supposing 6 months for analysis); *Torres*, 318 F.3d at 1064 n.4 (agreeing with *Bischel* and limiting period to 6 months if the official request and final action occur within the normal period of limitations); *Daniel*, 2010 WL 2680649, at *2 & n.2.

[17] *Meador*, 138 F.3d at 992 ("final action" if the requested state "believes it has completed its engagement [and fully complies with the request] and communicates that belief); *Jenkins*, 633 F.3d at 788 (no "final action" if requested state did not provide dispositive response to every item requested"); *Hagege*, 437 F.3d at 955-56 (no "final action" because requested state provided no certificate of authenticity, "nor had it indicated it would not comply with the

grounded in the notion of a "complete response."[18] Collectively, courts favor applying the concept of "final disposition" as determined by the foreign court or authority to distinguish the application of paragraphs (1) and (2) of subsection (c) and to ensure that the maximum period of three years does not favor the government.[19] However, this concept has remained somewhat elusive in practice, for example, when a foreign government provides what appears on its face to be a dispositive response but thereafter continues to provide requested evidence or other assistance.[20]

While clarifications to Section 3292 would support a wide range of criminal cases that depend on obtaining foreign evidence, they would be particularly helpful for cybercrime- and digital assets-related investigations because of these cases' significant reliance on data located abroad. Cybercrime- and digital assets-related investigations are often cross border in nature, involving overseas subjects, institutions, infrastructure, and stored information. Foreign entities often possess critical pieces of information needed to advance these investigations. This international dependence frequently entails prolonged coordination with foreign governments to obtain key investigative data. The proposed amendments to Section 3292, coupled with the amendments that the Department is proposing to Section 3293, will help ensure that investigators and prosecutors have appropriate time needed to collect evidence in cybercrime- and digital assets related-cases despite the hurdles and frequent delays associated with such technical international investigations.

Moreover, under existing law, there is no corresponding provision to toll the statute of limitations for civil forfeiture when requests for foreign assistance are pending, even though criminal prosecutions and forfeiture actions may be similarly dependent upon access to foreign evidence. Civil forfeiture is frequently used separately or in combination with criminal prosecutions to combat transnational crime and deny criminals the proceeds of their offenses. For example, the Department's Kleptocracy Asset Recovery Initiative frequently seeks to recover assets linked to foreign corruption affecting the U.S. financial system by filing civil judicial forfeiture complaints, and Task Force KleptoCapture uses civil judicial forfeiture to seek

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request for certification"); *DeGeorge*, 219 F.3d at 1215 ("final action" if "dispositive response by the foreign sovereign to both the request for records and for a certificate of authenticity"); *Bischel*, 61 F.3d at 1432 (no "final action" if requested state does not send all the documents requested); *Torres*, 318 F.3d at 1065 ("final action" if the requested state "provides a dispositive response to each of the items listed in the government's official request for information"); *United States v. Ratti*, 363 F. Supp. 2d 649, 659 (D. Md. 2005) ("final action" if requested state takes "some clear definitive act").

[18] *Torres*, 318 F.3d at 1063.

[19] *See, e.g.*, *Hagege*, 437 F.3d at 955; *Bischel*, 61 F.3d at 1434.

[20] *See, e.g.*, *United States v. Pursley*, 22 F.4th 586, 591 (5th Cir. 2022) (remanding case to district court to determine "whether the Isle of Man's May 18, 2017 letter was referring to both of the U.S. Government's Requests and whether, in context, that letter was an indication that the Isle of Man believed it had completed its engagement" so as to constitute "final action"); *Torres*, 318 F.3d at 1063-64 ("Although the underlying Congressional intent of § 3292 does provide us some assistance in determining when a foreign country takes 'final action,' we are still left without a clear-cut definition of 'final action' as the legislative history does not define nor otherwise indicate what Congress intended to signal 'final action.'").

recovery of assets linked to violations of sanctions issued under U.S. law, including sanctions issued by the Office of Foreign Asset Control relating to Russian aggression against Ukraine. Sometimes civil forfeiture is the only available tool to address the violation of U.S. law because criminal prosecution and criminal forfeiture requires that the person or legal entity charged appear in the U.S. court where charges are pending, which is often not possible in these types of cases because the kleptocrat or sanctioned person is beyond the reach of extradition or is immune from prosecution, or because foreign evidence is unavailable until after the kleptocrat has fled or died. By contrast, civil forfeiture actions can be filed where the court has jurisdiction over the assets, and the owners or interested third parties can file claims and litigate their interests. In such transnational cases, the fact that the owner cannot be extradited for legal or practical reasons, has diplomatic immunity, or is deceased is not a bar to forfeiture and recovery of criminal proceeds. Evidence located abroad is often critically important in these types of investigations.

