"To Return the Funds at All": Global Anticorruption, Forfeiture, and Legal Frameworks for Asset Return

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I. INTRODUCTION

Down went the U.S. district judge's gavel—and a home valued at nearly three quarters of a million dollars in the Maryland suburbs of Washington, D.C., no longer belonged to the Honorable Diepreye Solomon Peter Alamieyeseigha ("DSP"), former governor of oil-rich Bayelsa State in Nigeria.[1] The court held that full legal title to that residence passed to the United States Government ("USG").[2] In another courtroom, down went the gavel of another district judge, who ordered over $115 million in a frozen Swiss bank account belonging to the Government of Kazakhstan to be disbursed to an independent foundation to benefit the people of that country.[3] In yet another courtroom, down went the gavel, and Teodoro Nguema Obiang ("Teodorín"), son of the president of Equatorial Guinea and holder of the office of "second vice president," agreed to the USG's seizure of a set of life-sized Michael Jackson statues originally from the entertainer's Neverland Ranch, their sale at auction, and the depositing of the proceeds into a USG account where they would become fully vested property of the United States.[4]

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1. DOJ 13-628 (2013), 2013 WL 2366183; *DSP Alamieyeseigha Steals $700,000 Bayelsa State Money*, NIGERIA STANDARD (June 19, 2013), http://nigeriastandardnewspaper.com/ng/fugitive-dsp-alamieyeseigha-steals-700000-bayelsa-state-money-united-states-govt-says-ex-gov-used-corruption-proceeds-to-purchase-properties-in-america-accumu/.

2. DOJ 13-628, *supra* note 1.

3. DOJ 15-1509 (2015), 2015 WL 8289228.

4. Stipulation and Settlement Agreement at 15–19, United States v. One Michael Jackson Signed Thriller Jacket and Other Michael Jackson Memorabilia, No. CV 13-9169-GW-SS, (C.D. Cal. 2014); Julia Edwards, *Equatorial Guinea VP Loses Michael Jackson Statues in U.S. Settlement*, REUTERS (Oct. 10,

These seemingly disparate cases, involving a former governor, a national government, and a vice-president who was also the son of a head of state, led to loss of title to real estate and cash and other personal property. None included a criminal conviction. All were outcomes of prosecutions brought by the U.S. Department of Justice ("USDOJ") as part of a new venture, the Kleptocracy Asset Recovery Initiative ("Kleptocracy Initiative," "USDOJ-KI," or "KI").[5]

What exactly is the Kleptocracy Initiative? It can best be viewed as a policy initiative and ongoing program of prosecutorial activity operating within the Asset Forfeiture and Money Laundering Section ("AFMLS") of the USDOJ's Criminal Division since July 2010.[6] Its stated objectives are "to identify the proceeds of foreign official corruption, forfeit them, and repatriate the recouped funds for the benefit of the people harmed."[7] The typical target is a prominent public official or ex-official or a close relative—"politically exposed persons" in international anticorruption parlance.[8] The chief methodology for prosecutions begins with intensive investigation, almost always jointly with the FBI or other

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2014, 4:39 PM), http://www.reuters.com/article/us-usa-equatorial-idUSKCN0HZ1TA20141010. Regarding vesting of full title to the property in the USG, *see infra* note 240.

5. *See Asset Forfeiture and Money Laundering Section*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/criminal-afmls (last visited Nov. 12, 2016).

6. That the KI procedurally effectuates civil forfeiture, yet is housed in the USDOJ's Criminal Division, highlights the actual hybrid nature of the civil-criminal-administrative forfeiture regime in operation. One of the main objectives of this Note is to problematize this apparent tension from an American legal realist perspective, seeking to reconcile the KI "law on the books" with the KI's "law in action." THE CANON OF AMERICAN LEGAL THOUGHT Part I (David Kennedy & William W. Fisher III, eds., 2006).

7. Lanny Breuer, Assistant Attorney General, Address at the Franz-Hermann Brüner Memorial Lecture at the World Bank (May 25, 2011) (transcript available at http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-criminal-division-speaks-franz-hermann-br-ner). For an overview of mechanisms available to USDOJ prosecutors under the Kleptocracy Initiative, see U.S. DEP'T OF JUSTICE & U.S. DEP'T OF STATE, U.S. ASSET RECOVERY TOOLS AND PROCEDURES: A PRACTICAL GUIDE FOR INTERNATIONAL COOPERATION (2012) [hereinafter ASSET RECOVERY TOOLS], http://www.state.gov/documents/organization/190690.pdf.

8. THEODORE S. GREENBERG ET AL., POLITICALLY EXPOSED PERSONS 25 (2010), http://star.worldbank.org/star/publication/politically-exposed-persons.

federal agency, and often in cooperation with a foreign investigative body.[9] Next comes identification of assets within the U.S. believed to be proceeds of foreign corruption. This lays the groundwork for a federal *in rem* civil forfeiture action. Procedurally, the main basis for these prosecutions is the federal civil asset forfeiture statute, 18 U.S.C. Section 981; the typical substantive legal foundation is based on the money laundering statutes, 18 U.S.C. Sections 1956 and 1957.[10]

Successfully forfeited assets then become USG property.[11] The forfeiture of over $1 million in assets from DSP was its first success, but it is far from the largest prize netted by the USDOJ-KI. In its biggest monetary seizure to date, the Kleptocracy Initiative forfeited over $458 million in funds traceable to General Sani Abacha, Nigeria's *de facto* ruler for much of the 1990s and of whose regime DSP was an ally.[12] Other successful forfeitures have ranged from the hundreds of thousands of dollars to over $100 million.[13]

The Kleptocracy Initiative, then, is an attempt to systematize and institutionalize an innovative, hybrid practice in which the USG asserts jurisdiction over property located within the United States,[14] but the underlying criminal activity giving rise to the civil asset forfeiture proceedings occurred outside of the United States. Thus, USDOJ-KI seems to embody the vigorous exercise of a novel form of extraterritoriality—where enforcement is hyper-local,

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9. ASSET RECOVERY TOOLS, *supra* note 7, at 3–5.

10. *See id.*

11. *See infra* note 240 and corresponding text.

12. DOJ 14-230 (2014), 2014 WL 844298. In an even larger action, the USDOJ recently announced the filing of civil forfeiture complaints against Malaysian officials alleged to have embezzled over three billion dollars in funds from the 1Malaysia Development Berhad, an economic-development entity of the Government of Malaysia; the complaints sought the forfeiture of over one billion dollars laundered. DOJ 16-839 (2016), 2016 WL 3913897.

13. *See* DOJ 14-1114 (2014), 2014 WL 5073696; DOJ 15-1509 (2015), 2015 WL 8289228; DOJ 15-266 (2015), 2015 WL 910102.

14. As the procedural posture in the Kazakhstan case study shows, the assets are not always located in the United States; there, the assets were frozen by Swiss authorities in Swiss banks, presumably following an exercise of "mutual legal assistance" on anticorruption matters between U.S. and Swiss law enforcement. *See* DOJ 15-1509, *supra* note 3; *see also infra* note 34.

but the underlying offense was committed abroad.[15] Due to its procedural framework, it also represents the transnational side of the dramatically growing practice of domestic civil asset forfeiture. It stands squarely within the international legal movement, also of the past two decades, to go beyond the "supply side" of international corruption as addressed by the Foreign Corrupt Practices Act of 1977 to pursue the "*demand* side"—those on the receiving end of bribes and other forms of corruption.[16]

What happens to the forfeited assets? The Initiative's ultimate objective, often declared, is to return such funds to the people from whom they were stolen.[17] The Initiative's first chief, Jennifer Shasky,[18] was quoted in 2011 as saying "there is no legal requirement to return the funds at all . . . . Nonetheless, we are committed to working to [find] ways to repatriate or otherwise use the funds for [the] benefit [of] the people of a victim country."[19] The

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15. For an excellent overview of issues raised by expanding extraterritorial enforcement, see Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880 (1989).

16. *See infra* notes 25–26 and corresponding text.

17. Lanny A. Breuer, Assistant Attorney General, Keynote Address at Money Laundering Enforcement Conference (Oct. 19, 2010), (transcript available at https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-delivers-keynote-address-money-laundering).

18. Now Jennifer Shasky Calvery. Ms. Shasky Calvery spent fifteen years with the USDOJ, including, approximately two as the inaugural head of the Kleptocracy Asset Recovery Initiative; she left in 2012 to become Director of the Financial Crimes Enforcement Network (FinCEN) in the Department of the Treasury—her position at the time of this writing. DEP'T OF THE TREASURY, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/about_fincen/pdf/bio_director.pdf (last visited Nov. 12, 2016).

19. Christopher M. Matthews, *Fledgling Kleptocracy Initiative Faces Challenges, Expectations*, JUST ANTI-CORRUPTION: FOREIGN CORRUPT PRACTICES ACT NEWS (Sep. 19, 2011 11:36 AM), https://web.archive.org/web/20151122051202/http://www.mainjustice.com/justanticorruption/2011/09/19/fledgling-kleptocracy-initiative-face-challenges-expectations/. Shasky's phrasing furnishes the opening part of the title of this Note. Alexander W. Sierck, an attorney representing the Socio-Economic Rights and Accountability Project (SERAP) of Nigeria, paraphrases Ms. Shasky's statement as follows:

> SERAP notes that in a September 19, 2011 interview with the Main Justice blog, Jennifer Shasky, speaking on behalf of the Department's Kleptocracy Initiative, stated that: [t]he De-

USDOJ's practice handbook for asset recovery itself devotes a single paragraph to repatriation or other post-forfeiture remedies.[20] In light of this, the robust statutory underpinnings for USDOJ-KI investigation, pursuit, and forfeiture of corruptly-acquired assets appear asymmetrical with the basically voluntary and discretionary nature of post-forfeiture disposition. Put differently, there is a solid legal framework for the Initiative's means (seizure of assets) but not for its stated policy ends (return of assets).

This Note, in attempting to understand and address that tension, essays a preliminary mapping of forfeiture and return of assets in the global anticorruption context. In support of the Initiative's goals of denying kleptocrats a safe haven for their ill-gotten gains, punishing past and deterring future kleptocratic conduct, and, especially, returning assets to populations blighted by corruption, this Note will explore the novel, hybrid nature of actions brought under the Kleptocracy Initiative and potential ways to bridge the current statutory gap.

The Note will proceed in five parts. Part II examines the origins and operation of the Kleptocracy Initiative, the legal authorities under which its prosecutions unfold, some representative prosecutions, and a preliminary assessment of the Initiative. Part III presents a series of possible analogues for the return of ill-gotten assets, exploring the potential of each as a conceptual model for bridging the gap between forfeiture and return. Part IV sketches a possible statutory framework for the disposition of forfeited assets consisting of "four R's"— repatriation, restitution, repara-

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> partment has no [legal] obligation to repatriate assets subject to civil forfeiture, but that [t]he Department is committed to finding ways to repatriate or otherwise use such funds for the benefit of the victim country.

Letter from Alexander Sierck & Nicholai Diamond to Eric Holder, Jr., Attorney General (Mar. 18, 2014), https://www.icij.org/sites/icij/files/content/letter_to_attorney_general_holder_on_behalf_of_serap.pdf.

20. ASSET RECOVERY TOOLS, *supra* note 7 at 10. 18 U.S.C. § 981(i)(1) gives the Attorney General or the Secretary of the Treasury the discretion to transfer forfeited assets "to any foreign country which participated . . . in the . . . forfeiture of the property." 18 U.S.C. § 981(i)(1) (2013). Notably, the agreement of the Secretary of State is required, and such a decision to transfer is not subject to review. *Id.*

tions, and reimbursement—within a "derivative constructive trust" framework. Part V offers some brief concluding reflections.

II. THE US DEPARTMENT OF JUSTICE'S KLEPTOCRACY INITIATIVE

A. An Overview

Over nearly a half century, corruption has become a major target of both national and transnational legal regimes, with considerable growth since the turn of the 21st century.[21] Traditionally, the history of operational global anticorruption efforts begins with the U.S. Congress's enactment of the Foreign Corrupt Practices Act[22] ("FCPA") in 1977, after nearly a decade of revelations of widespread bribe payments from U.S. corporations to governments and officials in countries where the corporations conducted or sought to do business.[23] Of course, the USG had prosecuted numerous corruption cases prior to the enactment of the FCPA, but the FCPA's passage did signal a watershed moment in global anticorruption efforts—not least because it elevated the rhetoric and suggested an end to impunity. The FCPA was, and remains, fraught with limitations, the most notorious of which is the "facilitating payments" exception.[24] A larger limitation is the statute's

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21. Elena Helmer & Stuart H. Deming, *Non-Governmental Organizations: Anticorruption Compliance Challenges and Risks*, 45 INT'L LAW. 597, 598 (2011) ("Over the course of the past decade, enforcement of the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA), prohibiting the bribery of foreign officials, has experienced tremendous growth.") (citations omitted).

22. 15 U.S.C. § 78dd–1, et seq. (2013).

23. *See* U.S. SEC. AND EXCHANGE COMM'N, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1976), https://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf.

24. This provision, also known as the "grease payment" exception, has since the 1988 FCPA amendment been located in 15 U.S.C. § 78dd–1(b), which reads:

> Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

15 U.S.C. § 78dd–1(b) (2013). Thus, a corporate gift to a cabinet minister in an attempt to win a government contract would be criminalized by the FCPA. In contrast, a small payment to speed up issuance of a driver's license probably

deliberate failure to reach the conduct of those on the receiving end of bribery, a gap symbolized by the Fifth Circuit case of *United States v. Castle*.[25] The *Castle* court held "foreign officials may not be prosecuted under 18 U.S.C. § 371 for conspiring to violate the FCPA."[26]

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would not be. However, even the sort of conduct that falls within the FCPA carve-out is sternly criticized by one critic:

> [T]he demand for "grease payments" suggests a willingness on the part of a public official (agent) to withhold or delay services which the public (government representing people as the principal) has mandated to be provided without discrimination. Thus, the act of extortion creates injury to the extent that services are withheld or delayed.

Niles C. Logue, *Cultural Relativism or Ethical Imperialism? Dealing with Bribery Across Cultures*, at 13 n.20 (2005), http://www.cbfa.org/Logue.pdf. The "grease payments" exception has come under increasing fire, and the OECD has formally asked Congress to repeal it. *OECD Calls for an End to Facilitating Payments Exception,* JONESDAY (Dec., 2009), http://www.jonesday.com/oecd_calls/. At the other extreme, President-Elect Donald Trump has called the FCPA a "horrible law" that puts U.S. companies at a competitive disadvantage and urged its repeal. Ed Silverstein, *Donald Trump Has Called the FCPA a "Horrible" Law,* INSIDECOUNSEL (Aug. 17, 2015), http://www.insidecounsel.com/2015/08/17/donald-trump-has-called-the-fcpa-a-horrible-law.

25. United States v. Castle, 925 F.2d 831 (5th Cir. 1991).

26. *Id.* 18 U.S.C. § 371 is the general criminal statute covering conspiracy against the United States. Comparing the FCPA with the Mann Act, also known as the White-Slave Trade Act, 18 U.S.C. §§ 2421–2424, originally enacted in 1910 and criminalizing the transportation of people across state lines for prostitution or sex crimes, the Castle court held:

> Congress intended in both the FCPA and the Mann Act to deter and punish certain activities which necessarily involved the agreement of at least two people, but Congress chose in both statutes to punish only one party to the agreement. In *Gebardi* the Supreme Court refused to disregard Congress' intention to exempt one party by allowing the Executive to prosecute that party under the general conspiracy statute for precisely the same conduct. Congress made the same choice in drafting the FCPA, and by the same analysis, this Court may not allow the Executive to override the Congressional intent not to prosecute foreign officials for their participation in the prohibited acts.

Id. at 833 (referencing Gebardi v. United States, 287 U.S. 112 (1932)). Regarding the better-known carve-out in the FCPA for "facilitating payments," see *supra* note 24 and corresponding text.

1. Normative Overview

In an increasingly globalized world, awareness of the asymmetry of prosecuting only one side of the bribery transaction continues to grow among both policymakers and the public. Decades of the war on drugs and the post-9/11/2001 focus on international terrorism have led to a growing focus on the role of illicit international transfers of funds. Under President George W. Bush, foreign public corruption began to receive prominent attention as a criminal and economic matter—but also one with major national-security implications. In 2004, Presidential Proclamation 7750 addressed corruption in relation to immigration, giving the president the power to bar entry into the country of individual corrupt aliens or classes of corrupt aliens in order to protect national security.[27] Two years later, the Bush Administration announced that battling ¨large-scale corruption by high-level foreign public officials and target[ing] the fruits of their ill-gotten gains"[28] was part of "our freedom agenda" and of a "National Strategy to Internationalize Efforts Against Kleptocracy."[29]

A decade into the twenty-first century, under the presidential administration of Barack Obama, the battle against foreign corruption had assumed pride of place as a national policy concern. Even before his presidency, then-Senator Obama framed the issue as central. "The struggle against corruption," he said in an address in Kenya, "is one of the great struggles of our time."[30] During the first year of the Obama Administration, Attorney General Eric Holder cast the worldwide anticorruption fight as a matter of human rights and welfare: "When kleptocrats loot their nations'

27. Proclamation No. 7750, 69 Fed. Reg. 2287 (Jan. 12, 2004).

28. Fact Sheet: National Strategy to Internationalize Efforts Against Kleptocracy (Aug. 10, 2006), https://georgewbush-whitehouse.archives.gov/news/releases/2006/08/text/20060810-1.html.

29. President's Statement on Kleptocracy (Aug. 10, 2006), https://georgewbush-whitehouse.archives.gov/news/releases/2006/08/text/20060810.html.

