Negative: Russian Asset Confiscation

By “Coach Vance” Trefethen

The AFF case confiscates all Russian assets the US government can get its hands on and donates them to Ukraine for rebuilding from war damage.

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SOLVENCY

1. Unconstitutional

Confiscation of Russian assets will be found unconstitutional and voided by federal courts

Doug Bandow 2022. (JD; former special assistant to Pres. Reagan; Senior Fellow, Cato Institute) 12 May 2022 "Seizing Russian Assets Is a Bad Idea" (accessed 12 Feb 2023) https://www.cato.org/commentary/seizing-russian-assets-bad-idea

However, the Constitution [does not allow](https://fox40.com/news/no-biden-cant-just-sell-off-seized-russian-yachts-and-central-bank-assets-to-help-aid-ukraine-international-law-and-the-us-constitution-forbid-it/) the U.S. government to do as it pleases even with foreigners’ assets. Christopher Anders of the American Civil Liberties Union observed: “The problem with the bill as introduced was that the complete absence of any due process protections would likely have resulted in a court handing Russia a propaganda win by having an American court invalidate both the sanctions law and the sanctions themselves.”

Foreign government can and would file claims in US federal courts if we confiscate

Prof. Paul Stephan 2022 (Distinguished Professor of Law at the University of Virginia School of Law. He served as counselor on international law to the legal adviser of the U.S. State Department in 2006-07 and as special counsel to the general counsel of the U.S. Department of Defense in 2020-21) 26 Apr 2022 " Giving Russian Assets to Ukraine—Freezing Is Not Seizing" (accessed 12 Feb 2023) https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing

Tribe and Lewin envision a world where the president can seize and dispose of foreign sovereign property at will, without any judicial review. They seem to overlook the possibility that foreign sovereigns might sue to contest the seizure. When bringing a suit, they necessarily would have to waive their immunity from U.S. judicial process. These suits, however, would allow them to bring both administrative law and constitutional claims that a U.S. court could address.

Foreign governments have constitutional rights to their property being respected in federal courts

Prof. Paul Stephan 2022 (Distinguished Professor of Law at the University of Virginia School of Law. He served as counselor on international law to the legal adviser of the U.S. State Department in 2006-07 and as special counsel to the general counsel of the U.S. Department of Defense in 2020-21) 26 Apr 2022 " Giving Russian Assets to Ukraine—Freezing Is Not Seizing" (accessed 12 Feb 2023) https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing

The U.S. Constitution protects anyone who brings themselves or their property within the United States’ borders. That protection at least extends to not leaving those people and that property at the mercy of the whims of the government. This means ensuring some kind of judicial review of the legality of the government action. The Pfizer case rested on an important principle: Just because a foreign state has different rights and powers than a private person does not mean that it cannot enjoy the benefits of the rule of law within the United States.

A/T "Affirmative fiat says Congress can do it" - But AFF would have to fiat a constitutional amendment to the "Due Process Clause" get around the legal challenges

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Perhaps Congress, in the course of authorizing the president to confiscate foreign-owned property outside of wartime, also might bar foreign sovereigns from access to U.S. courts. No one has suggested this yet, but I see no other way around judicial involvement in the proposed confiscations. Here difficulties arise. As a matter of constitutional law, the government’s taking of property may proceed only on the basis of due process of law. Even if Congress were to characterize the confiscation of Russian assets as a penal forfeiture rather than a “taking,” the subject of the forfeiture still has a right under the Due Process Clause of the Constitution to obtain judicial review.

2. US taxpayers, not Russia, will pay

US taxpayers will ultimately pay for the Affirmative's plan whenever we have to reimburse the assets we confiscated

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First, in the case of unlawful seizure of state property for well-intentioned purposes, the chance of an unwanted reckoning always exists. Russia will not always be a pariah. When it returns to the fold, it will want its money back. Almost certainly the United States will comply with the request for repayment, which means that U.S. taxpayers will have to foot the tab for the money that went to Ukraine. Perhaps this is a good result, if Ukraine really is the most worthy recipient of U.S. largesse. But doing this without a deliberate decision by Congress or the executive seems somewhat fishy. The U.S. track record of using Cuban and Iranian assets to pay off the holders of default judgments for human rights claims follows this pattern, with U.S. taxpayers inevitably destined to pay the compensation bill, not the perpetrators of the outrages. I fear the same outcome for Russian atrocities against Ukraine.