For example, in kleptocracy cases, where the United States frequently seeks forfeiture based on criminal violations of U.S. money laundering laws, the government often needs foreign evidence to establish the link between a U.S. financial transaction and a corruption offense under foreign law committed overseas. This requires obtaining assistance from foreign authorities to secure witness testimony and documents or other evidence of the bribery, embezzlement, or misappropriation of government assets in admissible form through mutual legal assistance requests. In Task Force KleptoCapture cases, central evidence of the beneficial ownership of assets and records of financial transactions involving the sanctioned person or entity are also often overseas and obtained through mutual legal assistance requests. The U.S. has little ability to influence how long the country that receives the requests will take to respond or provide all of the requested evidence. Proposed new section 3292A (which incorporates the proposed amendments to Section 3292 discussed above) will help ensure that investigators and prosecutors have appropriate time needed to collect evidence, despite the hurdles and frequent delays associated with mutual legal assistance in complex international investigations.

SECTION-BY-SECTION ANALYSIS:

The proposed amendments clarify the above points and will provide uniformity in the application of this Section for federal investigations.

Section 3292(a)

The proposed amendments clarify procedural aspects of the application.

Section 3292(a)(1)

Within this subsection, the proposed amendments address several questions. First, the proposed amendments clarify that it is the official request to obtain evidence located in a foreign country, made by a court of the United States or an authority of the United States having criminal law enforcement responsibility to a court or other authority of a foreign country, that suspends the statute of limitations. Second, the amendments clarify that the government may

properly file its application before or after it receives the evidence, by omitting the requirement in the current statute that the application must "indicat[e] that evidence of an offense *is* in a foreign country," but maintaining the requirement that the court must find that "an official request has been made for such evidence, and that it reasonably appears, or appeared at the time the request was made, that such evidence is, or was, in such foreign country." Third, the amendments also codify the operation of caselaw making clear that the government must make the official request before the expiration of the statute of limitations.

Finally, the proposed amendments also address the question of whether a grand jury must be impaneled before the government may file an application under this section. By noting that it is the "district court before which a grand jury is, *or may be*, impaneled to investigate the office" that must rule on the application, the amendment clarifies that a grand jury need not be impaneled before the application is filed.

Section 3292(a)(2)

The proposed amendments preserve the time limit of 30 days for ruling on the application set forth in subsection (a)(3), and clarify that the suspension of the statute of limitations is effective irrespective of the date on which the statute of limitations would have expired absent this operation of this section.

Section 3292(b)

The proposed amendments clarify the period of suspension in the case of official requests made separately or concurrently. For the former, the applicable period runs from the date the request is made until six months after the date on which the government receives notice of final action by the foreign court or authority. In the case of multiple pending official requests, the applicable period runs from the date the first request is made until six months after the last date on which the government receives notice of final action.

The additional six-month suspension period is intended to afford the government time to examine and translate the evidence received from the foreign court or authority and adequately pursue new domestic leads that have arisen out of the results received.

Section 3292(c)(2)

The proposed amendments remove the language in subsection (c)(2), which establishes a separate calculation of the suspension period for cases in which foreign authorities take final action before the original statute of limitations would have expired. The proposed amendments instead subsume the calculation for such situations into subsection (b), as the rationale for providing the government an additional six-month suspension after receiving notice of final action is the same regardless of whether the government received notice before or after the original statute of limitations would have expired. In addition, removing the separate calculation provision simplifies the analysis and provides better certainty and predictability as to the operation of the statute. It also eliminates the possible disparity in suspension that may otherwise

occur if, for example, a foreign court or authority provides notice of final action shortly before or just after the original statute of limitations would have expired.

Section 3292(d)(2)

The proposed amendments clarify that the definition of "final action" means the "the receipt by the United States of the last response from the foreign court or authority either producing all requested evidence in the form requested or indicating that the official request has been, or will not be, fully executed," and thus does not involve consideration of simply the completeness of the response. Placing the disposition of the execution of the request with the requested state codifies the operation of caselaw and clarifies that periods will vary, subject to a maximum period of three years, as set forth in subsection (c).