30. President Barack Obama, An Honest Government, A Hopeful Future (August 28, 2006), http://obamaspeeches.com/088-An-Honest-Government-A-Hopeful-Future-Obama-Speech.htm.

treasuries, steal natural resources, and embezzle development aid, they condemn their nations' children to starvation and disease."[31]

2. Jurisdictional Overview

The normative genesis of the Kleptocracy Initiative can be discerned in Attorney General Holder's vision of bribe-takers dooming children to the scourges of poverty,[32] or in presidential pronouncements framing corruption in national security terms, but what is the KI's jurisdictional basis? The answer is not completely clear. In its most distilled form, KI jurisdiction appears to be basic *in rem*. U.S. courts have held that, even if a financial transaction's origin and ultimate destination are both outside the United States, the fact that the funds pass through any part of the U.S. financial system is enough to satisfy the jurisdictional aspects of the money laundering statute, 18 U.S.C. § 1956(a)(2).[33] Thus, the vigorous assertion of extraterritoriality in foreign-corruption-based civil forfeiture actions under the Kleptocracy Initiative is based, in part, on what might be termed a sort of "tag" jurisdiction *over the assets*—once assets "set foot in" the U.S. financial system, even if immediately transferred abroad, they fall within the scope of 18 U.S.C. § 981.[34] Surveying broader bases of jurisdiction under customary

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31. Attorney General Eric Holder, Address to the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009) [hereinafter Address to the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity], http://www.justice.gov/opa/speech/attorney-general-eric-holder-opening-plenary-vi-ministerial-global-forum-fighting.

32. *Id.*

33. United States v. All Assets Held at Bank Julius Baer & Co., 571 F. Supp. 2d 1, 13 (D.D.C. 2008). The main actor in the case, which has still not reached its conclusion, is Pavlo Lazarenko, former prime minister of Ukraine; *see also* United States v. All Assets Held in Account Number XXXXXXXX, 83 F. Supp. 3d 360, 368 (D.D.C. 2015) ("Use of the United States banking system . . . provides sufficient contact between property and the United States for a civil forfeiture action *in rem*.") (emphasis added).

34. *See All Assets Held at Bank Julius Baer*, 571 F. Supp. 2d at 13. The court rejected the argument that when a fund transfer originated in Poland, then went to a U.S. financial institution only as a brief intermediate stop, and from there went to Switzerland, the transfer should be viewed as a single Poland-to-Switzerland transfer. Rather, "[w]ith each EFT [electronic funds transfer] at least two separate transactions occurred: first, funds moved from the originating

and conventional international law, one could make a number of other arguments in support of prescriptive, adjudicative, and enforcement jurisdiction in anticorruption cases.[35]

The most settled form of jurisdiction, based on nationality, posits that the U.S. can seize assets of individuals who are "citizens of the United States or domiciled therein" through an appropriate exercise of judicial fiat.[36] These principles were elaborated in a case that arose from Teapot Dome, the biggest American political scandal before Watergate. There, one Harry M. Blackmer bribed Albert Fall, then-Secretary of the Interior, to convey leaseholds over USG land in Wyoming and California to private oil companies without competitive bidding.[37] The Interior Secretary's

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bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank . . . . While the two transactions can occur almost instantaneously, sometimes they are separated by several days." *Id.* (quoting United States v. Daccarett, 6 F.3d 37, 54 (2d Cir. 1993)). The Daccarett court cited 18 U.S.C. § 981(a)(1)(A). It can be inferred from the district court's holding in *All Assets Held at Bank Julius Baer* that the "several days" language was only meant to underline the fact that each transaction was separate and distinct, and would still be so even where funds were in the U.S. intermediary institution only for a few seconds.

35. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402–04 (1987) (hereinafter "R3FR"); UNITED NATIONS, OFFICE ON DRUGS AND CRIME, UNITED NATIONS CONVENTION AGAINST CORRUPTION 28 art. 42 (2004), https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. *United Nations Convention Against Corruption* permits jurisdiction for the following: Article 42(1)(a) (if corruption or money-laundering offenses occurred on the territory of a state party); Article 42(2) (if corruption "offense is committed *against a national of that State Party*") (emphasis added); Article 42(2)(d) (if corruption is committed "*against the State Party*") (emphasis added); Article 42(6) (permitting residual jurisdiction: "Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.").

36. *See, e.g.*, Blackmer v. United States, 284 U.S. 421, 434 (1932); *see also* Hans Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1048–49 (1961) (discussing whether an alien's residence or domicile in the U.S. provides a reasonable basis for the assertion of legislative jurisdiction with regard to an act committed outside the United States); R3FR § 402 (Nationality).

37. *See* Phil Roberts, *The Teapot Dome Scandal,* WYOHISTORY.ORG, http://www.wyohistory.org/encyclopedia/teapot-dome-scandal (last visited Nov. 13, 2016).

fall from grace resulted in prison time, while Blackmer fled to Paris with ten million dollars and a Norwegian opera singer paramour, continuing to challenge the legality of subpoenas and asset seizure orders against him.[38] The Court held that, following a contempt order, a court "may direct that property belonging to a witness and within the United States may be seized and held to satisfy any judgment which may be rendered against him in the proceeding."[39] So long as reasonable notice was provided to the property owner, jurisdiction *in personam* was proper even though the individual never appeared in court.[40]

In the contemporary view that poverty, corruption, and even climate change can act as powerful destabilizing forces,[41] the evocation of images of dying children also points to a strong, if implicit, assertion of jurisdiction based on a vicarious and inchoate "protective principle."[42] Further, under the "objective territorial

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38. *Blackmer, from Paris Refuge, Sues to Void $60,000 Teapot Fine*, CHICAGO DAILY TRIB., September 3, 1930, at 8.

39. *Blackmer*, 284 U.S. at 435–36.

40. *Id.* at 439 ("The efficacy of an attempt to provide constructive service in this country would rest upon the presumption that the notice would be given in a manner calculated to reach the witness abroad."). The Court upheld a lower court order of $60,000 in fines ($30,000 in each of two cases) and seizure of assets to pay those fines even in the owner's absence. *Id.* at 443. The Blackmer saga stretched on for decades. In 1942, after the revocation of his U.S. passport and indictment on various counts, including income tax evasion and perjury, a "ghost fund" of $10,000,000 in cash and securities was discovered in New York banks and seized by the Office of Foreign Funds Control of the Treasury Department. *Freeze Fortune of Teapot Dome Trial Fugitive: Reveal Blackmer Holds $10,000,000* in U.S. CHICAGO DAILY TRIB., June 23, 1942, at 8, ("The freezing order, which was issued [by the Secretary of the Treasury] on the theory that Blackmer is a 'national' of France altho [sic] a United States citizen, means that the accounts cannot be drawn on without [T]reasury permission.").

41. *See, e.g.*, THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 12 (2015), https://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy.pdf ("Climate change is an urgent and growing threat to our national security, contributing to increased natural disasters, refugee flows, and conflicts over basic resources like food and water."). *See also infra* notes 98–99.

42. U.N. Secretary General Kofi Annan, speaking of the "evil" of corruption, raised the specter of its pernicious effects on human rights and its spreading of misery among developing populations; these pronouncements dovetail with the U.S. invocation of the duty to protect. *See infra* note 96 and accompanying

principle," closely linked to the "substantial effects" doctrine, if the corrupt behavior by foreign officials can be said to negatively affect U.S. interests, then jurisdiction may be proper.[43] Lastly, it is even conceivable that universality principles[44] can serve as a basis for KI enforcement: that is, corruption anywhere is a threat to the rule of law everywhere. For all of the linking of the anticorruption movement to national security (via the argument that international money laundering is a key financing mechanism for terrorism) and to substantial-effects arguments (the destabilizing impact of money laundering of corrupt assets on the U.S. financial and monetary systems, on the one hand, and the furtherance of crime through such mechanisms, on the other), ultimately the invocation of a hybrid "duty to protect" seems the most compelling argument for the Initiative—particularly in light of the broadly protective argumentative frames wielded by the past two U.S. presidential administrations.[45]

The jurisdictional themes raised above—including judicial fiat, extraterritoriality, and various inchoate "protective" justifications—inform and constrain the actual operational reach of the KI. Yet if the KI's goal is to strengthen and/or harmonize the doctrinal and normative link between anticorruption enforcement and related global law enforcement aims like combating terrorism, tax evasion, and money laundering, then the USDOJ must be mindful of the

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text; *see also supra* note 31; R3FR §§ 402–404 (setting forth bases of jurisdiction under customary international law).

43. *See* United States v. Yousef, 327 F.3d 56 (2d Cir. 2003); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (holding that extraterritorial jurisdiction under antitrust law applies where the conduct by a foreign actor in foreign territory had substantial effects on the territory of the United States.).

44. *See* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323 (2001).

45. Assistant Attorney General Leslie Caldwell termed U.S. anticorruption work "not a service . . . to the global community, but rather . . . enforcement action to protect our own national security interests . . . ." Leslie R. Caldwell, Assistant Att'y Gen., Address at Duke University School of Law (Oct. 23, 2014) https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-duke-university-school-law. The core argument seems to be: corruption weakens and destabilizes states, making them breeding grounds for terrorism, piracy, and other destabilizing unlawful activity. *Id.*

optics of selective long-arm reach.[46] We must recall that explicit public announcement of the Kleptocracy Initiative came in July 2010 with Attorney General Holder's address at the African Union Summit in Uganda.[47] It is noteworthy that both the key rhetorical preparation for the Initiative and its actual unveiling occurred where they did—the Initiative's targets have overwhelmingly been in Africa and Asia, and in significant, though lesser, measure in Latin America. Also significantly, the official making both statements was Holder, then head of the USDOJ. Thus, unlike anti-terrorism, which is overwhelmingly framed as a military and intelligence matter—with the asserted need for legal flexibility in addressing these rapidly evolving challenges[48]—anticorruption's

46. "Selective long-arm reach" does not refer solely to the traditional bounds of prosecutorial discretion in individual cases. It also implies an agency's broadly permissive interpretation of its enabling statutes' long arm provisions in certain contexts, alongside far more formalistic, circumspect, and/or limited interpretations of jurisdictional language in related contexts, or as pertaining to certain classes of likely targets of prosecutorial activity *in the same context*. For example, the KI's enabling statutes do not limit KI's reach solely to foreign officials engaged in foreign corruption. *See infra* Section II.B.1. In fact, as the "Kazakhgate" prosecution demonstrates, U.S. citizens may be central figures in a given *foreign* corruption scheme. *See infra* Section II.C.2. In light of the above, an agency's interpretation and implementation of its enabling statutes in a way that aggressively targets foreign corruption, while simultaneously showing lax enforcement of corrupt domestic actors, may threaten the perceived credibility of the otherwise legitimate foreign-oriented efforts.

47. Attorney General Eric Holder, Address at the African Union Summit (Jul. 25, 2010), http://www.justice.gov/opa/speech/attorney-general-holder-african-union-summit. The program's full, formal name is: Kleptocracy Asset Recovery Initiative. The unveiling of the Kleptocracy Initiative is sometimes dated to November 2009. On November 7, 2009, at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity in Doha, Qatar, Holder spoke of anticorruption and asset recovery as a major USDOJ priority but did not formally announce the Kleptocracy Initiative. Address to the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity, *supra* note 31. Assistant Attorney General Lanny Breuer announced the Initiative's first cases targeting Alamieyeseigha in a May 2011 address at the World Bank. Breuer, *supra* note 7.

48. Of course, anti-terrorism efforts also rest on their own elaborate legal foundations, which continue to proliferate without an apparent overarching policy to harmonize the disparate statutory and enforcement schemes. *See, e.g.*, Jordan J. Paust, *Terrorism's Proscription and Core Elements of an Objective Definition*, 8 SANTA CLARA J. INT'L L. 51, 54 (2010); Naomi Norb-

framework seems to be an exclusively legal one. Because of this, clear jurisdictional rules become essential prerequisites for an effective law enforcement mandate.[49] To clarify this jurisdictional scope, the KI must explicitly reach domestic corruption with foreign overtones, including corruption occurring exclusively in "developed" (North–North) contexts;[50] and this will require a far more refined understanding of the principles of concurrent jurisdiction, conflicts jurisprudence, comity, and complementary, all from a

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erg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, 8 SANTA CLARA J. INT'L L. 11, 13–14 (2010); Nicolas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 251 (2004).

49. The decades-long saga of Blackmer is instructive. In *Blackmer*, the nationality and *in rem* bases of jurisdiction bases were far less controversial than the hybrid extraterritoriality underpinning the KI. *See supra* notes 36–39 and corresponding text. Yet in *Blackmer*, the jurisdictional fight rose all the way to the Supreme Court. *See* Blackmer v. United States, 284 U.S. 421 (1932). Such jurisdictional challenges in the kleptocracy context could arguably bog down the KI in jurisdictional battles, draining time and resources from investigation, prosecution, forfeiture, and disposition of assets. One can imagine multiple novel due process or jurisdictional challenges to KI asset forfeiture regimes. Without explicit statements of congressional intent, courts could apply any number of canons to limit jurisdictional reach, resulting in dissonance: some courts upholding assertions of jurisdiction and corresponding asset forfeitures, others not. *See* Morrison v. National Australia Bank Ltd., 561 U.S. 247, 255, 265 (2010) (reaffirming the presumption against extraterritoriality—absent explicit congressional authorization to apply U.S. law abroad, courts will interpret statutes as concerned solely with domestic affairs); E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 258 (1991) (reaffirming the presumption against extraterritoriality absent explicit congressional mandate to the contrary); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409–11, 439 (1964) (upholding and clarifying the "act of state doctrine" that a U.S. court should not sit in judgment of a foreign state's activities in that state); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that conflicts between a domestic statute and international law must be resolved so as to avoid conflicts with international law).

50. A parallel theme can be observed in the ongoing critiques of the International Criminal Court (an international adjudicative body chiefly promoted by the U.S.) prosecutions of predominantly African and other global South exleaders. *See, e.g.*, Asaid Kiyani, *A TWAIL Critique of the International Criminal Court: Contestations from the Global South*, CANADIAN POLITICAL SCIENCE ASSOCIATION, https://www.cpsa-acsp.ca/papers-2011/Kiyani.pdf (last visited Nov. 13, 2016).

multi-jurisdictional, comparative perspective—no simple task. However, the payoff of this effort would be commensurately heightened legitimacy, not only for the KI, but also for U.S. law enforcement efforts. Ultimately, the KI's efficacy and legitimacy hinge on implementation of a coherent normative, jurisdictional, and doctrinal vision.

3. Conceptual or Semiotic Mapping

As with its rich plurality of possible jurisdictional bases, the KI exists within, and in relation to, background anticorruption norms that show significant conceptual variability. The choice of "kleptocracy" as an official term for the USDOJ-KI is significant. First, it is a recent neologism.[51] A typical definition: "a government or state in which those in power exploit national resources and steal; rule by a thief or thieves."[52] But its novelty is not the most striking feature of the term "kleptocracy": while the Initiative pursues corruptly-acquired assets of particular *individuals* whom USDOJ-KI and national leaders often refer to as "kleptocrats," the Initiative's name, semantically, refers to a corrupt *system*—a State whose very structure is built on systemic theft of public resources.

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51. "Kleptocracy" was one of six hundred words that debuted in Random House Webster's College Dictionary in 1996. Jennifer M. Hartman, Note, *Government by Thieves: Revealing the Monsters Behind the Kleptocratic Masks*, 24 SYRACUSE J. INT'L L. & COM. 157, 157 (1997) (citation omitted).

52. *Id.* The word is of Greek origin and means "rule by thieves." *Kleptocracy*, ONLINE ETYMOLOGY DICTIONARY, http://www.etymonline.com/ index.php?term=kleptocracy (last visited Nov. 13, 2016); *see also -cracy*, ONLINE ETYMOLOGY DICTIONARY, http://www.etymonline.com/index. php?term=-cracy&allowed_in_frame=0 (last visited Oct. 20, 2016) (describing the Greek origin of "*kratia*"); *Kleptomania*, ONLINE ETYMOLOGY DICTIONARY, http://www.etymonline.com/index.php?term=kleptomania&allowed_in_frame=0 (last visited Oct. 20, 2016) (discussing the Greek origin of "*kleptes*"). It has been attested as early as 1819 in Spain. *Kleptocracy*, *supra* note 52. "Kleptocrat" is a derivative coinage formed from "kleptocracy," analogous to the back-formation of "bureaucrat" from "bureaucracy."