3. Unworkable

If the Russian assets are owned by private individuals, you'll be tied up in court forever

Matthieu Favas 2022 (The Economist’s Finance correspondent, quoted by journalists Sabri Ben-Achour and Jarrett Dang 2022) 17 June 2022" Western countries may have a hard time confiscating Russian assets they’ve frozen" (accessed 12 Feb 2023) https://www.marketplace.org/2022/06/17/western-countries-may-have-a-hard-time-confiscating-russian-assets-theyve-frozen/

In general, to be able to legally seize private assets, you need a criminal conviction in the courts and not any criminal conviction or for any crime, you need this crime to be on a specific list which warrants seizure. Not every crime is on that list. So you need a process to get to these assets, which can take years, you know, to prove that these assets have been either the instrument of a crime or linked to the proceeds from it, which is the condition you need to be able to see them. This is a lot of effort, time, and money spent in court. And so if the West was to try and do that—the U.S. or European countries—they would essentially spend a lot of time in front of judges.

4. Ukraine not ready

No mechanism within Ukraine for managing or properly using the assets if they were confiscated

Anna Romandash 2022 (Ukrainian journalist) 21 Nov 2022 "CONFISCATING RUSSIAN ASSETS: THE DEVIL IN THE DETAILS" (accessed 12 Feb 2023) https://inkstickmedia.com/confiscating-russian-assets-the-devil-in-the-details/ (brackets added)

“The biggest issue is that even if all the countries unite and start confiscating sanctioned assets as well as sell them to give money to Ukraine, we don’t have a mechanism for managing that money,” [founder and a managing partner at Arzinger, one of Ukraine’s leading law firms, Timur] Bondaryev explained. “For example, there are roughly $13 billion of sanctioned oligarchs’ assets in different European countries,” the expert continued, “Let’s imagine that the assets were sold, and the money was given to Ukraine. Now, we don’t know how to give that money to Ukraine in the most transparent and fair way. There is a politicization of this issue because everyone wants to use that money for houses and infrastructure, but we also understand that there are lots of businesses that were destroyed and lost lots of funds, and nobody talks about their recovery.”

DISADVANTAGES

1. Unjust

Seizing assets punishes the innocent with the guilty

Doug Bandow 2022. (JD; former special assistant to Pres. Reagan; Senior Fellow, Cato Institute) 12 May 2022 "Seizing Russian Assets Is a Bad Idea" (accessed 12 Feb 2023) https://www.cato.org/commentary/seizing-russian-assets-bad-idea

Moscow’s attack on Ukraine was unjustified. Hopefully the invasion will fail and peace will be restored quickly. However, nothing justifies allowing the president to seize property based on an accusation and transfer it to someone not harmed by the property owner. After all, not every person or organization tied to Russia bears responsibility for the attack on Ukraine or is a friend of Vladimir Putin and the ruling regime.[**END QUOTE**] In fact, in the West, Russians are being fired from jobs for simply voicing support for Moscow, not criticizing the Putin government, and having been born in Russia. Wimbledon [plans to bar tennis players](https://original.antiwar.com/doug-bandow/2022/04/24/wimbledon-declares-cultural-revolution-against-russians-will-rest-of-world-eventually-target-the-wests-crimes/) because of their nationality. This brings to mind the excesses of red‐​baiting and McCarthyism in America and the utterly deranged Cultural Revolution in China, in which people were punished for what they were seen to represent rather than what they did or believed. [**HE GOES ON LATER TO CONCLUDE QUOTE**:] Western liberal societies engaging in collective punishment are undermining their own principles and values.