Section 3292A

This new section applies the same tolling provision of Section 3292 to civil forfeiture cases. It incorporates the amendments discussed above, for consistency between Section 3292 and Section 3292A.

REDLINE:

§3292. Suspension of limitations to permit United States to obtain foreign evidence

(a)(1) An official request to obtain evidence of an offense located in a foreign country shall suspend the running of the statute of limitations if the district court before which a grand jury is or may be impaneled to investigate the offense finds, upon application of the United States filed before return of an indictment, by a preponderance of the evidence: that (A) an official request has been made for such evidence; (B) it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country; and (C) the request was made prior to the expiration of the statute of limitations. ~~Upon application of the United States filed before return of an indictment indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations as set forth in (a)(2), if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.~~

(2) The court shall rule upon such application not later than thirty days after the filing of the application. The suspension of the statute of limitations under (a)(1) shall be effective irrespective of the date on which the statute of limitations would have expired absent operation of this section.

(b) ~~Except as provided in~~ Subject to the operation of subsection (c) of this section, a period of suspension ~~under this section~~ shall begin on the date on which the official request is made and end ~~on the date on which the foreign court or authority takes~~ six months after final action on the

request. If the United States makes multiple official requests, the period of suspension shall begin on the date on which the first official request was made and end six months after the last date of final action.

(c) The total of all periods of suspension under this section with respect to an offense—

~~**(1)**~~ shall not exceed three years~~; and~~

~~**(2)** shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section~~.

(d) **(1)** As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

(2) As used in this section, the term "final action" means the receipt by the United States of the last response from the foreign court or authority either producing all requested evidence in the form requested or indicating that the official request has been, or will not be, fully executed.

§ 3292A. Suspension of limitations to permit United States to obtain foreign evidence in civil forfeiture in rem actions

(a)(1) An official request to obtain evidence of an offense located in a foreign country shall suspend the running of the statute of limitations for seeking forfeiture in rem if a district court before which a complaint seeking such forfeiture could be filed finds, upon application by the United States, by a preponderance of the evidence: that (A) an official request has been made for such evidence; (B) it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country; and (C) the request was made prior to the expiration of the statute of limitations.

(2) The court shall rule upon such application not later than thirty days after the filing of the application. The suspension of the statute of limitations under subsection (a)(1) shall be effective irrespective of the date on which the statute of limitations would have expired absent operation of this section.

(b) Subject to the operation of subsection (c) of this section, a period of suspension shall begin on the date on which the official request is made and end six months after final action on the request. If the United States makes multiple official requests, the period of suspension shall begin on the date on which the first official request was made and end six months after the last date of final action.

(c) The total of all periods of suspension under this section with respect to an offense shall not exceed three years.

(d) **(1)** As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or

an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

(2) As used in this section, the term "final action" means the receipt by the United States of the last response from the foreign court or authority either producing all requested evidence in the form requested or indicating that the official request has been, or will not be, fully executed.

Clerical amendment:

§ 3291. Nationality, citizenship and passports

§ 3292. Suspension of limitations to permit United States to obtain foreign evidence

§ 3292A. Suspension of limitations to permit United States to obtain foreign evidence in civil forfeiture in rem actions

§ 3293. Financial institution offenses

(10) Proposal to facilitate forfeitures of property involved in or facilitating sanctions violations, human rights violations, and war crimes

This proposal would amend 18 USC § 981(a)(1)(I) to clarify forfeiture authority to reach proceeds and property involved in or facilitating sanctions violations, human rights violations, or war crimes.

PROPOSED LEGISLATIVE LANGUAGE:

Section One. Section 981 of Title 18, United States Code, is amended in subsection (a)(1)(I) as follows–

(1) by inserting "tangible or intangible, constituting, derived from, or traceable to, proceeds taken, obtained, or retained directly or indirectly in connection with or as a result of, or" after "real or personal,";
(2) by striking " a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a prohibition imposed pursuant to" and replacing with ", or is used or intended to be used in any manner or part to commit or facilitate a criminal violation, attempted criminal violation, or any conspiracy to commit a criminal violation of section 1091, 2340, 2340A, 2441, or 2442 of this title or of the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.); the Trading With the Enemy Act, as amended (50 U.S.C. 4301 et seq.); the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c); the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1901-1908);"; and
(3) by inserting, "; or any order, regulation, prohibition, or license issued under such authorities" after "section 104(a) of the North Korea Sanctions and Policy Enhancement Act of 2016".