TABLE 1. CORRUPTION AND KLEPTOCRACY: SELECTED TERMINOLOGY

TERM & DEFINITION	SOURCE
Corruption. "A fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others; an act carried out with the intent of giving some advantage inconsistent with official duty or the rights of others."	Black's Law Dictionary 423 (10th ed. 2014)
Corruption. "[A]n insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish."	Secretary-General Kofi Annan, Foreword to UNCAC, iii
Corruption. N/A [Convention contains no definition.]	United Nations Convention Against Corruption
Grand Corruption. The "steal[ing] or extort[ion]" of "public assets . . . by prominent public office holders," then "mostly laundered through financial institutions," especially banks.	Theodore S. Greenberg, et al., *Stolen Asset Recovery* (World Bank and UNODS, StAR, 2012)
Indigenous Spoliation. "[T]he destruction of the sum total of a state's endowment, the laying waste of the wealth & resources belonging by right to her citizens, & the denial of their heritage."	Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation* (1995) 58
Kleptocracy. "[L]arge-scale corruption by high-level foreign public officials."	President George W. Bush, Statement on Kleptocracy, Aug. 10, 2006
Kleptocracy. "Rule by thieves; a government in which the officials are thieves . . . [I[t arises if the holders of office take office in order to use its authority for their personal ends, or, after taking their offices, they use them to benefit themselves and their political and personal	Steven Michael Sheppard, Bouvier Law Dictionary, 2012

allies rather than to the benefit of the governed."	
Kleptocracy. "Kleptocrat is usually defined as a ruler whose primary goal is personal enrichment. . . Similar to corruption, kleptocracy refers to the rent-seeking activities of the government. However, although the literature of corruption usually studies low or medium rank government officials, the literature of kleptocracy focuses on sovereign rulers."	C. Simon Fan, *Kleptocracy and Corruption*, 34 J. COMPAR. ECON. 57 n.1
Kleptocrats. "When kleptocrats loot their nations' treasuries, steal natural resources, and embezzle development aid, they condemn their nations' children to starvation and disease."	Eric Holder, Address to Global Forum, Doha, Qatar, Nov. 7, 2009
Patrimonicide. "The word . . . seems appropriate for this new international economic crime. The word comes from . . . the Latin words 'patrimonium,' meaning 'the estate or property belonging by ancient right to an institution, corporation, or class' . . . ; and 'cide,' meaning killing."	Kofele-Kale, *Patrimonicide* at 57–58
Politically Exposed Persons. "[I]ndividuals who are, or have been, entrusted with prominent public functions, such as heads of state or government. [F]inancial institutions [are] also expect[ed] to treat a prominent public official's family and close associates as PEP's." (at 25; n.36 & n.37 cite to FATF Glossary; Article 52(1), UNCAC)	Greenberg et al., *Stolen Asset Recovery*
Presidential Graft. [Used more or less synonymously with "indigenous spoliation" and "patrimonicide."]	Kofele-Kale, *Patrimonicide* (1995) 1
Specified Unlawful Activity. [Includes] "bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official."	18 U.S.C. § 1956(c)(7)(B)(iv)
Stolen Assets. N/A [No definition provided]	Stolen Asset Recovery Initiative (StAR)

The Initiative's name thus implies an invidious characterization of an entire system of government, evoking the specter of a "failed" or even "outlaw" State.[53]

Its political-rhetorical character notwithstanding, the term "kleptocracy" has begun to find its way into case law. The Ninth Circuit, in a 1988 immigration case, held that beatings and other mistreatment by government security forces to extort money from a person "may constitute persecution on account of political opinion" pursuant to the Immigration and Nationality Act.[54] In so holding, the court explained: "The record also contains substantial evidence that the Haitian government under Duvalier operated as a 'kleptocracy,' or government by thievery" at all levels.[55]

Black's Law Dictionary defines "corruption" as "[a] fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others; an act carried out with the intent of giving some advantage inconsistent with official duty or the rights of others."[56] "Kleptocracy" has been defined as "Rule by thieves" and "a government in which the officials are thieves."[57] The related term, "grand cor-

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53. *See, e.g.*, GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL ORDER (2004).

54. Desir v. Ilchert, 840 F.2d 723, 724 (9th Cir. 1988).

55. *Id.* at 727. The Ninth Circuit further noted that ordinary agents of the Ton Ton Macoutes security forces often went unpaid, a situation ripe for pervasive violent extortion. *Id.* The court also noted an earlier federal district court decision that recognized the political nature of virtually any interaction between a citizen and the security forces: "To challenge the extortion by which the Macoutes exist is to challenge the underpinnings of the political system. Accordingly, to resist extortion is to become an enemy of the government." *Id.* (quoting Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 498–500 (S.D. Fla. 1980)).

56. *Corruption*, BLACK'S LAW DICTIONARY (10th ed. 2014).

57. *Kleptocracy*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Stephen Michael Sheppard ed. 2012). The definition continues: "[I]t arises if the holders of office take office in order to use its authority for their personal ends, or, after taking their offices, they use them to benefit themselves and their political or personal allies rather than to the benefit of the governed." *Id.* It is not difficult to see just how overbroad this definition may be. Interestingly, the leading legal dictionary has not, as of its tenth edition, yet registered the terms "kleptocracy" or "kleptocrat," although there is an entry for "kleptomania," defined as "[a] compulsive urge to steal, esp[ecially] without economic motive." *Kleptomania*, BLACK'S LAW DICTIONARY (10th ed. 2014). The lack of econom-

ruption," has been defined as "st[ealing] or extort[ion]" of "public assets . . . by prominent public office holders," then "mostly laundered through financial institutions," especially banks.[58] Kleptocratic corruption is also known as "indigenous spoliation" or, in the coinage of Cameroonian-born legal scholar Ndiva Kofele-Kale, "patrimonicide"—terms that evoke the vast scale of this form of corruption involving "stupendous . . . amounts of wealth."[59] "Indigenous spoliation," in Kofele-Kale's usage, is "the illegitimate use of power for private ends by . . . heads of states . . . and other *high-ranking*[] leaders."[60] Table 1, an overview of definitions of key anticorruption terms, highlights the terminological and conceptual difficulties in this emerging area of the law.

4. Institutional/Prosecutorial Overview

The Initiative has its administrative home in the Asset Forfeiture and Money Laundering Section of the USDOJ's Criminal Division. The principal procedural arrow in its quiver is civil asset forfeiture, sometimes referred to as "non-conviction based" forfeiture.[61] Following intensive investigation, usually in partnership with another agency such as the FBI, USDOJ-KI prosecutors bring a civil forfeiture action in federal court.[62]

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ic motive or an institutional context puts this definition in the realm of psychological disorders and clearly has little to do with the notion of kleptocracy as used in the anticorruption realm.

58. GREENBERG, ET AL., *supra* note 8, at xiii.

59. Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation,* 28 VAND. J. TRANSNAT'L L. 45, 48, 58–59 (1995).

60. *Id.* at 60 (emphasis added).

61. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF STATE, *supra* note 7, at 5.

62. USDOJ-KI typically enter into a collaborative relationship with (1) Department of Justice, Criminal Division, Office of International Affairs; (2) Department of Justice, Federal Bureau of Investigation (FBI); or (3) Department of Homeland Security, Immigration and Customs Enforcement (ICE) Homeland Security Investigation. The investigative partner can also be foreign (an agency of a government abroad) or international (a treaty body such as the United Nations or the World Bank). Where the partner is foreign, the USDOJ Office of International Affairs receives and handle such requests. Drawing on the investigative work conducted, USDOJ-KI prosecutors then bring a civil forfeiture action in federal court, asserting *in rem* jurisdiction over assets believed by the prosecutors to be traceable to foreign corruption. Given that jurisdiction is *in*

USDOJ-KI began with over $1 million in twin forfeitures against DSP, its first target.[63] Other forfeitures have included $115 million in an action involving the regime of Kazakhstan; $30 million from "Teodorín" Obiang of Equatorial Guinea; $28.7 million from former South Korean president Chun Doo Hwan.[64] In just over a half-decade of activity, the Initiative has forfeited several billions of dollars in corruptly acquired assets.[65] The substantial volume of assets obtained (even if a tiny fraction of the total volume of corruption) underlines a striking procedural characteristic of the USDOJ-KI's activity: unlike conventional civil litigation, where collecting on a judgment is the final (often extremely difficult) procedural step, here, prosecution *begins* with the funds—over which the law enforcement bodies and federal court exercise jurisdiction.

After forfeiture, the destination of assets presents an unclear picture. Some funds have been repatriated, as for instance just under $30 million to the government of South Korea.[66] Some funds have been returned in less conventional, more innovative ways, as for instance some $115 million in the Kazakhstan forfeiture given to needy populations in that country through an NGO created expressly for that purpose. Problematically, however, the majority of the funds remain in USG accounts, unrepatriated or otherwise unrestored to their source countries.

B. Legal Authorities

The USDOJ-KI operates in a complex landscape of anticorruption statutes, treaties, agencies, and practices that have arisen

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rem, the defendant in such cases is typically the property. The very first USDOJ-KI case, against Nigeria's DSP, was *United States v. The Contents of Account Number Z44-343021 Held at Fidelity Brokerage Services, L.L.C., Boston, Massachusetts In the Name of Nicholas Aiyegbemi D/B/A Inadinov and Co. OAO and All Assets Traceable Thereto*, No. 1:11-cv-10606-RWZ (D. Mass. 2012).

63. DOJ 13-628 (2013), 2013 WL 2366183; DOJ 12-827 (2012), 2012 WL 2454717. *See also supra* note 1 and corresponding text.

64. DOJ 15-266 (2015), 2015 WL 910102; DOJ 15-1509 (2015), 2015 WL 8289228; DOJ 14-1114 (2014), 2014 WL 5073696.

65. FIN. CRIMES ENF'T NETWORK, *supra* note 18. The website refers to "the annual forfeiture of more than $1.5 billion in criminal assets . . . ." *Id.*

66. DOJ 15-266 (2015), 2015 WL 910102.

mostly in the past two decades. It also stands at the intersection of multiple law-enforcement policies, among them the war on drugs, prosecution of organized crime, anti-terrorism, and the fight against bribery and other official corruption. A brief overview of the domestic, international, and foreign legal regimes affecting the Initiative follows.

1. U.S. Federal Statutory Framework

The domestic statutory framework for the USDOJ-KI has both procedural and substantive components; further layers of complexity are added by its hybrid use of both criminal and civil actions and its interaction with foreign law. Procedurally, USDOJ-KI prosecutors rely mainly on 18 U.S.C. Section 981, the civil forfeiture statute. This statute provides a civil remedy even where the predicate offense giving rise to forfeiture is criminal.[67] Furthermore, the substantive provisions themselves, in turn, have underlying predicates, as will be seen below. Thus the statutory scheme is marked by both the relative ease and simplicity of civil forfeiture and by the complexity and interlocking nature of two separate levels of predicate substantive offenses. Section 981 was originally enacted in 1986 as Public Law 99-570 Subsection (a)(1)(A), which broadly subjects to forfeiture "[a]ny 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."[68] Where the underlying criminal conduct occurred outside of the United States, subsection (a)(1)(C) makes civil forfeiture applicable to "any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense."[69]

67. Note, too, the codification of civil asset forfeiture within Title 18, governing criminal offenses.

68. 18 U.S.C. § 981(a)(1)(A) (2013).

69. *Id.* § 981(a)(1)(C).

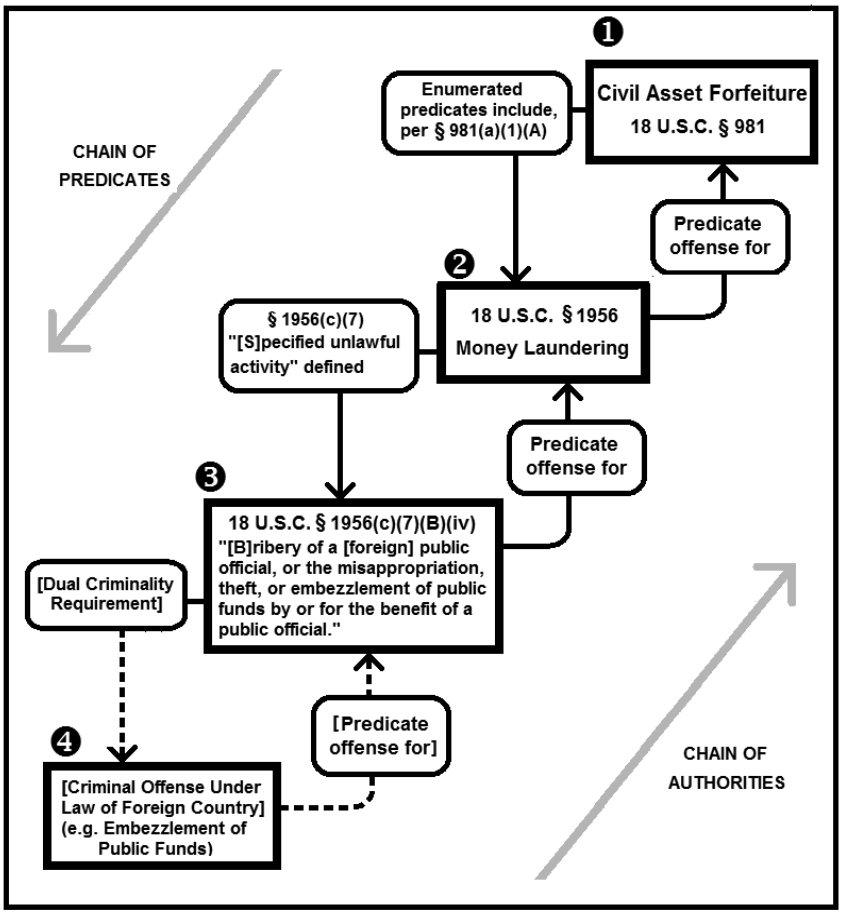

Fig. 1. Typical predicate-offense structure for Kleptocracy Initiative actions. The procedural nature of the USDOJ-KI action is (1), whose predicate offense is (2), which, in turn, has an underlying predicate of (3). Where dual criminality is required, or at least asserted, the foreign offense is (4). *Diagram created by the author.*

The "specified unlawful activity" provision of subsection 1956(c)(7) acts as a key unlocking the door to forfeiture prosecutions under literally hundreds of separate statutes. As of 2015, these ultimate predicate offenses numbered 236, any one of which may serve as a basis to trigger civil asset forfeiture proceedings connected with money-laundering offenses.[70] The key predicate

70. U.S. DEP'T OF JUSTICE, ASSET FORFEITURE AND MONEY LAUNDERING STATUTES app. A (2015), http://www.justice.gov/sites/default/files/criminal-afmls/legacy/2015/04/24/statutes2015.pdf. The overwhelming majority of the underlying offenses are located within Title 18, governing criminal offenses; a

offenses, from a USDOJ-KI perspective, are enumerated in subsection (a)(1)(A): Title 18, Sections 1956, 1957, and 1960.[71] Section 1956 defines money laundering as a financial transaction with property that "represents the proceeds of some form of unlawful activity."[72] A money launderer "conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate," technical skills that can be crucial to the success of criminal enterprises.[73]

The most potent provision of section 1956 for USDOJ-KI prosecutors defines "specified unlawful activity . . . with respect to a financial transaction occurring in whole or in part in the United States," as, *inter alia*, "bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official."[74] The latter is one of seven enumerated types of predicate "offense[s] against a foreign nation" "with respect to a financial transaction occurring in whole or in part in the United States."[75] Thus, section 1956, the chief predicate for section 981 civil forfeiture, in defining and criminalizing money laundering, derives the prohibited nature of the conduct from a further predicate—essentially, foreign corruption.

What is not entirely clear, however, is whether, for the sort of forfeiture actions undertaken by USDOJ-KI to succeed, a dual-criminality requirement applies. Under such a requirement, the underlying predicate offense must be a crime under both the law of the United States and of the foreign State in which the illicit en-

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significant number are in Title 21, governing food and drugs; nine state-law felonies including murder, robbery, and kidnapping are covered as well.

71. 18 U.S.C. § 1956 concerns money laundering, § 1957 engaging in monetary transactions in property derived from specified unlawful activity, and § 1960 prohibits unlicensed money transmitting business.

72. 18 U.S.C. § 1956(a)(1) (2013).

73. PRESIDENT'S COMM'N ON ORG. CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 7 (1984), https://www.ncjrs.gov/pdffiles1/Digitization/166517NCJRS.pdf.

74. 18 U.S.C. § 1956(c)(7)(B)(iv) (2013).

75. *Id.* § 1956(c)(7)(B)(i)–(iii), (v)–(vii), broadly, deal with (i) controlled substances; (ii) murder, kidnapping, and other violent crimes; (iii) fraud against a foreign bank; (v) smuggling or export-control violation involving items subject to the U.S. Munitions List or Export Administration Regulations control; (vi) an extraditable offense under applicable treaty; and (vii) trafficking in persons, selling or buying of children, and transporting persons for commercial sex acts.

richment occurred.[76] Government pleadings in USDOJ-KI actions appear to proceed on the assumption that there is indeed a dual-criminality requirement; for instance, the "Basis for Forfeiture" section of the Abacha complaint begins:

> At all times relevant to this complaint, conduct constituting theft; conversion; fraud; extortion; and the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official were criminal offenses under Nigerian law, as enumerated in the Nigerian Criminal and Penal Codes, including but not limited to Nigerian Criminal Code Act 1990, CAP. 77[sic], Part 3, Chapters 12 and 34, and the Nigerian Penal Code Law 1963, CAP. 89 (1987), Chapters X, and XIX.[77]

The complaint then appends Attachment A, "Selected Excerpts of Applicable Nigerian Law."[78]

Moreover, case law supports the proposition that where a forfeiture action is brought in relation to section 1956, the underlying conduct must be a violation of law in the country where it occurred.[79] The violation must also be equivalent to a felony under U.S. law.[80]

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76. UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 35, at 30 art. 43 ¶ 2 addresses the dual-criminality requirement, imposing a flexible test for satisfying the requirement. See *infra* note 95 and corresponding text.

77. Complaint for Forfeiture *In Rem* at 33–34, United States v. All Assets Held in Account Number 80020796, No. 1:13-cv-01832-JDB (D.D.C. Nov. 18, 2013), https://www.justice.gov/iso/opa/resources/765201435135920471922.pdf.

78. *Id.* at Attachment A: Select Excerpts of Applicable Nigerian Law.

79. United States v. 2291 Ferndown Lane, No. 3:10–CV–0037, 2011 WL 2441254, at *4 (W.D. Va. June 14, 2011). The district court specified that "[f]or all presently relevant purposes, 'specified unlawful activity' requires an 'offense against a foreign nation.'" *Id.* (quoting 18 U.S.C. § 1956(c)(7)(B)(iv). . . .")

80. *Id.* (citing 18 U.S.C. § 981(a)(1)(B)(ii)).