Confiscation is different from sanctions and unjust: It punishes past economic transactions that were legal at the time they were done

Doug Bandow 2022. (JD; former special assistant to Pres. Reagan; Senior Fellow, Cato Institute) 12 May 2022 "Seizing Russian Assets Is a Bad Idea" (accessed 12 Feb 2023) https://www.cato.org/commentary/seizing-russian-assets-bad-idea

Yet such concerns have been dismissed because grabbing Russian cash has become a priority. It is supposed to go to a good cause, helping Ukrainians. However, that alone cannot justify seizing and redistributing other people’s assets. Imposing economic sanctions, prohibiting new transactions, is prospective. Doing so affects future behavior. People can adjust their behavior and comply. Prosecutions come after due warning. Penalties are imposed for active violations, not past occurrences.

Confiscation is unjust because it punishes people when they're accused, not after being found guilty, and without hearing their defense

Doug Bandow 2022. (JD; former special assistant to Pres. Reagan; Senior Fellow, Cato Institute) 12 May 2022 "Seizing Russian Assets Is a Bad Idea" (accessed 12 Feb 2023) https://www.cato.org/commentary/seizing-russian-assets-bad-idea

Guilt would be decided beforehand. [Observed Bruce Fein](https://thehill.com/opinion/judiciary/3472889-the-plan-to-seize-russian-oligarchs-assets-sets-an-appalling-precedent/), a Justice Department official during the Reagan administration: “The targeted oligarchs receive neither notice nor an opportunity to respond, nor an opportunity to confront accusers, nor an independent or impartial decisionmaker—summary justice at its worst.”

Being really angry at the accused doesn't make it right to suspend civil rights to punish them without trial

Doug Bandow 2022. (JD; former special assistant to Pres. Reagan; Senior Fellow, Cato Institute) 12 May 2022 "Seizing Russian Assets Is a Bad Idea" (accessed 12 Feb 2023) https://www.cato.org/commentary/seizing-russian-assets-bad-idea

Giving confiscated funds to Ukraine might feel good, but that doesn’t make it right or just. Should Washington be able to deny constitutional protections to anyone accused of being a terrorist, drug dealer, child molester, or other criminal du jour? Indeed, creative prosecutors have often misused legislation originally approved to deal with special circumstances, most notably organized crime and terrorism, against other criminals. There is no reason to assume government officials would not do the same with new, streamlined procedures for property confiscation.

Impact: We become the human rights violators. Taking away people's rights in the name of fighting authoritarianism is hypocritical and wrong

J.D. Tuccille 2022 (contributing editor) 13 May 2022 REASON magazine "Don't Oppose Russian Authoritarianism With More Authoritarianism" <https://reason.com/2022/05/13/dont-oppose-russian-authoritarianism-with-more-authoritarianism/> (accessed 23 June 2022)

Restrictions on freedom are authoritarian, even if government officials try to justify them with hollow claims of being on the side of peace and liberty. Just as you've gained nothing if battling monsters turns you into a monster, you need to rethink just what you hope to win if fighting authoritarians pushes your own society towards authoritarianism. If we want support for Ukraine to equate to defense of freedom, we have to actually respect that value instead of becoming what our political leaders pretend to oppose.

2. Hurts peace process

Link: Confiscation would create a big disincentive for Russia to negotiate a settlement to the war

Doug Bandow 2022. (JD; former special assistant to Pres. Reagan; Senior Fellow, Cato Institute) 12 May 2022 "Seizing Russian Assets Is a Bad Idea" (accessed 12 Feb 2023) https://www.cato.org/commentary/seizing-russian-assets-bad-idea

There is another serious problem with the attempt to willy‐​nilly steal the property of Russians and treat it as reparation payments. Peace between Russia and Ukraine looks far away. If Moscow figures that the West plans to treat it as a defeated power no matter what happens at the negotiating table, [it has less reason to make a deal](https://fox40.com/news/no-biden-cant-just-sell-off-seized-russian-yachts-and-central-bank-assets-to-help-aid-ukraine-international-law-and-the-us-constitution-forbid-it/). Indeed, the Putin regime likely would see this legislation as signaling the continuation of sanctions even if Russia made peace.