Section Two. The amendments to Section 981 of Title 18, United States Code, herein regarding civil forfeiture shall apply to any civil forfeiture proceeding pending or commenced on or after the date of enactment of this Act.

SECTION-BY-SECTION ANALYSIS:

This proposal would amend 18 U.S.C. § 981(a)(1)(I) to enable the United States to forfeit proceeds and property involved in, used, or intended to be used to commit or to facilitate criminal violations of economic sanctions programs, human rights violations, and war crimes.

The United States imposes economic sanctions to protect U.S. national security interests, including sanctions directed at Russian oligarchs, major foreign drug traffickers, foreign corrupt officials, and those involved in serious human **RIGHTS** abuses, among others. Under current law, when sanctions are willfully violated, the United States can prosecute offenders and forfeit certain proceeds of some sanctions violations, taking away some violators' profits. However,

existing law does not authorize forfeiture of the proceeds of all criminal violations of U.S. economic sanctions, such as those imposed under the Foreign Narcotics Kingpin Designation Act, and does not authorize forfeiture of facilitating property—*i.e.*, property used to commit sanctions violations—even where the proceeds can be forfeited under separate existing forfeiture authority, such as in the case of willful violations of the International Emergency Economic Powers Act (IEEPA) or the Trading With the Enemy Act (TWEA). *See* 18 U.S.C. § 981(a)(1)(C); 18 U.S.C. § 1956(c)(7)(D); 28 U.S.C. § 2461(c). This proposal would correct these deficiencies by authorizing forfeiture for proceeds, facilitating property, and property involved in criminal violations of IEEPA (50 U.S.C. §1701, *et seq.*); TWEA, as amended (50 U.S.C. § 4301, *et seq.*); the United Nations Participation Act of 1945, as amended (22 U.S.C. § 287c); the Foreign Narcotics Kingpin Designation Act (21 U.S.C. §§ 1901-1908); and the Executive Orders and regulations promulgated thereunder. Doing so would further empower the United States to take away the profits of criminal violators of sanctions and their "tools of the trade."

Additionally, the proposal would fill a gap in existing law by authorizing forfeiture for certain serious human rights violations that have long been criminalized under U.S. law: genocide (18 U.S.C. § 1091), torture (18 U.S.C. §§ 2340 and 2340A), war crimes (18 U.S.C. § 2441), and recruitment or use of child soldiers (18 U.S.C. § 2442).

Section Two provides that the civil forfeiture amendments will apply to actions pending or filed after enactment to ensure that sanctions violators cannot escape forfeiture if their offenses have not been discovered as of the date of enactment.

PROPOSAL HISTORY:

We do not believe this proposal has been presented to Congress. However, in 2022, a proposal to amend IEEPA to authorize forfeiture for facilitating property was included in an Administration proposal to strengthen tools to hold Russian oligarchs and elites accountable following Russia's further invasion of Ukraine.

REDLINE REFLECTING PROPOSED CHANGES TO CURRENT LAW:

18 U.S.C. § 981

(a)(1) The following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property.

(B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, or any property used to facilitate such an offense, if the offense--

(i) involves trafficking in nuclear, chemical, biological, or radiological weapons technology or material, or the manufacture, importation, sale, or distribution of a controlled substance (as that term is defined for purposes of the Controlled Substances Act), or any other conduct described in section 1956(c)(7)(B);

(ii) would be punishable within the jurisdiction of the foreign nation by death or imprisonment for a term exceeding 1 year; and

(iii) would be punishable under the laws of the United States by imprisonment for a term exceeding 1 year, if the act or activity constituting the offense had occurred within the jurisdiction of the United States.

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 670, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or any offense constituting "specified unlawful activity" (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.

(D) Any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of--

(i) section 666(a)(1) (relating to Federal program fraud);

(ii) section 1001 (relating to fraud and false statements);

(iii) section 1031 (relating to major fraud against the United States);

(iv) section 1032 (relating to concealment of assets from conservator or receiver of insured financial institution);

(v) section 1341 (relating to mail fraud); or

(vi) section 1343 (relating to wire fraud),

if such violation relates to the sale of assets acquired or held by the the[1] Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the National Credit Union Administration, as conservator or liquidating agent for a financial institution.