TABLE 2. COMPARISON OF CRIMINAL FORFEITURE AND CIVIL ASSET FORFEITURE

	Criminal Forfeiture	**Civil Asset Forfeiture**
Type of jurisdiction	In personam	In rem
Criminal conviction required?	Yes	No
Burden of proof	Beyond a reasonable doubt	Preponderance of the evidence *or* Probable cause ("Customs carve-out")
Substitution of assets allowed?	Yes	No
Money judgments allowed?	Yes	No

Civil forfeiture *in rem* offers prosecutorial and judicial efficiencies. First, personal jurisdiction over a defendant is not needed; *in rem* jurisdiction suffices—the court exercises control over the property.[81] Since the property is treated as guilty through its link to the predicate offense, as established by a preponderance of the evidence, actions can go forward even when a wrongdoer is a fugitive, refuses to appear, or is deceased.[82] A notable advantage of criminal forfeiture is that the defendant's assets are considered fungible: the government can forfeit the defendant's legitimate property if the illicit assets cannot be located.[83] In civil forfeiture, jurisdiction is *in rem* and only reaches the particular assets. Thus *in rem* proceedings adjudicate the "guilt" of the property; *sensu stricto*, such proceedings are not a forum to adjudicate the underlying corrupt act, with the punitive, educational, and spotlight effects such prosecution could offer. Complicating matters further, courts' apparent insistence that, to justify civil asset forfeiture, the

81. Benjamin B. Wagner, *Asset Forfeiture and International Cooperation*, U.S. DEP'T OF JUSTICE, http://www.americanbar.org/content/dam/aba/directories/roli/raca/asia_raca_apec_asset_forfeiture.authcheckdam.pdf (last visited Nov. 13, 2016).

82. *Id.* at 13; *see also supra* Section II.A.2.

83. Wagner, *supra* note 81.

offense against the foreign nation be equivalent to a U.S. felony opens the possibility of due process challenges based on the discrepancies in respective evidentiary burdens and procedural protections between civil and criminal prosecutions.[84] Table 2 charts several key differences between civil and criminal forfeiture in this regard.[85]

2. Complementary International or Foreign Legal Frameworks[86]

The first international convention on corruption came from Latin America, the Inter-American Convention Against Corruption (IACAC), adopted in March 1996, and entered into force in March 1997.[87] The United States is one of 34 IACAC signatory states.[88] Almost immediately after, the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed in December 1997, entering into force in February 1999.[89] The United States is one of 41 signatory states.[90]

However, the most important international legal regime in the anticorruption fight is the United Nations Convention Against Corruption ("UNCAC"), which on entering into force in 2005 became the most ambitious multilateral effort to date to combat grand

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84. *See supra* notes 80–82 and accompanying text; *infra* Section III.G.

85. *See infra* Section III.G, for further elaboration.

86. This Note's focus on U.S. and related common law legal structures precludes a comprehensive treatment of international or comparative anticorruption efforts, which lie far outside its scope.

87. Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, O.A.S.T.S. No. B-58.

88. For a list of the signatory states, see ORGANIZATION OF AMERICAN STATES, *Signatories and Ratifications*, http://www.oas.org/juridico/english/Sigs/b-58.html (last visited Nov. 13, 2016).

89. ORG. FOR ECON. CO-OPERATION AND DEV., CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 6–19 (Nov. 21, 1997), http://www.oecd.org/daf/antibribery/ConvCombatBribery_ENG.pdf.

90. All 35 OECD member states, and 6 non-member states, are signatories for a total of 41. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, ORG. FOR ECON. CO-OPERATION AND DEV., http://www.oecd.org/corruption/oecdantibribery convention.htm (last visited Nov. 13, 2016).

corruption and the first global, legally binding framework to that end. Of particular importance under the UNCAC are Article 31, obligating each state party to take necessary measures to enable tracing, freezing, and confiscation of the proceeds of corruption; Article 57, governing return of confiscated assets; [91] and Articles 54 and 55, establishing an international regime of state-to-state mutual legal assistance ("MLA"). MLA can involve enforcement of foreign orders relating to corrupt assets as well as the initiation of freezing, seizure, and other proceedings against the proceeds of crimes of corruption by means of judicial processes in the requested State. The UNCAC framework is even influential in the U.S. domestic legal context. For instance, when Congresswoman Sheila Jackson Lee introduced a House Resolution to use the Abacha forfeiture assets to create a fund for Boko Haram terror victims in Nigeria, the draft legislation began by invoking the Convention.[92] The USDOJ-KI also prominently features the UNCAC as its basic international framework.[93]

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91. Article 31 obligates State Parties to take these steps "to the greatest extent possible," a standard that arguably renders this and other UNCAC measures more aspirational than prescriptive. UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 35, at 24–25 art. 31; *see also* UNITED NATIONS, OFFICE ON DRUGS AND CRIME, TECHNICAL GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 66–67 (2009), http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf ("Most countries have already established regulatory and supervisory bodies with the responsibility of imposing standards of conduct on financial institutions, such as banks, insurance companies, securities firms and currency exchanges. . . . [Therefore, to effectuate the aims of UNCAC] an organizational model must be carefully designed to avoid the danger of conflicting instructions to institutions, and duplication of the examination of capacity and propriety, corporate governance controls and records.").

92. "Whereas the United Nations Convention Against Corruption (UNAC) [sic] obliges state parties to implement a wide and detailed range of anticorruption measures affecting their laws, institutions and practices." Expressing the Sense of the House of Representatives Regarding the Victims of the Terror Protection Fund, H.R. Res. 528, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-resolution/528/text. The resolution also cites "UNCAC's asset recovery provision[, which] is robust and delineates a global asset recovery framework and strategy . . . ." *Id.* On the Abacha forfeiture, *see infra* Section II.C.1.

93. This is visible in USDOJ-KI public materials, such as an entire page featuring USDOJ-KI activities under the heading, "U.S. Support for Asset Re-

One UNCAC provision particularly significant to the USDOJ-KI comes at the start of Chapter IV (International Cooperation): Article 43, Section 2 addresses dual criminality—that is, that predicate offenses which are crimes in the State Party requesting assistance also be crimes in the State Party of whom assistance is requested.[94] Where dual criminality is required, Section 2 deems the requirement fulfilled as long as the conduct underlying the offense is criminal in both State Parties, even if categorized or named differently in each State Party.[95]

The UNCAC print edition includes this call to arms by then Secretary-General Kofi Annan:

> Corruption is an insidious plague . . . . This evil phenomenon is found in all countries . . . but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment.[96]

Notably, no definition of corruption appears in this foreword, nor the UN General Assembly Resolution "[a]dopt[ing]" the Convention,[97] nor the Convention's Preamble, nor even the defini-

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covery and the Implementation of Chapter V of the UNCAC." U.S. DEP'T OF JUSTICE & U.S. DEP'T OF STATE, *supra* note 7, at 5.

94. UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 35, at 30.

95. *Id.* On whether a dual-criminality requirement applies to USDOJ-KI actions, see *supra* Section II.B.1.

96. UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 35, at iii.

97. *Id.* at 2 ("The General Assembly . . . *Adopts* the United Nations Convention against Corruption annexed to the present resolution, and opens it for signature at the High-level Political Signing Conference to be held in Merida, Mexico, from 9 to 11 December 2003, in accordance with resolution 57/169[.]"). While the legal effect of U.N. General Assembly resolutions is the subject of some scholarly and diplomatic controversy, for the most part such resolutions (unlike those of the U.N. Security Council) are not understood to have binding force. LORI F. DAMROSCH, ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 265 (5th ed. 2009).

tional provisions of Article 2.[98] The general UNCAC stance of deferring to (and facilitating enforcement of) the statutory schemes of member states helps mitigate the omission. Yet the absence is still glaring, exemplifying the legal indeterminacy affecting anti-corruption legal regimes.

Jointly with The World Bank, the United Nations created an administrative entity to serve the anticorruption work of all State Parties pursuant to the UNCAC: the Stolen Asset Recovery Initiative ("StAR").[99] StAR serves in some senses as both a multilateral equivalent and as an aid and resource to such national enforcement mechanisms as the Kleptocracy Initiative in the United States. The Financial Action Task Force ("FATF"), "an intergovernmental body established in 1989," aims "to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system."[100] FATF's formal recommendations are influential in shaping national policies against money laundering and other, related crimes.[101]

In addition to multilateral legal frameworks for international anticorruption action, foreign law is also part of the anticorruption landscape. Indeed, the U.S. is far from alone in creating a legal regime targeting the financial proceeds of criminal activity. In

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98. UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 35, at iii–iv, 1–3, 5–8.

99. *Stolen Asset Recovery Initiative*, WORLD BANK & UNITED NATIONS OFFICE ON DRUGS AND CRIME, http://star.worldbank.org/star (last visited Nov. 14, 2016).

100. *Who We Are*, FATF, http://www.fatf-gafi.org/about/ (last visited Nov. 14, 2016).

101. *Id.* The Recommendations were originally issued in 1990 and amended in 1996, 2001, 2003 and 2012.

> The FATF monitors the progress of its members in implementing necessary measures, reviews money laundering and terrorist financing techniques and counter-measures, and promotes the adoption and implementation of appropriate measures globally. In collaboration with other international stakeholders, the FATF works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse.

Id.

the United Kingdom, whose legal system is most closely aligned with that of the U.S., the Proceeds of Crime Act 2002 ("POCA") placed a sweeping array of new tools in government hands, including anti-money laundering measures and non-conviction based (i.e. civil) forfeiture, among others.[102]

The references to foreign law in USDOJ-KI prosecutions also evidence the proliferation of foreign legal mandates against corruption. For instance, in one of the DSP forfeiture actions, the government's affidavit in support of its verified complaint *in rem* cites Nigerian law with thoroughness and specificity.[103] Given the numerically small number of prosecutions under the KI, there is insufficient empirical data from which to draw conclusions regarding comparative advantages or deficiencies in other State anticorruption laws. But the need seems apparent for a workable complementary regime cognizant of the interrelationships between multiple vertical (domestic–international) and horizontal (domestic–foreign) enforcement vectors.

C. Three Representative USDOJ-KI Prosecutions

What does a USDOJ-KI prosecution look like in the real world? Key characteristics and issues in the operation of the Kleptocracy Initiative emerge from a brief overview of actual forfeiture actions targeting corruption in Nigeria, Kazakhstan, and Equatorial Guinea—showing success in obtaining forfeiture of assets but disparities in the later disposition of the assets.[104] The discrepancy in post-forfeiture disposition of funds is significant because it can

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102. COLIN KING & CLIVE WALKER, DIRTY ASSETS: EMERGING ISSUES IN THE REGULATION OF CRIMINAL AND TERRORIST ASSETS 3 (Colin King & Clive Walker eds., 2014). The UNDOC "TRACK" portal allows one to examine the national legislation of over 100 countries regarding corruption-related offenses. News of the portal's debut can be found at https://www.unodc.org/unodc/en/corruption/news-track.html. The actual link to the TRACK portal is http://www.track.unodc.org/Pages/home.aspx.

103. Affidavit of Cynthia Coutts, Special Agent, Immigration and Customs Enforcement (ICE), United States v. The Contents of Account Number Z44-343021 Held at Fidelity Brokerage Services, LLC, No. 11-10606-RWZ, 4–5 (D. Mass. Apr. 8, 2011). Cited law included the Nigerian Constitution; the Code of Conduct for Public Officers, contained in a schedule to the Constitution; and various criminal statutes.

104. *See infra* Sections II.C.1, II.C.2, II.C.3.

undermine the legitimacy and long-term viability of the USDOJ-KI as a global legal enforcement mechanism.

1. Nigeria: Oil Riches in Africa's Giant

The West African country of Nigeria is the continent's giant; its population of some 182 million is the eighth largest in the world.[105] The Niger Delta, a region not unlike Louisiana on the Gulf of Mexico, contains considerable oil wealth.[106] Nigeria is emblematic of what some observers have called the "resource curse."[107] The concept was originally used by political-economy scholars to highlight a paradox that countries endowed with such resources tend to be poorer than countries that lack them—but it is now widely used in connection with risk factors for corruption.[108] One scholar notes, "Mineral dependence turns out to be a curse not just in terms of economic growth, but also in terms of risks of violent conflict, greater inequality, less democracy and more corruption."[109]

DSP was elected governor of Bayelsa State, Nigeria in 1999 and reelected in 2003.[110] Midway into his second term, he was impeached and was arrested in London in September 2005 on money-laundering charges; police found some $1.5 million in unaccounted cash among his personal effects.[111] In the following

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105. *Nigeria*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html (last visited Nov. 15, 2016) (click on "People and Society :: NIGERIA" drop down menu).

106. *Nigeria*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html (last visited Nov. 15, 2016) (click on "Economy :: NIGERIA" drop down menu).

107. Nicholas Shaxson, *Oil, Corruption, and the Resource Curse,* 83 INT'L AFFAIRS 1123–40 (2007); *see also* Carlos Leite & Jens Weidmann, *Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth* 9 (1999), https://www.imf.org/external/pubs/ft/wp/1999/wp9985.pdf.

108. *See* RICHARD M. AUTY, SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS 1–3 (1994); TERRY LYNN KARL, THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES 3–5, 241–42 (1997).

109. Shaxson, *supra* note 107, at 1123.

110. Anayo Onukwugha & Osa Okhomina, *Goodnight Alamieyeseigha,* LEADERSHIP (Oct. 11, 2015, 3:47 AM), http://leadership.ng/news/466258/goodnight-alamieyeseigha.

111. *Id.*

decade, DSP would become the USDOJ-KI's first target. USDOJ-KI prosecutors lodged a forfeiture action in federal district court in Massachusetts, and in June 2012 obtained a motion for default judgment and a forfeiture order authorizing the seizure of just over $400,000 in assets in Fidelity Investment brokerage accounts traceable to DSP.[112] The next step in the Kleptocracy Initiative's prosecution of DSP occurred the following year, in May 2013, in the federal district court in Maryland. There, the court ordered the forfeiture of a home in Rockville, Maryland, valued at $700,000 and which had been purchased with funds allegedly traced to corrupt conduct by DSP.[113] The proceeds of these twin forfeitures, valued at over 1 million dollars, apparently still sit in USDOJ accounts, unrepatriated and otherwise unreturned.[114]

Far greater in scale was the USDOJ-KI prosecution launched against funds originating in corruption by Nigeria's former dictator, Gen. Sani Abacha, ultimately leading to forfeiture of over $458 million.[115] In October 2015, Congresswoman Sheila Jackson Lee (D-Tex.) proposed legislation to turn the Abacha forfeiture into a fund to benefit victims of terror in Nigeria, in particular those victimized by Boko Haram.[116] The ultimate destination of these funds remains uncertain. A Nigerian NGO, through its U.S. counsel, wrote to Attorney General Holder in 2014 "respectfully request[ing] that the [USDOJ] establish a general process for the repatriation of assets seized as part of its Kleptocracy Initiative"—eloquently expressing the gap this Note addresses.[117]

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112. Press Release, U.S. Dep't of Justice, Department of Justice Forfeits More Than $400,000 in Corruption Proceeds Linked to Former Nigerian Governor (June 28, 2012), http://www.justice.gov/opa/pr/2012/June/12-crm-827.html.

113. Christopher M. Matthews, *U.S. Seizes House of Allegedly Corrupt Nigerian Official*, WALL ST. J. (May 31, 2013, 4:11 PM), http://on.wsj.com/143RQZI.

114. *Diepreye Alamieyeseigha,* WORLD BANK & UNITED NATIONS OFF. ON DRUGS AND CRIME, STAR DATABASES, http://star.worldbank.org/corruption-cases/node/18493 (last visited Nov. 15, 2016).

115. DOJ 14-230 (2014), 2014 WL 844298.

116. Expressing the Sense of the House of Representatives Regarding the Victims of the Terror Protection Fund, H.R. Res. 528, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-resolution/528/text

117. Letter from Alexander W. Sierck & Nicholai Diamond to Att'y Gen. Eric Holder, *supra* note 19.

2. Kazakhstan: Oil and Power in Post-Soviet Central Asia

Kazakhstan, formerly one of the Central Asian republics within the Soviet Union, is a territorial giant with a population of 18.1 million, of whom some 70% are Muslim.[118] The combination of petroleum resources and extensive cattle-raising lands makes for a poetic analogy to Texas and the American "Wild West." Kazakhstan was the last of the former Soviet republics to gain independence, doing so in December 1991.[119] President Nursultan Nazarbayev has been Kazakhstan's only head of state in the 25 years since independence.[120]

American businessman James Giffen had been active in Kazakhstan since 1992 and in the former Soviet Union for over two decades prior.[121] Giffen eventually became an adviser, and chief oil negotiator, to President Nazarbayev.[122] Giffen was arrested and prosecuted in 2003 in a case that became known as "Ka-

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118. *Kazakhstan Physiographic Map*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/resources/cia-maps-publications/map-downloads/Kazakhstan_physiography.pdf (last visited Nov. 14, 2016); *see also Kazakhstan*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/kz.html (last visited Nov. 14, 2016). At just over 1 million square miles, it has the largest territory of any of the former Soviet republics besides Russia and ranks ninth among all states in the world. *Id.*

119. *Kazakhstan*, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/place/Kazakhstan/Cultural-life#toc214566 (last visited Nov. 15, 2016).

120. *Kazakhstan*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html (last visited Nov. 20, 2016) (click on "Government :: KAZAKHSTAN" drop down menu).

121. Robert Winnett, *George Clooney Film Inspiration 'Mr Kazakhstan' Finally Brought to Justice*, THE TELEGRAPH (Aug. 13, 2010, 9:00 PM), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7943201/George-Clooney-film-inspiration-Mr-Kazakhstan-finally-brought-to-justice.html. The 2005 feature film SYRIANA, starring George Clooney, is based on the account of Giffen by an ex-intelligence officer. ROBERT BAER, SEE NO EVIL: THE TRUE STORY OF A GROUND SOLDIER IN THE CIA'S WAR AGAINST TERRORISM (2003); SYRIANA (Warner Bros. 2005).

122. *See* Winnett, *supra* note 121.

zakhgate."[123] The criminal charges were violations of (1) the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-2; (2) the wire fraud statute, 18 U.S.C. § 1343; and (3) U.S. money laundering laws, 18 U.S.C. §§ 1956 and 1957.[124] The heart of the case was the charge that Giffen had made some $80 million in bribe payments on behalf of U.S. oil companies to the Kazakh government and officials in return for oil concessions.