More sanctions make it harder for Putin to back down and toughen his resolve to win

Dr. William Ruger 2022 (Ph.D. in politics specializing in foreign policy, president of the American Institute for Economic Research) 5 May 2022 REASON magazine " William Ruger on Russia's Invasion of Ukraine" <https://reason.com/2022/05/05/william-ruger-on-russias-invasion-of-ukraine/> (accessed 23 June 2022)

The history of sanctions shouldn't leave anyone all that sanguine about their ability to effect the ultimate ends that you're trying to seek. Now, these sanctions may be extreme in many ways. If you impose essentially a financial blockade, they may have more bite. But the question is, do they actually cause what you're trying to achieve or do they make it much harder for Russia to stand down? You can imagine Putin and the Russian state not wanting to appear to cry uncle to this pressure. I think that's a real concern.

Confiscation eliminates an incentive for Russia to change its behavior and end the war or negotiate for peace

Matthieu Favas 2022 (The Economist’s Finance correspondent, quoted by journalists Sabri Ben-Achour and Jarrett Dang 2022) 17 June 2022" Western countries may have a hard time confiscating Russian assets they’ve frozen" (accessed 12 Feb 2023) https://www.marketplace.org/2022/06/17/western-countries-may-have-a-hard-time-confiscating-russian-assets-theyve-frozen/

The difference is if you freeze assets that are still there, and the legal owner doesn’t change, which means that if you unfreeze the assets, if you know, we feel that Russia has done enough to stop the war in Ukraine, is ready perhaps to pay for some of the damages, then we can return the assets to Russia. If you confiscate the assets, then you change the owner. And then the assets are no longer there. You know, you can give the assets to someone else you can give them to Ukraine. It’s irreversible wealth. Freezing is reversible. And that’s part of the idea because when you freeze the assets, you provide an incentive to the targeted country to change its behavior. If you confiscate the assets, then even if the behavior of the country changes, then you can’t return the assets.

Impact: "Not" confiscating allows assets to be used to motivate a peace deal. Otherwise, we raise the risk of escalation to nuclear weapons

Doug Bandow 2022. (JD; former special assistant to Pres. Reagan; Senior Fellow, Cato Institute) 12 May 2022 "Seizing Russian Assets Is a Bad Idea" (accessed 12 Feb 2023) https://www.cato.org/commentary/seizing-russian-assets-bad-idea

It would be far better for Washington to use the status of confiscated property as an inducement for Moscow to make a speedy and reasonable peace deal. To the extent that the War Party is able to [turn America’s objectives](https://www.theamericanconservative.com/articles/not-in-my-back-yard-but-in-yours/) from supporting Ukraine to defeating Russia, peace will become much more difficult to achieve. Continued military escalation is likely, with serious danger of open conflict between Russia and NATO forces. Given Moscow’s relative conventional weakness, the Putin government might use tactical nuclear weapons to maintain rough military parity. This is a road that no one, including Washington, should want to go down.

Reverse Advocacy: Russian assets provide leverage in post-war settlement. That's why Ukraine wants to wait and do it under an international commission

Ingrid Wuerth 2022 (holds the Helen Strong Curry Chair in International Law at Vanderbilt Law School where she directs the Branstetter Litigation and Dispute Resolution Program) 11 July 2022 (accessed 13 Sept 2022) "Russia Should Not be Designated a State Sponsor of Terrorism" <https://www.justsecurity.org/82262/russia-should-not-be-designated-a-state-sponsor-of-terrorism/> (brackets and ellipses in original)

Frozen Russian assets might provide important leverage in any post-war settlement negotiations. They might also be used to compensate Ukrainian victims of Russian aggression or to help rebuild the country. As Chiara Giorgetti, Markiyan Kliuchkovsky, and Patrick Pearsall recently [explained](https://www.justsecurity.org/81558/launching-an-international-claims-commission-for-ukraine/), “[t]he Government of Ukraine [recently expressed its intension](https://www.president.gov.ua/en/news/proponuyemo-derzhavam-partneram-viznati-sho-rosiya-povinna-p-75221) to cooperate with interested Parties to establish an international commission… to adjudicate claims for compensation arising out of Russia’s actions.”