(E) With respect to an offense listed in subsection (a)(1)(D) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations or promises, the gross receipts of such an offense shall include all property, real or personal, tangible or intangible, which thereby is obtained, directly or indirectly.

(F) Any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, from a violation of--

(i) section 511 (altering or removing motor vehicle identification numbers);

(ii) section 553 (importing or exporting stolen motor vehicles);

(iii) section 2119 (armed robbery of automobiles);

(iv) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(v) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

(G) All assets, foreign or domestic--

(i) of any individual, entity, or organization engaged in planning or perpetrating any any[1] Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization;

(ii) acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing any Federal crime of terrorism (as defined in section 2332b(g)(5) against the United States, citizens or residents of the United States, or their property;

(iii) derived from, involved in, or used or intended to be used to commit any Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property; or

(iv) of any individual, entity, or organization engaged in planning or perpetrating any act of international terrorism (as defined in section 2331) against any international organization (as defined in section 209 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 4309(b)) or against any foreign Government. Where the property sought for forfeiture is located beyond the territorial boundaries of the United States, an act in furtherance of such planning or perpetration must have occurred within the jurisdiction of the United States.

(H) Any property, real or personal, involved in a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a violation, of section 2339C of this title.

(I) Any property, real or personal, tangible or intangible, constituting, derived from, or traceable to, proceeds taken, obtained, or retained directly or indirectly in connection with or as a result of, or that is involved in ~~a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a prohibition imposed pursuant to~~, or is used or intended to be used in any manner or part to commit or facilitate a criminal violation, attempted criminal violation, or any conspiracy to commit a criminal violation of section 1091, 2340, 2340A, 2441, or 2442 of this title or of the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.); the Trading With the Enemy Act, as amended (50 U.S.C. 4301 et seq.); the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c); the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1901-1908); section 104(a) of the North Korea Sanctions and Policy Enhancement Act of 2016; or any order, regulation, prohibition, or license issued under such authorities.

(2) For purposes of paragraph (1), the term "proceeds" is defined as follows:

(A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

(B) In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term "proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.

(C) In cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.

(11) Proposal to extend the statute of limitations from five years to ten years for civil and criminal enforcement actions brought by OFAC under the International Emergency Economic Powers Act and the Trading with the Enemy Act

PROPOSED LEGISLATIVE LANGUAGE:

AMENDMENT TO STATUTE OF LIMITATIONS FOR VIOLATIONS OF THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT.

Section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705) is amended by adding the following new paragraphs as subsection (d), "Statutes of limitation":

(1) No person shall be prosecuted, tried, or punished for any offense under this section unless the indictment is found or the information is instituted within ten years from the latest date of the violation upon which the indictment or information is based.

(2) An action, suit, or proceeding for the enforcement of any civil fine or penalty under subsection (b) shall not be entertained unless commenced within ten years from the latest date of the violation upon which the civil fine or penalty is based. For purposes of this subsection, the commencement of an action, suit, or proceeding includes, but is not limited to, the issuance of a pre-penalty notice or finding of violation.

AMENDMENT TO STATUTE OF LIMITATIONS FOR VIOLATIONS OF THE TRADING WITH THE ENEMY ACT

Section 16(b) of the Trading with the Enemy Act (50 U.S.C. 4315(b)) is amended by adding the following new paragraphs:

(5) No person shall be prosecuted, tried, or punished for any offense under this section unless the indictment is found or the information is instituted within ten years from the latest date of the violation upon which the indictment or information is based.

(6) An action, suit, or proceeding for the enforcement of any civil fine or penalty under subsection (b) shall not be entertained unless commenced within ten years from the latest date of the violation upon which the civil fine or penalty is based. For purposes of this paragraph, the commencement of an action, suit, or proceeding includes, but is not limited to, the issuance of a pre-penalty notice or finding of violation.

(b) Conforming Amendment.— PENDING

SECTION-BY-SECTION ANALYSIS:

Civil conspiracy enforcement actions brought by OFAC under numerous authorities, including but not limited to the International Emergency Economic Powers Act (IEEPA), are subject to the general five-year statute of limitations (SOL) set forth in 28 U.S.C. § 2462, which runs "from the date when the claim first accrued." This SOL has created difficulties for OFAC with respect to civil conspiracy charges based on transactions that took place more than five years after the date of the first transaction of the conspiracy, which is when the civil conspiracy "first accrued."[1] This proposal would amend Section 206 of IEEPA (50 U.S.C. § 1705) and Section 16 of the Trading with the Enemy Act (TWEA) (50 U.S.C. § 4315(b)) to include an SOL that will run ten years from "the latest date of the violation" giving rise to the OFAC enforcement action. This proposal would not affect the statute of limitations for civil forfeiture actions brought under Section 981 of title 18 based upon such offenses, which is governed by Section 1621 of title 19.