Giffen fought back doggedly over the course of a lengthy prosecution that stretched out for over seven years, witnessed multiple changes in prosecutors, and involved dozens of court appearances.[125] From the outset, his defense was that his conduct was known and approved at the highest levels of the USG, including the CIA.[126] His defense sought disclosure of documents he said would corroborate his claims. The documents were never publicly disclosed, but the judge saw them and stated they showed Giffen had "advanced the strategic interests of the United States and American businesses in Central Asia."[127] Seemingly vindicating Giffen's heroic self-portrait, the judge stated, "How does Mr. Giffen reclaim his reputation? This court begins by acknowledging his service."[128] In the words of one observer, "The biggest [FCPA] prosecution of all time . . . just fizzled out."[129] Finally, Giffen

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123. *Id.*; Government's Notice of Final Release of Settlement Funds and Motion to Dismiss, United States v. Approximately $84 Million on Deposit in Account No. T-94025 in the Name of the Treasury of the Ministry of Finance of the Republic of Kazakhstan at Pictet & Cie, Geneva, Switzerland, Formerly on Deposit in Account No. 1017789e at Cai Indosuez, Geneva, Switzerland, and All Interest, Income, Benefits, and Other Proceeds Traceable Thereto, No. 2:07-cv-03559-LAP (S.D. N.Y. 2015) [hereinafter Kazakhstan Settlement].

124. Kazakhstan Settlement, *supra* note 123.

125. *See* Richard L. Cassin, *No Punishment for 'Hero' Giffen*, FCPA BLOG (Nov. 22, 2010, 1:13 AM), http://www.fcpablog.com/blog/2010/11/22/no-punishment-for-hero-giffen.html.

126. *See* Steve Levine, *The Giffen Strategy: Waiting Out the CIA, Hoping Prosecutors Lose Heart or Interest*, FOREIGN POLICY (June 4, 2010), http://foreignpolicy.com/2010/06/04/the-giffen-strategy-waiting-out-the-cia-hoping-prosecutors-lose-heart-or-interest/.

127. Cassin, *supra* note 125. The judge further said Giffen had served as a valuable go-between with Soviet leadership during the Cold War. *Id.*

128. *Id.*

129. Scott Horton, *Kazakhgate Ends With a Whimper*, BROWSINGS: THE HARPER'S BLOG (AUG. 9, 2010, 10:01 AM), http://harpers.org/blog/

pled guilty to a misdemeanor tax charge and one count of unlawful payment to a Kazakh official; he received no fine or prison time.[130]

The forfeiture proceeding, however, was successful, and its resolution had a unique twist: an innovative non-profit entity, the BOTA Foundation, was created on the basis of $115 million ($80 million plus interest accrued) in funds forfeited by USDOJ.[131] In 2007, the governments of the United States, Kazakhstan, and the Swiss Confederation agreed to the Memorandum of Understanding creating the Foundation.[132] This agency ran three programs: (1) a conditional cash transfer ("CCT") program, (2) a grants program called the Social Service Program ("SSP"), and (3) a scholarship program known as the Tuition Assistance Program ("TAP").[133] The BOTA Foundation claims to have benefited over 200,000 individuals by dispensing the Kazakhstan forfeiture, and the effort

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2010/08/kazakhgate-ends-with-a-whimper/. Horton notes that when the CIA revealed it had not turned over all relevant documents, the prosecution's legs were cut out from under it. *Id.* He also characterized Giffen's CIA defense as "graymail." *Id.*

130. U.S. Attorney's Office, Southern District of New York, *New York Merchant Bank Pleads Guilty to FCPA Violation; Bank Chairman Pleads Guilty to Failing to Disclose Control of Foreign Bank Account*, FED. BUREAU OF INVESTIGATION (Aug. 6, 2010), https://archives.fbi.gov/archives/newyork/press-releases/2010/nyfo080610a.htm; Steve Levine, *Was Giffen Telling The Truth?*, FOREIGN POLICY (Nov. 19, 2010), http://foreignpolicy.com/2010/11/19/was-james-giffen-telling-the-truth; Cassin, *supra* note 125.

131. *The BOTA Foundation: Final Report Executive Summary*, IREX (Feb. 12, 2015), https://www.irex.org/resource/bota-foundation-final-report (click on "Executive summary" link); Aaron Bornstein, *The BOTA Foundation Explained (Part Two): Where Did BOTA Get Its Money?*, FCPA BLOG (Apr. 7, 2015 7:02 AM), http://www.fcpablog.com/blog/2015/4/7/the-bota-foundation-explained-part-two-where-did-bota-get-it.html; *see also The BOTA Foundation: Innovative Asset Return*, IREX, https://www.irex.org/projects/bota-foundation [https://web.archive.org/web/20150922024426/https:/www.irex.org/projects/bota-foundation] (last visited Nov. 16, 2016).

132. Aaron Bornstein, *The BOTA Foundation Explained (Part Six): How Was BOTA Set Up?*, FCPA BLOG (Apr. 15, 2015, 7:08 AM), http://www.fcpablog.com/blog/2015/4/15/the-bota-foundation-explained-part-six-how-was-bota-set-up.html. The government's final release of settlement funds and dismissal motion in the case were accompanied by final reports on the activities of the BOTA Foundation issued by both IREX and The World Bank. *Id.*

133. *Id.*

appears to have been well administered without any taint of corruption.[134] It has been cited as an example of what can be accomplished by dispensing forfeited assets innovatively and prioritizing service to vulnerable populations.[135]

3. Equatorial Guinea: Paradise and Plunder on the Rio Muni

The former Spanish colony of Equatorial Guinea, in Central Africa, has some 750,000 inhabitants.[136] Since independence in 1968, it has had two heads of state: Francisco Macías Nguema, who ruled from 1968 until a 1979 coup, and his nephew Teodoro Obiang Nguema Mbasogo ("Obiang") who rose to power via the coup.[137] Obiang has now ruled for 37 years.[138] The country began major petroleum and natural gas production in the 1990s, and is now sub-Saharan Africa's third largest petroleum producer.[139] According to the World Bank, the country's per-capita GDP of $18,389 ranked 41st out of 183 countries, well in the top quarter worldwide and ahead of such countries as Uruguay, Chile, and

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134. *Id.*

135. For instance, Congresswoman Sheila Jackson Lee cites the outcome of the Kazakhstan forfeiture as a model for what could be done with the funds forfeited from Gen. Abacha of Nigeria. *See* Press Release, Congresswoman Sheila Jackson Lee Introduces Bipartisan Legislation Urging the Creation of a $458 Million Victims of Terror Protection Fund Utilizing the Abacha Forfeited Funds, United States Congresswoman Sheila Jackson Lee (Oct. 27, 2015), https://jacksonlee.house.gov/media-center/press-releases/congresswoman-sheila-jackson-lee-introduces-bipartisan-legislation-0.

136. *Equatorial Guinea*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ek.html (click on "Population and Society :: EQUATORIAL GUINEA" drop down menu).

137. *Equatorial Guinea*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ek.html (click on "Government :: EQUATORIAL GUINEA" drop down menu).

138. *Equatorial Guinea*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ek.html (click on "Energy :: EQUATORIAL GUINEA" drop down menu).

139. *Equatorial Guinea*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ek.html (click on "Population and Society :: EQUATORIAL GUINEA" drop down menu).

Hungary.[140] Yet, on various public-health metrics, Equatorial Guinea is desperately poor.[141] The horrific gap between the country's high-middle income and its grim health indices seem to indicate a harsh case of the "resource curse."[142]

Teodoro Nguema Obiang ("Teodorín"), the president's son and holder of the office of "second vice president," was the target of corruption investigations for years.[143] In 2010, the U.S. Senate Permanent Subcommittee on Investigations exhaustively documented his schemes using shell companies, kickbacks, and other corrupt means to amass and transfer tens of millions of dollars into the U.S. financial system.[144] Some funds were used to purchase big-ticket real property such as a $30 million residence in Malibu, California, and a $38.5 million jet aircraft.[145] The Senate investigation also detailed 61 separate wire transfers through two U.S. banks between 2006 and 2008, totaling $110.4 million.[146] After a

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140. GDP Per Capita for Equatorial Guinea, THE WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.PCAP.CD (scroll down and click on "Equatorial Guinea" hyperlink).

141. The 58-year life expectancy ranks 167th out of 196 countries. *Equatorial Guinea,* WORLD HEALTH RANKINGS, http://www.worldlifeexpectancy.com/equatorial-guinea-life-expectancy (last visited Nov. 16, 2016). On another crucial public-health yardstick, infant mortality, the rate of 71 per 1,000 live births ranks 187th out of 202 in the world according to the United Nations. *See Infant Mortality Rate for Equatorial Guinea*, UNITED NATIONS, http://esa.un.org/unpd/wpp/DataQuery/ (click on "Infant mortality rate, 1q0, for both sexes combined (infant deaths per 1,000 live births); then type "Equatorial Guinea" into the search box above and click on "Next" button twice").

142. *Supra* notes 107–08 and corresponding text.

143. Leslie Wayne, *Wanted by U.S.: The Stolen Millions of Despots and Crooked Elites*, N.Y. TIMES (Feb. 16, 2016), http://www.nytimes.com/2016/02/17/business/wanted-by-the-us-the-stolen-millions-of-despots-and-crooked-elites.html.

144. STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 111th Cong., REP. ON KEEPING FOREIGN CORRUPTION OUT OF THE UNITED STATES: FOUR CASE HISTORIES 16–107 (Comm. Print 2010).

145. *Id.* at 98.

146. *Id.* at 99–106. The USDOJ calculated Teodorín's total fortune at $300 million. *Second Vice President of Equatorial Guinea Agrees to Relinquish More than $30 Million of Assets Purchased with Corruption Proceeds*, U.S. DEP'T OF JUSTICE: OFFICE OF PUBLIC AFFAIRS (Oct. 10, 2014) [hereinafter *Second Vice President of Equatorial Guinea*],

prosecution lasting years, the Teodorín kleptocracy action took a startling turn. USDOJ began negotiations with Teodorín in June 2014 and reached a settlement in October: The Equatoguinean official agreed to liquidate his Malibu mansion, a Ferrari sports car, and his Michael Jackson memorabilia, forfeiting some $30 million in proceeds to the U.S.[147] He would also have to "contribut[e]" $1 million to a special fund set up by the USDOJ.[148]

In absolute terms, the Teodorín settlement yielded a large dollar amount that doubtless qualified it as a major USDOJ-KI success. On the other hand, as a proportion of Teodorín's corrupt gains, it was dishearteningly small: according to the USDOJ's announcement, Teodorín's corruptly amassed wealth totaled some $300 million.[149] He got to keep his Gulfstream jet and Michael Jackson's crystal-studded glove—symbolic of what was only a partial USDOJ-KI victory.[150] The outcome can thus be viewed from two distinct vantage points. Some observers question the implications of the USG allowing a kleptocrat to keep a large percentage of what had been proven in court to be "ill-gotten gains."[151] Others emphasize a partial victory is still a victory, and that substantial resources looted from the people of Equatorial

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http://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased

147. Stipulation and Settlement Agreement, *supra* note 4. The style of the case hints at both the high life beloved of the second vice-president, and some of the ways kleptocrats convert misappropriated funds into assets abroad. *See also Second Vice President of Equatorial Guinea*, *supra* note 146.

148. Stipulation and Settlement Agreement, *supra* note 4.

149. *Second Vice President of Equatorial Guinea*, *supra* note 146.

150. Kara Scannell, *Corruption: Moving Money out of Purgatory*, FIN. TIMES (Jul. 5, 2016, 5:41 PM), http://www.ft.com/cms/s/0/10d8679c-228b-11e6-9d4d-c11776a5124d.html.

151. Robert Packer, *Settlements in Asset Recovery Cases—Neither Ethical Nor Effective*, GLOBAL ANTICORRUPTION BLOG (Jun. 30, 2015), http://globalanticorruptionblog.com/2015/06/30/guest-post-settlements-in-asset-recovery-cases-neither-ethical-nor-effective. Packer argues that settlements such as the one reached with Teodorín encourage kleptocrats to think of asset forfeiture as a mere "business expense"; "a conviction and seizure of *all* illicit assets is the best way to help achieve" improvements in the lives of corruption's victims. *Id.*

Guinea would soon be returned via some as yet unspecified mechanism.[152]

The language of one of the Settlement Agreement provisions underlines the uncertainty over the ultimate fate of the forfeited assets: "The United States represents that, where practicable and consistent with law, and after deducting its usual case-related costs and expenses, it intends to utilize the net Settlement Amount for the benefit of the people of the Republic of Equatorial Guinea."[153] As a statement, it reflects U.S. policy, but it raises two questions: first, what legal force, if any, does the "representation" by the United States have? Second, is there a way that this "inten[tion]," here and in other USDOJ-KI actions, could be placed on a more solid legal footing?

D. USDOJ-KI: Strengths and Weaknesses

Half a decade later, and on the edge of a change in presidential administrations, the leaders and staff of the USDOJ's Kleptocracy Initiative can point to some remarkable successes and a track record in which substantial experience has been built in the pursuit of tainted fruits of grand corruption abroad. The successful confiscation of nearly half a billion dollars in the Abacha action, over $100 million in the Kazakhstan action, and $30 million from Teodorín Obiang of Equatorial Guinea, among other forfeitures, represent undeniable achievements. Nevertheless, the overall picture is not uniformly rosy. A more complex depiction of success, challenges, and critiques emerges from our examination of the USDOJ-KI.

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152. Richard L. Cassin, *'Shameless' Kleptocrat Teddy Obiang Forfeits $30 Million in DOJ Settlement*, FCPA BLOG (Oct. 13, 2014, 1:38 AM), http://www.fcpablog.com/blog/2014/10/13/shameless-kleptocrat-teddy-obiang-forfeits-30-million-in-doj.html. Matthew Stephenson suggests that recoveries expressed as a percentage of the total assets originally sought is not necessarily the best metric for success since USDOJ-KI prosecutors may start out with the most ambitious goal possible. Matthew Stephenson, *Is the Kleptocracy Initiative Worth It? A Tentative Yes,* GLOBAL ANTICORRUPTION BLOG (Feb. 23, 2016), https://globalanticorruptionblog.com/2016/02/23/is-the-kleptocracy-initiative-worth-it-a-tentative-yes/#more-5525; *see also* Martin Kenney, *Kleptocracy Stinks. The DOJ Fights Back "With Impact,"* FCPA BLOG (Mar. 22, 2016, 9:28 AM), http://www.fcpablog.com/blog/2016/3/22/martin-kenney-kleptocracy-stinks-the-doj-fights-back-with-im.html.

153. Stipulation and Settlement Agreement, *supra* note 4, at 23–24.

In nearly six years of operation, the Kleptocracy Initiative has done much more than simply carry out over a dozen successful forfeiture actions. It has amassed a body of practical experience in investigative cooperation (domestically and internationally), mutual legal assistance, invocation of foreign statutes and multilateral treaties and conventions, and, in more limited cases, repatriation or (in at least one case) more innovative ways of restoring forfeited assets to the countries from which they were stolen. The deterrent effect on existing or aspiring kleptocrats ought not be scorned—nor should the encouragement to citizens and NGOs in countries battling corruption.[154]

On the other hand, the USDOJ-KI has faced considerable challenges and is subject to a range of critiques. First, prosecutions are extraordinarily labor-intensive in the investigative phase; kleptocrats have very deep pockets and can foot the bill for top-notch legal representation, drawing forfeiture actions out for years.[155] This leads to pressure to settle, and the USDOJ-KI attorneys and staff may be supposed to reach a point where they may be eager—or at least willing—to obtain a positive (if only partial)

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154. The KI's deterrent effect must also be assessed in light of similar, ongoing U.S.-led investigative and law enforcement efforts against entities like FIFA. Rebecca R. Ruiz, *FIFA Official Plans to Fight Conspiracy Charges*, N.Y. TIMES (Mar. 29, 2016), http://www.nytimes.com/2016/03/30/sports/soccer/fifa-official-plans-to-fight-court-charges.html?_r=0. IRS prosecutions of U.S. tax evaders who arguably concealed income in Swiss banks led to historic settlement agreements with Swiss banking giants like UBS whereby the Swiss banks waived their centuries-long secrecy conventions. *Unsettling Settlements: More Wrongdoing at Banks, More Swingeing Fines, No Prosecutions*, THE ECONOMIST (May 23, 2015), http://www.economist.com/news/finance-and-economics/21651885-more-wrongdoing-banks-more-swingeing-fines-no-prosecutions-unsettling. The point worth emphasizing is that every successful prosecution or record-breaking settlement in these spheres adds to the overall "snowball effect" in enforceability in each individual sphere. By the same token, as expressed throughout this Note, one should pay careful attention to the optics or perception of so-called hegemonic enforcement, where U.S. enforcement actions in disparate fields of regulated activity are taken as further corroboration of the dangerously simplistic narrative of the U.S. as "the world's policeman." It seems manifest that to achieve a legitimate deterrent effect, enforcement measures must be balanced against various countervailing interests and rooted in well-settled doctrinal ground.

155. James Giffen is a case in point; see *supra* notes 121–130. Pavlo Lazarenko is another; see *supra* note 33.

result.[156] Where such settlements are reached and USDOJ-KI prosecutors are only able to forfeit a fraction of the targeted corrupt assets, an unintended message may be sent to corrupt officials and a perverse incentive established: kleptocratic wrongdoers may be inspired to misappropriate as much money as possible from their national treasuries so as to increase the value of a potential eventual settlement. Some observers have expressed serious misgivings about such arrangements.[157] Teodorín Obiang, the beneficiary of one such "golden handshake"[158] reportedly told the media he was "happy to 'continue the charitable work I have sponsored for many years in Equatorial Guinea.'"[159] A settlement—particularly where there is no admission of wrongdoing—may thus enable a wrongdoer to reframe the forfeiture as a voluntary charitable donation.