3. Violates international law

Link: Confiscating/redistributing Russian assets violates international law

Prof. Paul Stephan 2022 (Distinguished Professor of Law at the University of Virginia School of Law. He served as counselor on international law to the legal adviser of the U.S. State Department in 2006-07 and as special counsel to the general counsel of the U.S. Department of Defense in 2020-21) 26 Apr 2022 " Giving Russian Assets to Ukraine—Freezing Is Not Seizing" (accessed 12 Feb 2023) https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing

I think it clear that the assets of a sovereign central bank enjoy some kind of international legal immunity from confiscation, as opposed to freezing, by the state in which they are found. This immunity does not depend on the presence or absence of judicial process and thus is independent of the kind of sovereign immunity that Tribe and Lewin talk about. Granted, the scope of this immunity is unclear, largely because, outside of armed conflicts, states are not in the habit of doing this. Accordingly, there have been few if any disputes to provide precedents. But the absence of seizures during times of peace itself speaks loudly. The International Court of Justice (ICJ) currently has a [suit](https://www.icj-cij.org/en/case/164) that raises this issue, involving U.S. legislation that diverts the frozen assets of Iran’s central bank to specified U.S. judgment creditors. ICJ cases sometimes go off the rails for procedural reasons, but it is at least possible that the court will find that the United States violated Iran’s rights under international law. If Congress takes the same approach to Russia’s assets as it did to Iran’s, it likely will manifestly violate international law.

Ukrainian lawyer admits: It's just not legal to confiscate Russian property and give it to Ukraine

Anna Romandash 2022 (Ukrainian journalist) 21 Nov 2022 "CONFISCATING RUSSIAN ASSETS: THE DEVIL IN THE DETAILS" (accessed 12 Feb 2023) https://inkstickmedia.com/confiscating-russian-assets-the-devil-in-the-details/ (brackets added)

“Our case is unique because Russia is the aggressor, and many countries have admitted that,” [founder and a managing partner at Arzinger, one of Ukraine’s leading law firms, Timur] Bondaryev said, “That is why we do not rule out that there would be some exceptions made for Russia and its assets despite the protections guaranteed for state property under the international law. There are still debates because international law does not give us an easy path for confiscating Russian property. There is no instrument yet that would allow for directing these assets to Ukraine or selling the properties for sending the money to Ukraine.”

Impact: Negative net benefits for world peace and prosperity when we trash the norms of international law

Prof. Paul Stephan 2022 (Distinguished Professor of Law at the University of Virginia School of Law. He served as counselor on international law to the legal adviser of the U.S. State Department in 2006-07 and as special counsel to the general counsel of the U.S. Department of Defense in 2020-21) 26 Apr 2022 " Giving Russian Assets to Ukraine—Freezing Is Not Seizing" (accessed 12 Feb 2023) https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing

Second, U.S. policymakers should not be comfortable about flouting international law, even if the law produces a result they find repugnant. Since the end of the Cold War, U.S. foreign policy has presented the international rule of law as one of the linchpins of the global society that the U.S. wants to build. Granted, the United States’ principal adversaries, China and Russia, have [a different conception](https://static1.squarespace.com/static/5f0a3654a47d231c00ccd14f/t/616b3967330a29221ec29219/1634417000622/Stephan%2BArticle.pdf) as to what the international rule of law means. But a transparent violation of a category of rules that the U.S. normally supports, simply because compliance would frustrate an immediate sense of justice, undermines the ability to use international law to shape a more peaceful and prosperous world, for those in the United States as well as the other residents of this planet.

Voting Impact: Disad of disregarding the rule of law outweighs any Affirmative reason to justify the plan

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Confiscating the frozen central bank assets is not something to be done lightly, if at all. In arguing that the executive already has the authority to do this and that Russia’s property in any event enjoys no legal protection in the United States, Tribe, Lewin, Zelikow and Johnson play to the passions of the American public, not its judgment. Grave and consequential matters of constitutional and international law are at stake. U.S. policymakers should not ignore these considerations just because doing so would make the American people, however briefly, feel good.