Similarly, the criminal SOL for IEEPA and TWEA are five years – although if a criminal conspiracy, *e.g.,* 18 U.S.C. § 371, is charged, the statute of limitations extends to the duration of the conspiracy, not the date the conspiracy begins. For consistency between criminal and civil authorities, as well as in recognition of the complexity of investigating these crimes with a significant international component, the criminal statute of limitations should also be extended to ten years.

Budget Implications: The U.S. Treasury Department does not believe this proposal has any significant cost implications. A budget table is inapplicable and has not been provided.

[1] Some courts (including the Supreme Court and D.C. Circuit) have found that certain civil conspiracy SOLs that are substantively similar to 28 U.S.C. § 2462 run separately from each overt act giving rise to the conspiracy claim.

(12) Proposal to add enablers of corruption as a category for visa ineligibility

SUMMARY:
This proposal would enable public designations of visa ineligibility for those who enable or facilitate corruption, to complement the private designations authorized by Presidential Proclamation 10685 in December 2023. *Note: The proposal below does not preclude the Administration from seeking other changes to Section 7031(c) in the future.*

PROPOSED LEGISLATIVE LANGUAGE:

(c) Anti-Kleptocracy and Human Rights.—

(1) Ineligibility.--

(A) Officials of foreign governments and their immediate family members about whom the Secretary of State has credible information have been involved, directly or indirectly, in significant corruption, including corruption related to the extraction of natural resources, or a gross violation of human rights, including the wrongful detention of locally employed staff of a United States diplomatic mission or a United States citizen or national, shall be ineligible for entry into the United States.

(B) Concurrent with the application of subparagraph (A), the Secretary shall, as appropriate, refer the matter to the Office of Foreign Assets Control, Department of the Treasury, to determine whether to apply sanctions authorities in accordance with United States law to block the transfer of property and interests in property, and all financial transactions, in the United States involving any person described in such subparagraph.

(C) The Secretary shall also publicly or privately designate or identify the officials of foreign governments and their immediate family members about whom the Secretary has such credible information without regard to whether the individual has applied for a visa.

(D) Other foreign persons and their immediate family members about whom the Secretary of State has credible information have enabled, facilitated, or otherwise been

involved in significant corruption, including through the laundering of its proceeds, obstruction of judicial or investigative processes, or bribery, among other acts, may be deemed ineligible for entry into the United States.

(E) The Secretary may publicly or privately designate or identify the other foreign persons and their immediate family members about whom the Secretary of State has such credible information without regard to whether the individual has applied for a visa.

(2) Exception.--Individuals shall not be ineligible for entry into the United States pursuant to paragraph (1) if such entry would further important United States law enforcement objectives or is necessary to permit the United States to fulfill its obligations under the United Nations Headquarters Agreement: Provided, That nothing in paragraph (1) shall be construed to derogate from United States Government obligations under applicable international agreements.

(3) Waiver.--The Secretary may waive the application of paragraph (1) if the Secretary determines that the waiver would serve a compelling national interest or that the circumstances which caused the individual to be ineligible have changed sufficiently.

(4) Report.--Not later than 30 days after the date of enactment of this Act, and every 90 days thereafter until September 30, 2024, the Secretary of State shall submit a report, including a classified annex if necessary, to the appropriate congressional committees and the Committees on the Judiciary describing the information related to corruption or violation of human rights concerning each of the individuals found ineligible in the previous 12 months pursuant to paragraph (1)(A) as well as the individuals who the Secretary designated or identified pursuant to paragraph (1)(B), or who would be ineligible but for the application of paragraph (2), a list of any waivers provided under paragraph (3), and the justification for each waiver.

(5) Posting of report.--Any unclassified portion of the report required under paragraph (4) shall be posted on the Department of State website.

(6) Clarification.--For purposes of paragraphs (1)(C), 1(E), (4), and (5), the records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall not be considered confidential.