Second, the USDOJ-KI's broad, protective justifications with ethical and humanitarian overtones stand in tension with the perception of unilateralism in the Initiative's actions. While USDOJ-KI practice is often highly collaborative with foreign states and/or citizens, making the criticism unfair in many cases, the rhetoric of American exceptionalism helps feed it. Advocacy of international cooperation around broad principles of justice can sometimes fit uneasily with the unilateral-sounding rhetoric of American exceptionalism—as with President George W. Bush's 2006 characterization of anticorruption work as "a critical component of *our* freedom agenda" that would "extend America's transformational democratic values to all free and open societies."[160]

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156. *See, e.g.*, Equatorial Guinea kleptocracy prosecution, *supra* Section II.C.3.

157. Mohamed Moussa, *The Golden Handshake: Background Rules and the Choice of Restoring Money or Doing Justice*, GLOBAL ANTICORRUPTION BLOG (Apr. 13, 2015), http://globalanticorruptionblog.com/2015/04/13/the-golden-handshake-background-rules-and-the-choice-of-restoring-money-or-doing-justice; s*ee also* Packer, *supra* note 151.

158. Moussa, *supra* note 157.

159. Packer, *supra* note 151.

160. President George W. Bush, President's Statement on Kleptocracy (August 10, 2006), http://georgewbush-whitehouse.archives.gov/news/releases/2006/08/20060810.html (emphasis added). Rhetorically, it is also unclear how societies that are already "free and open" require, or would benefit, from having "America's transformational values [extended]" to them. Such rhetoric, perhaps, encourages criticism of an "ethical imperialism" that rides roughshod over

Third, until now the USDOJ-KI has mostly targeted activity in Africa and Asia, and, to a more limited extent, Latin America. The shape of USDOJ-KI operations bears an uncomfortable resemblance to the North/South, developed/underdeveloped global divide.[161] The fact that U.S. anticorruption efforts are not only directed at those regions, and even in some cases target conduct within the U.S. by domestic actors, helps mitigate this perception but does not dispel it entirely.[162] Two scholars note the targeting of corruption in the global "South" and "East," and find "Orientalist overtones" in the anticorruption movement.[163]

Fourth, similar concerns to those raised by civil asset forfeiture domestically arise regarding the USDOJ-KI. In principle the government, like local police departments, has an incentive to take legal shortcuts in order to forfeit and obtain title to substantial sums of money, which the government is under no affirmative duty to return.[164] Of course, even some critics acknowledge significant

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a wide range of cultural practices, not all of which deserve broad-brush condemnation as "corruption." The FCPA's "facilitating payment" exception, of course, already makes allowances for this view. *See supra* note 24 and corresponding text. Both conceptual and empirical difficulties in distinguishing corruption from the other, culturally-rooted phenomena alluded to form a key theme running through several of the contributions to CORRUPTION AND THE SECRET OF LAW: A LEGAL ANTHROPOLOGICAL PERSPECTIVE (MONIQUE NUIJTEN & GERHARD ANDERS EDS., 2007). S*ee*, *e.g.*, Andrew MacNaughton & Kam Bill Wong, *Corruption Judgments in Pre-War Japan: Locating the Influence of Tradition, Morality, and Trust on Criminal Justice*, *in* CORRUPTION AND THE SECRET OF LAW 77–80 (2007).

161. *See, e.g.*, B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L COMTY. L. REV. 3, 3 (2006).

162. *See, e.g.*, Richard C. Smith et al., *Anti-Corruption Enforcement Is Escalating Worldwide*, LAW 360 (May 27, 2015, 8:17 AM), http://www.law360.com/articles/659365/anti-corruption-enforcement-is-escalating-worldwide. The article mentions the indictment of U.S. Senator Robert Menendez (D-NJ). *Id. See also* Kazakhstan kleptocracy case, *supra* Section II.C.2.

163. Nuijten & Anders, *Corruption and the Secret of Law: An Introduction*, *in* CORRUPTION AND THE SECRET OF LAW: A LEGAL ANTHROPOLOGICAL PERSPECTIVE 1, 3 (asserting that "[e]ndemic corruption . . . represents the evil and primitive Other [in] global rhetoric about transparency and good governance" whereas corruption in the wealthier countries is treated as "incidental, . . . a few rotten apples."). *Id.*

164. *See supra* note 19 and corresponding text.

differences between the two situations.[165] The ability of a local police department to expand its resources substantially through forfeitures finds little parallel in the USDOJ—the budgets involved differ by many orders of magnitude; and, unlike the situation in a local police department that may be chronically understaffed, the USDOJ-KI is carried out by highly trained, experienced legal professionals. Additionally, USDOJ-KI forfeiture actions are tested in the rigorous forum of a federal court. However, even in the highly professionalized USDOJ context, matters of institutional prestige, advancement incentives, and the use of forfeiture amounts as a metric for administrative efficacy and budgetary claims, may make the analogy a little less far-fetched.

Finally, the "discretion to return" and the accompanying incentives are vexing. The gap pointed out at the outset of this Note—between the firm statutory underpinnings of the Kleptocracy Initiative's means (forfeiture) and the voluntary, discretionary framework for the ends (return)—likely does more than anything else to undermine the legitimacy of the Initiative in some eyes.[166]

Could it be that the USDOJ-KI would benefit from having *less* post-forfeiture discretion over assets? Initially, assets forfeited through Kleptocracy Initiative actions belonged to the people of the States that were hosts to the corruption in question. Logically, that ought to be their ultimate destination. That is the fundamental political, rhetorical, and moral underpinning for the legal doctrines used by the USDOJ-KI; and it is linked to the principal jurisdictional assertion made for the USDOJ-KI at the highest levels of the USG: the protective principle.[167] Whatever can be done to increase the likelihood of asset return will strengthen the Initiative, bolstering its prestige and legitimacy in the eyes of the internation-

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165. Matthew Stephenson, *The StAR "Few and Far" Report, and (Conflicted) Reflections on Civil Forfeiture*, GLOBAL ANTICORRUPTION BLOG (Nov. 4, 2014), http://globalanticorruptionblog.com/2014/11/04/the-star-few-and-far-report-and-conflicted-reflections-on-civil-forfeiture/.

166. *See* Oluwafunmilayo Akinosi, *Asset Recovery and the Department of Justice's Discretion to Return*, GLOBAL ANTICORRUPTION BLOG (Aug. 31, 2015), https://globalanticorruptionblog.com/2015/08/31/asset-recovery-and-the-department-of-justices-discretion-to-return/. Akinosi argues that leaving the return of assets to the discretion of the USDOJ saddles the USDOJ with a degree of arbitrary power that is unfair and harms its overall effectiveness. *Id.*

167. *See supra* note 42 and corresponding text.

al community, the populations affected, and their allies and co-nationals within the U.S. At the same time, kleptocrats also have skilled lawyers capable of advancing novel theories for the return of assets—to their clients. The next section will attempt to find usable doctrinal analogues for the return of forfeited assets to their rightful owners compatible with the KI's existing legal authorities and sufficient to withstand legal counter-claims by the corrupt officials.

III. RETURN OF ILL-GOTTEN ASSETS: POSSIBLE ANALOGUES

Returning forfeited assets to their rightful owners under the USDOJ-KI is hampered both by the fact that it is discretionary and that it is difficult. Fig. 2 is an attempt to graphically express the problem: how is the dotted line to be accomplished; completing the circle by returning looted funds to their true owners? This section will look at a series of historical mechanisms or doctrines by which government takes control of property,[168] in search of promising analogues potentially adaptable into a more robust legal framework of asset return in the kleptocracy context.

168. *See Infra* note 213.

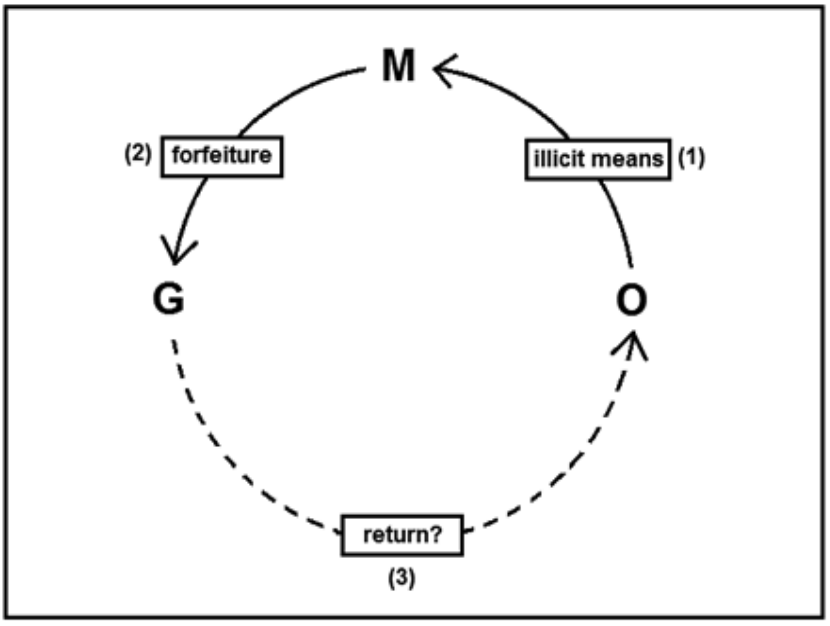

Fig. 2. Asset Forfeiture and Potential Return. (1) The original embezzlement, theft, or other illicit acquisition of assets by malfeasor M from true owner O. (2) The forfeiture of the assets by government G. (3) The possible return of assets by G to O. Solid lines show actual shifts in possession of the assets, dotted lines a potential shift. *Diagram created by the author.*

A. Deodand

The origins of deodand are ancient. Justice Holmes in THE COMMON LAW (1881) recalls the "well-known passage in Exodus [21:28] . . . : 'If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.'"[169] The "deodand" was the forfeited beast or object, "'an accursed thing,' in the language of Blackstone."[170] Eventually, destruction gave way to confiscation: the deodand went to God by way of the king.[171] In a typical early-modern English case where "a falling tree kill[ed] a man," the jury found that the tree caused the man's death" and was deodand.[172]

169. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 7 (1881).
170. *Id.*
171. *Id.* at 24.
172. Anna Pervukhin, *Deodands: A Study in the Creation of Common Law Rules*, 47 AM. J. LEGAL HIST. 237, 242 (2005).

Gradually, deodand evolved as a common law rule, though with much fluctuation and variation in its application.[173]

Deodand later became a form of civil compensation for wrongful death, or pension to surviving dependents. An 18th century coroner's jury declared "a stack of timber which had fallen on a child to be forfeited as a deodand, it was ransomed for 30*s.*, . . . paid over to the child's father."[174] Juries often improvised and even manipulated the facts to achieve a desired result; like situations could be treated inconsistently from region to region or even jury to jury.[175]

Deodands also underwent evolution into a source of Crown revenue, justified as a penalty and deterrence to carelessness; the Crown even began to raise revenue by selling off the rights to all the deodands from a particular jurisdiction to lords and townships.[176] The Industrial Revolution brought with it a revival of the deodand, now expressly used to compensate survivors, such as the widows of workmen killed in factory or railway "misadventures."[177] Deodand was finally abolished in 1846, when Lord Campbell's Act created a cause of action for wrongful death in survivors.[178] Thus, deodand's twilight was the dawn of tort liability in English law.[179]

What recourse was available to the owner of chattels declared deodands? The records are not entirely clear, but there are grounds to infer that a property owner could appeal to the court to overturn the jury's verdict. Certainly the opposite could and did occur: in *Rex v. Cheyney*, a lord challenged the sufficiency of a jury verdict of deodand against the wheel of a wagon that had run

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173. *Id.* at 242–47.

174. J.W. CECIL TURNER, KENNY'S OUTLINES OF CRIMINAL LAW 8 (18th ed. 1962).

175. Pervukhin, *supra* note 172, at 239.

176. *Id.* at 237.

177. *Id.* at 249.

178. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 n.19; Harry Smith, *From Deodand to Dependency*, 11 AM. J. LEGAL HIST. 389, 397–99 (1967).

179. Smith, *supra* note 178, at 389.

over and killed a child; his appeal was denied.[180] Courts were generally highly deferential to jury findings of deodand; in a 1755 case, the court reasoned that a court "ought not to contradict the [factual] finding of a jury" even where it was "exceedingly improbable, if not altogether impossible."[181] It appears that challenges to deodand findings were possible but infrequent.[182]

Deodand has been a many-faceted, almost protean, legal doctrine meaning different things at different times: destruction of "guilty" property, forfeiture to God by way of king, transfer as compensation to victims of negligence, accident, or felony. Its absolute destruction of the original owner's title suggests strong parallels with the kleptocracy forfeiture regime. This, in combination with its evolution in a restitutionary direction, makes it an intriguing analogue for potential reforms aimed at bolstering the return of forfeited assets to their true owners by permanently extinguishing the corrupt individual's property rights, and therefore legal and equitable basis for challenging the seizure.

B. Piracy

Piracy was prosecuted at admiralty. Original title to the vessel as property was irrelevant to the proceedings. Rather, the vessel's association with the crime of piracy acted as an acid, dissolving the original title. Barnet analyzes the case as an example of "legal fictions" around forfeiture.[183] Here, the fiction is the personification of the ship as a moral agent capable of guilt. Such prosecutions involved a vigorous assertion of extraterritoriality—the target of the vessel's piracy can be "any vessel of the United States, or of the citizens thereof, or . . . any other vessel."[184]

In *The Palmyra*, 25 U.S. 1 (1827), the commander of a U.S. vessel of war boarded and captured, under suspicions of piracy, a Spanish vessel whose commander identified it as a privateer sail-

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180. Pervukhin, *supra* note 172, at 247 (quoting Rex v. Cheyney, 3 Keble 312, 84 ER 739 (1674)). The challenge failed; presumably, the lord would have become the owner of any deodands on his land. *Id.*

181. *Id.* at 247 (quoting Rex v. Grew, Sayer 249–50, 96 ER 869 (1755)).

182. *Id.* at 239.

183. Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 77 (2001).

184. The Palmyra, 25 U.S. 1, 7–8 (1827) (citing Act of Congress, 3 Mar. 1819, ch. 75, as continued in force by Act of Congress, 15 May 1820, ch. 112).

ing under a commission from the King of Spain.[185] The Spanish commander sued unsuccessfully for return of the vessel and for damages incurred pursuant to capture but was awarded damages on appeal.[186] On the government's appeal before the U.S. Supreme Court, the appellee argued that forfeiture was improper absent a criminal conviction.[187] The Court rejected the argument, differentiating statutory forfeiture actions from criminal forfeitures:

> It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but . . . could [occur] only by the conviction of the offender . . . . But this doctrine never was applied to . . . forfeitures[] created by statute, in rem, cognizable on the revenue side of the Exchequer. The . . . offence is attached primarily to the thing . . . . The same principle applies to proceedings in rem, on seizures in the Admiralty . . . . In the judgment of this Court, no personal conviction of the offender is necessary to enforce a forfeiture in rem in cases of this nature.[188]

The Court's holding gives us a glimpse of the deodand origins of forfeiture.

Did owners of property stolen by pirates have any legal recourse? The British Bounty Legislation of 1825 Retroactive to 1820 contained a provision "requir[ing] the return of property in the possession of 'pirates' to its former owners or proprietors after *in rem* proceedings in Admiralty, and on the payment by owners of one eighth of the value of the property returned in lieu of salvage."[189] This seems to have been general practice by the U.S.: "[r]eturn of the vessel and cargo to its legal owners and payment by them of 'salvage.'"[190] Thus, where the owner of stolen property

185. *Id.* at 8.
186. *Id.* at 8–9.
187. *Id.* at 12.
188. *Id.* at 14–15.
189. ALFRED P. RUBIN, THE LAW OF PIRACY 205 (1988).
190. *Id.* at 165.

was known, admiralty courts in piracy prosecutions appear to have made return of property a key objective.

Like deodand's severing of title from the original owner, anti-piracy doctrine implies absolute dissolution of title in the pirate vessel. The strong legal and moral opprobrium attached to piracy—its infamy leading to ubiquitous condemnation and universal jurisdiction—is thus a compelling parallel with kleptocratic corruption. The focus on return of stolen property, too, makes the piracy regime, like deodand, a potentially relevant parallel.

C. Customs Offenses

Forfeiture could also be imposed for such offenses as fraudulently undervaluing a ship's cargo in order to avoid customs duties. Such seizures, coupled with the broad, general warrant known as the Writs of Assistance, were a major grievance leading to the American Revolution.[191]

Customs offenses present some interesting legal difficulties, one being that the identity of the person who shipped the goods was often difficult, or even impossible, to ascertain:

> If the seller has committed a customs offense, say by preparing invoices which understate the purchase price of the goods, forfeiture of the goods may be the only practical way to exact the equivalent of a civil or criminal fine from the seller, at least where the seller has retained title to the goods, as in a consignment sale.[192]

The leading admiralty treatise underscores the practicalities of seizure: "[I]n a great variety of . . . cases [involving violations of the laws of trade, navigation, and revenue committed on navigable

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191. James Otis, *Against the Writs of Assistance*, NATIONAL HUMANITIES INSTITUTE, http://www.nhinet.org/ccs/docs/writs.htm (last visited Nov. 20, 2016); Thomas K. Clancy, *The Importance of James Otis*, 82 MISS. L.J. 487 (2013).

192. Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1918 (1998). That the charge of "kleptocracy" should be hurled at law enforcement is ironic, but in the context of this Note, it underlines the care with which forfeiture actions need to be undertaken and prosecuted.

waters], the vessels and the goods alone are within the reach of the process of the courts; the individuals concerned are in other countries" and beyond reach.[193] Justice Holmes famously noted a ship may be "the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home . . . ."[194]

In the influential Supreme Court case of *United States v. Twenty-Five Packages of Panama Hats*, 231 U.S. 358 (1913), the government initiated forfeiture proceedings against a shipment of Panama hats a consignee, Castillo, had unloaded at New York harbor with fraudulently undervalued invoices.[195] Castillo argued that the goods were not introduced into the commerce of the United States within the meaning of the Tariff Act of 1909 because they were stored in the General Order warehouse rather than formally entered through customs.[196] The Court held that storage in General Order *did* place the goods in "a channel of [U.S.] commerce."[197] More importantly, the fact that the consignor of the goods was beyond U.S. jurisdiction did not shield the goods from forfeiture.[198]

Forfeiture thus operated as a strict liability mechanism, enabling the U.S. to take title to goods in a way that avoided both prohibitively expensive factual inquiry to identify the culpable party and *in personam* jurisdictional barriers. In effect, forfeiture could serve as an expedient in the face of practical limits on extraterritorial jurisdiction to adjudicate.

The peculiar circumstances of this legal form, unlike the cases of deodand and piracy, tended to make forfeiture final—there was typically no move to restore property to its owner. Customs

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193. 4 Benedict on Admiralty 607, at 177 (6th ed. 1940), *quoted in* Herpel, *Toward a Constitutional Kleptocracy*, at 1919 n.31. United States v. 25 Packages of Panama Hats, 231 U.S. 358, 361–62 (1913).

194. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 28 (1881).

195. *Panama Hats*, 231 U.S. at 359.

196. *Id.* at 360.

197. *Id.* at 362.

198. Indeed, the Court made clear that the 1909 statute broadened liability for customs fraud to include consignors "beyond the seas" to close loopholes in the earlier statute. Castillo argued that it was not he but the consignor who made the valuation and did so while outside U.S. jurisdiction; to the Court, this was further reason why the goods were subject to forfeiture. *Id.* at 361–62.

offenses where true owners are unknown and the harmed party is the government are an inverted mirror-image of kleptocratic situations where it is the victims who are difficult to identify with particularity because the misappropriation harms numerous, anonymous individuals.[199] The relevance of customs forfeiture regimes to grand corruption cases lies in this core prudential consideration: where the evidence of the link between, say, judicially noticed corruption and the property at issue is so high that it results in a forfeiture order under the KI, the USDOJ's posture following the forfeiture resembles the administrative posture of customs officials with respect to post-forfeiture asset disposition obligations, if any. Absent a clear obligation to return the funds, and due to the lower evidentiary burden in both regimes, incentives for administrative overreach exist. The overall legitimacy of both customs and anti-corruption forfeiture schemes hinges on perceptions of even-handed application and objectively fair judicial review; Congress would do well to limit the discretionary scope of kleptocracy actions by harmonizing the conceptual definition of corruption, and clarifying evidentiary standards at each step of the forfeiture process (investigative findings, judicial notice of foreign grand corruption, and post-forfeiture asset return), and creating a statutory framework for asset return.[200]

D. Forfeiture of Estate

A harshly punitive mechanism at English common law was forfeiture of estate against convicted felons or traitors: the convict forfeited all his real property to a lord or the king and all chattels to

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199. These numerous individuals could also pursue claims on the basis of potentially cognizable group or class interests. "Class" as used herein alludes to the *analogical* American procedural vehicle of a "class action," recognizing that a diffused group of individuals may form a class of affected persons capable of aggregating their claims against a defendant. *See* Fed. R. Civ. P. 23. This is not meant to suggest the existence of a class action right in kleptocracy contexts, especially in light of *Morrison v. National Australia Bank Ltd*., 561 U.S. 247 (2010), which limited extraterritorial jurisdiction under the Securities Exchange Act in the securities class action context, and the Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), which limited extraterritorial jurisdiction under the Alien Tort Statute for "foreign cubed" claims arising from alleged gross violations of human rights.

200. *Infra* Section IV.

the king.[201] The doctrine of "corruption of blood" was harsher still: the felony or treason conviction led to the legal severing of the convict's blood line, that is, his ability to bequeath property to his heirs.[202] Convicted felons and heirs thus suffered the loss of estate.[203] However, the penalty's reach was limited by the common law's recognition of the rights of innocent third parties:

> The common law 'saved' to innocent parties all rights, title, uses, possession, . . . rents, leases, or other interests in the land. Moreover, if a felony statute specified that 'no corruption of blood' must occur or if the statute 'saved to the heirs' the offender's land, the offender's wife did not lose her dower rights and the offender's heirs could inherit the convicted offender's land interests.[204]

The law offered a remedy, then, not to the convicted felon but certainly to those who could prove their status as innocent third parties, or, in some cases, as heirs with rights safeguarded by law.

At first glance, forfeiture of estate seems to offer little of use to the kleptocracy asset context. Yet perhaps a poetic analogy can be made between the "corruption of blood" doctrine and the practical effects of non-return of forfeited assets. In the case of a decedent who was adjudicated "corrupt," the seizure of assets eliminates heirs' rights to the property; an unintended consequence of non-return is the denial of the forfeited resources to future generations in the country concerned.[205] As such, the accompanying doctrine of saving the rights of innocent third parties might be a metaphoric expression of the USDOJ-KI's stated, ultimate goal.

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201. Michael Paul Austern Cohen, *The Constitutional Infirmity of RICO Forfeiture*, 46 WASH. & LEE L. REV. 937, 937 (1989).

202. Cecil Greek, *Drug Control and Asset Seizures: A Review of the History of Forfeiture in England and Colonial America*, *in* DRUGS, CRIME AND SOCIAL POLICY 109, 112 (Thomas Mieczkowski, ed., 1992).

203. *Id.*

204. Cohen, *supra* note 201, at 937 n.2 (citation omitted).

205. Of course, nepotism often characterizes kleptocratic regimes, making it important that the property rights of corrupt individuals be taken away in an analogue to forfeiture of estate: Equatorial Guinea is a case in point; *see supra* Section II.C.3.

E. Criminal Forfeiture

Criminal forfeiture involves the seizure of property connected with the commission of a crime; historically, it bears some relation to the deodand. Underlying offenses could be many. Unlike forfeiture of estate, it involved the government's seizing of property linked to the commission of a crime, rather than all the property in the estate of the criminal. Two important contemporary cases underline the harshness of this type of forfeiture in providing no protection for innocent owners or co-owners. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the owner-lessor of a yacht suffered forfeiture of the vessel by Puerto Rican police authorities when a marijuana cigarette was found, apparently belonging to the lessees. Despite the owner-lessor's lack of knowledge, much less consent, with regard to the use of illegal drugs on the yacht, the Supreme Court upheld the forfeiture.[206] The Court was guided largely by the lack of any mitigating provisions in the relevant Puerto Rican statute.[207]

An even harsher outcome came in *Bennis v. Michigan*, 516 U.S. 442 (1996). There, a man was convicted of gross indecency for an act with a prostitute and the government seized the automobile in which the act occurred.[208] The man's wife objected to the forfeiture of her interest in the motor vehicle; the Court rejected her innocent owner defense and upheld the forfeiture.[209]

Interestingly, legal history shows a series of attempts in the English common law "to mitigate the harshness of felony and deodand forfeitures" through the availability of "[t]he writ of restitution . . . to an individual whose goods were stolen by a thief and forfeited to the crown as a consequence of the thief's conviction."[210] Thus even the regime of criminal forfeiture afforded rightful owners some opportunity to recover.

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206. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

207. *Id.* at 686–87. The Puerto Rican statute authorizing forfeiture of the yacht was P.R. LAWS ANN. tit. § 2512(a)(4) (Supp. 1973). *Id.* at 665–66.

208. Bennis v. Michigan, 516 U.S. 442, 443–44 (1996).

209. *Id.* at 452–53. The legal authority under which both the husband's and wife's interests in the vehicle were taken by the State of Michigan was the nuisance abatement statute, MICH. COMP. LAWS ANN. § 600.3801 (West Supp. 1995). *Id.* at 444.

210. *Calero-Toledo*, 416 U.S. at 689 n.27.

The harshness of recent application of criminal forfeiture doctrine, with its effective indifference to the plight of innocent co-owners of tainted property, offers little in the way of useful parallels to the kleptocracy context. However, the historical provision for the writ of restitution provides an analogue that seems useful both in connection with a private right of action to claim ownership of forfeited assets, and as potentially adaptable to a claim for constructive return on behalf of a population affected by corruption.

F. Seizure of Stolen Property as Evidence

When the government takes possession without claiming title, as in a criminal proceeding where law enforcement seized allegedly stolen property, the Federal Rules of Criminal Procedure offer recourse through a motion to return property. The relevant rule states:

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.[211]

The federal rule, along with various state statutes,[212] provide for the return of property seized by the government in two

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211. FED. R. CRIM. PRO. 41(g).

212. States take a variety of approaches in dealing with the return of private property following seizure in criminal or other contexts. Under Wisconsin law, for example, "any person claiming the right to possession of property seized pursuant to [or without] a search warrant . . . may apply for its return to the circuit court for the county in which the property was seized . . . ." WIS. STAT. ANN. § 968.20(1) (Westlaw 2016). Tennessee law offers another perspective, Tenn. Code Ann. § 40-17-118 requires that stolen property confiscated by law enforcement be appraised, catalogued and photographed; that the prosecutor show cause to the court with jurisdiction over the property in order to impound it

sorts of cases: one where the property was wrongly seized and thus without actual taint of criminality, the other where the property was justly seized from a wrongdoer, but a third party to the seizure asserts her claim as rightful owner of the property.[213] The latter most closely matches the kleptocracy context, particularly where claims for the return of the property emanate from victim groups.

G. Civil Asset (or In Rem) Forfeiture[214]

Civil asset forfeiture, also known as *in rem* forfeiture, is based on ancient jurisprudence; but until 1970 its use in U.S. law

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beyond thirty days; and that the state or local authority holding the property return it to its lawful owner, with liability for damage or destruction caused by delay in the return. Persons asserting a claim to property in government possession can move for return of the property pursuant to the statute. *See, e.g.*, Maness v. Woods, No. W2000-01049-COA-R3-CV, 2001 WL 29457 (Tenn. Ct. App. Jan. 10, 2001). The additional circumstance that occurs when the government damages or loses seized property gives rise to no statutory claim for compensation, unlike the case of civil asset forfeiture. David B. Smith, *A Comparison of Federal Civil and Criminal Forfeiture Procedures: Which Provides More Protections for Property Owners?*, Legal Memorandum No. 158, HERITAGE FOUNDATION (Jul. 30, 2015), http://www.heritage.org/research/reports/2015/07/a-comparison-of-federal-civil-and-criminal-forfeiture-procedures-which-provides-more-protections-for-property-owners.

213. In describing a typology for asset seizure, forfeiture, and return, it must be borne in mind that we are inevitably dealing in heuristics. There is, of course, a large number of legal regimes governing forfeiture and the rights of innocent third-parties and/or victims. Some of the most elaborate arise in various criminal contexts which, in their essence, are mainly matters of state law. A detailed account of the full array of legal theories for the return of seized property lies well outside the scope of this Note. What is worth noting is that in the bribery context, the property notions are more complicated than in, say, embezzlement from the fisc—there is no warrant for the bald assertion that "the funds were stolen from the people" of the country in which the bribe was received. *See supra* Section II.C.2. Among the colorable claims in corruption cases, however, is that of "theft of honest services." *See* 18 U.S.C. § 1346 (the federal mail and wire fraud statute). One could continue cataloguing the various allied federal/state/foreign, statutory/administrative/common law, historical/contemporary/emerging doctrines, but while inherently useful, such a taxonomy lies, again, far outside the present scope.

214. *See supra* notes 81–85 and accompanying text & Table 2.

was limited mainly to maritime, revenue, and wartime contexts.[215] Two landmark pieces of legislation in 1970 ushered in a new era: the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 881, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968.[216] The scope of application of those statutes, as well as the total number of statutes that contemplate civil asset forfeiture, have both expanded dramatically in the nearly half-century since—now some 150 federal statutes (not to mention state laws) provide for the use of this enforcement mechanism.[217]

The distinctions between civil asset forfeiture and its criminal "cousin" are significant (see Table 2). Perhaps most important from a prosecutorial standpoint is that forfeiture requires no criminal conviction; indeed, the property owner need not even be present.[218] The lower burden of preponderance of the evidence is all that is required for a showing that the property is traceable to statutorily covered criminal conduct.[219] Formerly the even more modest standard of "probable cause" was all that was required in civil asset forfeiture prosecutions; the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which aimed to put an end to the most abusive features of the civil forfeiture regime then in place, changed the standard to the higher one of "preponderance of the evidence." But even this reform had an exception in which the old, lower standard still prevailed: the so-called "customs carve-out," 18 U.S.C. § 983(i).[220]

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215. Herpel, *supra* note 192, at 1914–15. The wartime use was as a mechanism to seize enemy property. *Id.*

216. Mary M. Cheh, *Forfeiture*, ENCYCLOPEDIA OF CRIME AND JUSTICE (2002), http://www.encyclopedia.com/topic/Forfeiture.aspx.

217. *Id.*

218. WAGNER, *supra* note 81, at 8, 13, 14.

219. *Id.* Regarding other prosecutorial advantages to one or the other mechanism, *see supra* notes 81–85 and accompanying text.

220. Smith, *supra* note 212, at No. 7; U.S. DEP'T OF JUSTICE, *Policy Manual*: *Asset Forfeiture Policy Manual* 51, Chap. 1, Sec. II.C (2016), https://www.justice.gov/criminal-afmls/file/839521/download.. Though known as the "customs carve-out," the exception to the CAFRA reform provisions also applies to IRS and FDA forfeitures as well as seizures pursuant to the Trading With the Enemy Act. FORFEITURE ENDANGERS AM. RIGHTS FOUND, *How to Determine Whether Your Case is Governed by CAFRA or Falls in the 'Customs Carve Out' Exception*, FEAR.ORG (Jul. 20, 2014) http://fear.org/1/pages/law-

Return of assets to rightful owners does not even figure in most accounts of this forfeiture regime. On the contrary, the use of such assets by law enforcement itself is a major aspect of civil asset forfeiture practice, leading to considerable criticism of what some see as a perverse financial incentive for overreach by police and prosecutors.[221] Federal agencies, too, "share among themselves the proceeds of jointly conducted forfeiture" and "transfer hundreds of millions of dollars . . . to state, local, and foreign law enforcement . . . ."[222]

In spite of recent reforms, *in rem* civil forfeiture as a whole seems to offer little in the way of encouraging analogues for the

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library/federal-forfeiture-statutes/federal-forfeiture-procedure/customs-carve-out.php. The carve-out marks one of the limits of the reform drive's success. Another CAFRA reform "amended 28 U.S.C. § 2680(c), a provision of the Federal Tort Claims Act, to provide a damage remedy for property owners who prevail in a civil forfeiture case where the law enforcement agency has lost, destroyed, or damaged the property." Smith, *supra* note 212, at No. 9. However, even this remedy has been rendered almost meaningless by court holdings that the damage remedy is unavailable if the property was also seized as possible evidence of a crime. Smith, *supra* note 212, at No. 9.

221. Smith, *supra* note 212, at No. 9. A large and growing body of legal scholarship and popular political discourse from across the ideological spectrum subjects civil asset forfeiture by police to withering criticism. LEONARD LEVY, LICENSE TO STEAL: THE FORFEITURE OF PROPERTY (1996); for a review of Levy's book, see Herpel, *supra* note 192. A prominent recent instance of such critique: the Cato Institute, on the libertarian Right of the political spectrum, sponsored a 2010 public policy forum, "Policing for Profit: The Abuse of Civil Asset Forfeiture." The forum was linked to a book by the ideologically kindred Institute for Justice: MARIAN R. WILLIAMS, ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE (2010). Two decades earlier, Cato published REP. HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? (1995). An instance from the left is Chloe Cockburn, *Easy Money: Civil Asset Forfeiture Abuse by Police*, ACLU SPEAKING FREELY BLOG (Feb. 3, 2010 1:16 PM), https://www.aclu.org/blog/easy-money-civil-asset-forfeiture-abuse-police. A scholarly critique of a famous forfeiture case is Charlena Toro, *From Piracy to Prostitution: State Forfeiture of an Innocent Owner's Property:* Bennis v. Michigan, 11 BYU J. PUB. L. 209 (1997). For a critique of civil asset forfeiture urging reforms to curtail abuses while preserving the process as an important law enforcement tool, see Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777 (2009).

222. CHARLES DOYLE, CONG. RESEARCH SERV., CRIME AND FORFEITURE, (2015), https://www.fas.org/sgp/crs/misc/97-139.pdf.

kleptocracy asset context. The practice of civil forfeiture is a powerful mechanism for *taking* property, not for its *return.* The criticism of *in rem* civil forfeiture exposes potential dark sides of KI prosecutions and serve as illuminating reminders of how institutional legitimacy depends on judicious consideration and internalization of these critiques.

H. Constructive Trust

The equitable doctrine of constructive trust offers a mechanism for "a court [to] recognize[] that a claimant has a better right to certain property than the person who has legal title to it."[223] The doctrine has been described as a key "flexible restitutionary device that imposes an equitable duty . . . to convey property acquired under certain circumstances to the rightful owner."[224] The essence of the trust as a property-law doctrine is "separation of 'legal' and 'equitable' title. The trustee holds legal title to the trust property and manages that property for the benefit of the beneficiaries, who have the right of beneficial enjoyment of the property."[225]

Justice Cardozo, writing for the majority in *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (N.Y. 1919), stated the principle thus: "When property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest" equity converts him into a trustee.[226] The typical elements for an equitable trust were a confidential or fiduciary relation, a promise, a transfer in reliance thereon, and unjust enrichment.[227] The New York Court of Appeals later pulled back from such requirements, emphasizing that "[u]njust enrichment . . . does not require the performance of any wrongful act by the one enriched. Innocent parties may frequently be unjustly enriched."[228]

The constructive trust doctrine seems a promising way forward for the emerging forfeiture regime because it offers a frame-

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223. *Constructive Trust*, BLACK'S LAW DICTIONARY (10th ed. 2014).

224. ELAINE SHOBEN, WILLIAM TABB, RACHEL JANUTIS, THOMAS MAIN, REMEDIES 917 (6th ed., 2016).

225. JESSE DUKEMINIER, ET AL., PROPERTY 295 (8th ed. 2014).

226. Sharp v. Kosmalski, 351 N.E.2d 721, 723 (N.Y. 1976) (quoting Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 380 (N.Y. 1919)).

227. *Id.*

228. Simonds v. Simonds, 380 N.E.2d 189, 194 (N.Y. 1978).

work for reconciling the finality of 18 U.S.C. § 981(f), resulting in full vesting of title to forfeited assets in the USG, with a variety of possible equitable and legal remedies. Objection to the constructive trust doctrine in the forfeiture regime might be framed in procedural or institutional terms—specifically, the concern that U.S. courts would be ill-equipped to effectuate constructive-trust remedies in the kleptocracy context given the vast sums involved and the breadth of jurisdictional coverage; however, one recent high-profile federal case showed that federal courts are adept at using the vehicle of constructive trusts in extremely complex, multi-jurisdictional cases involving corruption issues.[229] The next section will sketch the outlines of a possible statutory scheme within the overall embrace of a constructive trust approach.

IV. "FOUR R'S" IN A CONSTRUCTIVE TRUST FRAMEWORK

This Note suggests a series of possible reforms focusing on the post-forfeiture disposition of assets under the Kleptocracy Initiative built on the fundamental notion that the United States government, through the USDOJ, act as a fiduciary overseeing assets held in trust for the benefit of the people from whom they were stolen. Assaying the existing array of options USDOJ-KI has and exploring where those options can be enhanced and complemented, this Note sketches a possible statutory reform providing USDOJ-KI prosecutors with a post-forfeiture framework of "Four R's" to guide them in the disposition of assets. By providing guidance through an orderly decision-making process for the disposition of forfeited assets, Congress can free the USDOJ from the politically and diplomatically contentious "discretion to return."[230]

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229. Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 640–41 (S.D.N.Y. 2014). For an approving view of the Second Circuit's employment of constructive-trust doctrine, see William E. Thomson et al., *Rule of Law Trumps Rhetoric in Chevron's 2nd Circ. Win*, LAW360 (Aug. 19, 2016, 12:50 PM), http://www.gibsondunn.com/publications/Documents/Thomson-Scolnick-Mefford-Rule-Of-Law-Trumps-Rhetoric-In-Chevrons-2nd-Circ-Win-Law360-8-19-16.pdf; for a critical view, see Brief of International Law Professors as Amici Curiae in Support of Reversal (filed Jul. 8, 2014), *Chevron v. Donziger*, No. 14-0826 (2d Cir. 2016).

230. *See* Oluwafunmilayo Akinosi, *Asset Recovery*, *supra* note 166; *see also supra* note 20. In addition to the discretionary nature of the return of for-

The four tools contained in this sketch for a possible reform scheme are (1) *Repatriation*, i.e. transferring the assets to the government of the country in question; (2) *Restitution*, i.e. the creation of a private right of action for individuals or groups seeking to recover assets stolen from them by the kleptocrat whose assets were the subject of the forfeiture action; (3) *Reparations*, i.e. constructive return of the assets to the people through an appropriate, responsible non-governmental organization ("NGO") or organizations; (4) *Reimbursement*, i.e. retention of funds by USDOJ to help defray some of its prosecution costs and for potential sharing with FBI or other investigative entity—domestic, foreign, or international—that aided the prosecution.

Repatriation of assets to the relevant national government is the first "R," to be done where practicable on both prudential and ethical grounds. "[H]ow . . . property [will] be returned to the state requesting it"[231] is the heart of the asset-recovery part of the UNCAC treaty framework that forms the underlying legal foundation for Kleptocracy Initiative work. Yet clearly, multiple real-world cases have presented themselves where returning funds to the government in question seems to defeat the very purposes of the Initiative by inviting a repeat of the original misappropriation.[232]

Where it is not possible or desirable to repatriate forfeited assets to the government currently in power in the relevant State, the statutory reform would allow for *restitution* to individuals with claims to forfeited assets, through the creation of a private right of action under the Initiative. Similar reforms have been proposed to other statutory schemes involving international corruption, most notably the FCPA.[233]

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feited assets, it is noteworthy that the statutory language authorizing such return makes use of the legally imprecise term "country." 18 U.S.C. § 981(i)(1) (20130. The ambiguity in the statutory language warrants legislative drafting review.

231. *United Nations Convention Against Corruption: Convention Highlights*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, https://www.unodc.org/unodc/en/treaties/CAC/convention-highlights.html (last visited Aug. 29, 2016).

232. *See supra* note 151 and corresponding text.

233. Nika Antonikova makes some partly analogous proposals with respect to private-sector corruption. She urges twin reforms of the FCPA, the first

A third option, *reparations*, is conceived of as a collective, constructive restoration of assets to the people through an appropriately chosen and monitored non-governmental organization ("NGO") or organizations.[234] The BOTA Foundation stands as the most solidly grounded, well executed exemplar of this solution.[235] The remarkable outcome to the Kazakhstan kleptocracy prosecution via creation of a charitable foundation inspires hope. However, the fact that it is the lone case where this has occurred underlines the difficulties facing this option. Most notably, the Equatorial Guinea forfeiture is one in which the absence of a BOTA-like solution has been most glaring. It is not clear, however, why the United Nations, World Health Organization, and other multilateral organizations with strong infrastructure and long experience have not also been considered as possible vehicles for constructive return of forfeited kleptocratic assets.[236]

Fourth, *reimbursement* would allow USDOJ to help defray some of its costs in bringing Kleptocracy Initiative actions, as well

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of which would create a private right of action for victims of private sector corruption to recover damages. Nika A. Antonikova, *Private Sector Corruption in International Trade: The Need for Heightened Reporting and a Private Right of Action in the Foreign Corrupt Practices Act*, 11 BYU INT'L L. & MGMT. REV. 93, 121–23 (2015). Delphia Lim et al. make a similar argument for the creation of a private right of action in *Access to Remedies for Transnational Public Bribery: A Governance Gap*, 28 CRIM. JUST. L. 35 (2013). A related proposal is to create mechanisms for redistributing FCPA penalties so as to benefit the populations harmed by the bribery in question. *Id.* at 43–44.

234. Lim et al. argue, in addition to a private right of action under the FCPA, for the creation of what they call a "public interest-based right of action" under the statute. Lim et al., *supra* note 233 at 44–45. Broadly, they advocate moving away from regarding the fines collected under the FCPA as U.S. federal revenue, instead shifting to a conceptualization of potential "remedies" aimed at providing public benefit in the countries affected. *Id.* Their suggestion is akin to what this Note refers to as "reparation," or a collective, constructive restoration of funds to the people of a national state affected by kleptocratic wrongdoing. It also has features in common with the notion of the USG holding forfeited assets *in trust*.

235. *See supra* Section II.C.2.

236. Such arrangements would comport with current calls for reforms in United Nations funding and practice, in the direction of partnerships with civil society, business, and other stakeholders. UNITED NATIONS GLOBAL COMPACT OFFICE, BUSINESS UNUSUAL: FACILITATING UNITED NATIONS REFORM THROUGH PARTNERSHIPS 1–3 (2005).

as to equitably share with cooperating law enforcement or investigative agencies; the reform would cap this option by statute so as to reduce the perception of self-interested agency behavior or prosecutorial overreach, and thereby enhance the legitimacy of the Initiative. The statutory cap, or limit, would be the smaller of 12.5% (one-eighth of the forfeited assets) or $50 million.[237] This fourth "R" would function similarly to the reasonable administrative fee courts will customarily permit a trustee to deduct from trust assets the trustee administers.[238] The one-eighth share also comports with the "salvage" amount in piracy-related seizure actions, dampening critiques based on arbitrariness.[239]

Perhaps most importantly, all four options would be placed within a framework that could be termed a "derivative constructive trust." The purpose of this overall framework is to place forfeited assets in a clearer legal status *as property*. This is necessary because the civil forfeiture statute that furnishes the procedural framework for USDOJ-KI actions provides that forfeited assets vest fully in the USG.[240] The trust framework enables us to uncouple *legal* title, held by the USG upon forfeiture, from *equitable* title, which could be asserted by victims' groups.[241]

Applying the constructive-trust doctrine to the sorts of illgotten assets forfeited by the USDOJ-KI, the "unjust enrichment" aspect of the mechanism would, in effect, "pass through" to the United States Government. The "pass-through" of the taint is the

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237. In other words, a 12.5% share capped at $50 million. The logic behind the proposed cap is this: the largest single forfeiture accomplished by the Kleptocracy Initiative as of the date of this writing, against former Nigerian dictator Gen. Sani Abacha, was for approximately $458 million; a one-eighth share of that forfeiture would be just over $50 million. The cap would play a further, legitimizing function; USDOJ would not be rewarded simply for the size of the forfeitures it achieves, beyond a certain point. Again, the perception of self-interested conduct would be reduced.

238. This "reimbursement" provision is also analogous to UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 35, at 47–48, art. 57, para. 4, making it possible to "deduct reasonable expenses incurred in investigations, prosecutions, or . . . proceedings . . . ."

239. *See supra* note 189 and corresponding text.

240. "All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section." 18 U.S.C. § 981(f) (2013).

241. *See supra* note 199 and corresponding text.

derivative aspect of this form of constructive trust. In other words, while there is no assertion that the U.S. itself was guilty of malfeasance, there would be an analogy to the receipt of stolen property; the taint attaching to the assets would still be there. A court order mandating a trusteeship would constitute an institutionalized, judicially-overseen effort to return stolen property to its true owners.

Turning back to Justice Cardozo,[242] we could view the dubious acquisition of the property as effected, not by the United States, but by the defendant in the action giving rise to the original forfeiture. The phrase "has been acquired in such circumstances," therefore, need not refer to the acquisition by the United States; rather, it can refer to the prior link in the chain of title—the illegitimate acquisition yielding invalid title and exposing the acquirer to USDOJ-KI prosecution.

The first and fourth options already exist, and the third has been attempted at least once. The proposed statutory framework would offer a coherent, unified protocol for choosing and implementing the pertinent option or options in a given asset forfeiture.[243] Though the framework can be viewed as a set of constraints on the USDOJ, it can best be understood instead as liberating the agency from external critiques of selective prosecution and

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242. Sharp v. Kosmalski, 351 N.E.2d 721, 723 (N.Y. 1976) (quoting Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 380 (N.Y. 1919)).

243. Like concerns are shared by a number of contemporary legal scholars. *See* Jorene Soto, *Show Me the Money: The Application of the Asset Forfeiture Provisions of the Trafficking Victims Protection Act and Suggestions for the Future*, 23 PENN. ST. INT'L L. REV. 365 (2004) (advocating more robust international cooperation to use the statute's forfeiture provisions in ways adapted to the particular characteristics of international sex trafficking and help undermine the trade's profitability); Amy M. Schaldenbrand, *The Constitutional and Jurisdictional Limitations of In Rem Jurisdiction in Forfeiture Actions: A Response to International Forfeiture and the Constitution: The Limits of Forfeiture Jurisdiction Over Foreign Assets Under 28 U.S.C. 1355(B)(2)*, 38 SYRACUSE J. INT'L L. & COM. 55 (2010) (urging caution on constitutionality and comity where U.S. courts assert jurisdiction over assets located in countries whose government is not cooperating with the U.S. court); Bruce Zagaris, *International Enforcement Law Trends for 2010 and Beyond: Can the Cops Keep Up with the Criminals?*, 34 SUFFOLK TRANSNAT'L L. REV. 1 (2011) (advocating creation of innovative tools to help face complex new challenges in international white-collar and related kinds of crime).

institutional self-interest and enabling a more transparent process of decision-making.

V. CONCLUSION

In its half-dozen years of operation, the USDOJ's Kleptocracy Initiative can point to some remarkable successes and a track record in which substantial experience has been built up on the complex global terrain of pursuing the proceeds of corrupt leaders. Yet, for all the immense investigative resources and legal acumen at its disposal, the KI often finds its targets to be formidable adversaries in the courts. The KI is also vulnerable to a range of critiques on issues ranging from the inevitably political framework in which it operates to perceived (and possibly real) unilaterality and arbitrariness. Perhaps most problematic is the destiny of funds after their forfeiture. Indeed, the widely varying post-forfeiture outcomes of USDOJ-KI prosecutions remain a continuing source of disquiet and mistrust.

At the same time, Voltaire's famous aphorism contains real-life wisdom: "Perfect is the enemy of good."[244] Samuel Johnson memorably expressed perfectionism in the context of scholarship as "prescrib[ing] to [oneself] such a degree of exactness as human diligence cannot attain."[245] The analogy between scholarship and policy is inexact, but the caution is invaluable. The challenge is to safeguard the good in the KI and shore up its weaknesses.

In reflecting on the future of the KI and possible reforms, we must also understand anticorruption efforts in a far longer *durée* than even the doctrinal sources surveyed here. Condemnation of corruption runs like a long thread through human civilization

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244. The original French: "Le mieux est l'ennemi du bien." *Proverbes,* LINTERN@UTE, http://www.linternaute.com/proverbe/694/le-mieux-est-l-ennemi-du-bien/. The maxim is often cited in the negative: "Let perfect not be the enemy of good" or, more informally, "Don't let the perfect be the enemy of the good."

245. SAMUEL JOHNSON, NO. 65 FATE OF POSTHUMOUS WORKS., (1759), *reprinted in* THE IDLER, http://www.johnsonessays.com/the-idler/fate-posthumous-works/. Johnson further urged, "Let it always be remembered that life is short, that knowledge is endless, and that many doubts deserve not to be cleared." *Id.*

and appears to be universal.[246] Roman imperial law "forbade all enrichment by senatorial officials, allowing only certain specific exceptions[.]"[247] The Old Testament prophets railed against bribery, as in the admonition to judges in Deuteronomy: "Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift: for a gift doth blind the eyes of the wise, and pervert the words of the righteous."[248] Our most elaborate taxonomy (and hierarchy) of the despicable, Dante's *Inferno*, reserved the eighth and ninth circles of hell for the lowest of the low: those who, in committing "fraud, a form of malice . . . unique to human beings[,] . . . victimize someone with whom they share a special bond of trust."[249]

Against this backdrop of solemn, even pious censure of corruption, one tradition comes down to us as so jovial in its poetic justice, so comically rooted in the wicked reality of human appetite, as to prove irresistible. I have in mind the purported early English custom of the "weigh-in," where elected officials were weighed at the start and end of their time in office; to grow heavier over the term of office was taken as a sign and proxy for corrup-

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246. JOHN T. NOONAN, JR., BRIBES 702–03 (1984). The cynical response is not long in coming: if the thread of condemnation is universal, so must be the corruption it condemns.

247. P.A. Brunt, *Charges of Provincial Maladministration under the Early Principate*, 10 HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE 189, 191 (1961).

248. *Deuteronomy 16:19* (King James).

249. *Fraud: Pimping and Seducing (18), Flattery (18), Simony (19), Sorcery (20), Political Corruption (21-2), Hypocrisy (23)*, UNIV. OF TEXAS AT AUSTIN, http://danteworlds.laits.utexas.edu/circle8a.html#fraud (last visited Nov. 21, 2016). Many other cultural touchstones can be cited; just a few example include Martin Luther, who inveighed against the Roman Church's sale of indulgences, saying that "[t]here is no divine authority for preaching that so soon as the penny jingles into the money-box, the soul flies" out of purgatory, but that the ringing of the coin in the box surely signaled "gain and avarice," MARTIN LUTHER, 95 THESES, Nos. 27–28 (last updated Mar. 27, 2013), http://www.crivoice.org/creed95theses.html; Hugh Latimer, the destitute Anglican bishop, giving pungent expression to the Christian anticorruption tradition: "If a judge should ask me the way to hell, I would show him this way: First, . . . let his heart be poisoned with covetousness," NOONAN, *supra* note 246, at 315 (quoting Hugh Latimer, *Fifth Sermon* (April 5, 1549)); and Geoffrey Chaucer, who appears to have introduced "bribe" and related words into the English language, "although shaded more to extortion than to voluntary offering." NOONAN, *supra* note 246, at 315.

tion and led to the pelting of the offending officeholder with rotten fruit and other measures of crowd justice.[250]

Our world is unfathomably more complex than that of our ancestors, the levers of power and the schemes for its abuse intricate beyond the wildest imaginings of Dante Alighieri or the Hebrew prophets. But it may be there is nothing new under the sun. Today's kleptocrats spin novel variations on the oldest of themes; a new chapter is added, but the book is ancient. This long view of human venality and power's abuse of the weak may make today's prosecutors feel a bit like Sisyphus with his rock. Yet perhaps there is grandeur in this view of corruption, in situating the battle over kleptocracy within the annals of human culture—and nobility in working to ensure that high justice is administered justly.

250. A weigh-in is still performed every May on brass scales in the middle of the town square of High Wycombe, near London. Kimiko de Freytas-Tamura, *A British Town Weighs Its Officials' Merits, With Scales*, N.Y. TIMES (May 18, 2016), http://www.nytimes.com/2016/05/19/world/what-in-the-world/high-wycombe-england-annual-weigh-in.html. Whether this ritual is a true survival of an ancient practice or just a bit of madcap humor, we have to say with the Italians, *"Se non è vero è ben trovato*" [Even if it is not true, it sounds awfully good].