

Summary and Analysis of the Senate and House “Magnitsky” Bills

Brief overview of Magnitsky issue:

Sergei Magnitsky was a Russian lawyer working for a Western investment fund (Hermitage) that had been charged with massive tax evasion and tax fraud. Magnitsky went public with allegations of criminal wrongdoing in the case by tax officials and two investigators of the Interior Ministry. Shortly thereafter, Magnitsky was arrested and charged with tax fraud himself. Magnitsky was kept in pre-trial detention for nearly a year. He died in prison in November 2009 after repeatedly being refused medical treatment despite doctors’ requests for medical follow-up, including surgery. The Economist succinctly summarizes the complex fraud case: “The offices of Hermitage and the law firm where Mr Magnitsky worked were raided by police officers. They seized documents, stamps and seals, which were later used to mount one of the most spectacular frauds in Russian history. The fraud involved three subsidiaries of Hermitage that had paid taxes worth \$230m. Soon after the police raid, these companies were fraudulently re-registered under new owners, who applied for, and immediately received, a tax rebate of \$230m. The documents were stamped with the seals that had been confiscated by the police. In 2008 Mr Magnitsky launched an official complaint alleging that the policemen who had conducted the raid on Hermitage were involved in the fraud. Soon, Mr Magnitsky himself was arrested—by the same Lt Colonel Artyom Kuznetsov who had led the Hermitage raid and was the subject of Mr Magnitsky’s complaint.”*

The Magnitsky case continues to draw widespread attention and criticism. After ordering an investigation shortly after Magnitsky’s death, President Medvedev fired 20 prison officials.[†] On May 30th of this year, Russia’s Investigative Committee cleared the police investigator viewed as the most likely target of any potential prosecution of any wrongdoing in the case, meaning that no one was likely to be prosecuted in connection with Magnitsky’s death. The investigator, Oleg Silchenko, authorized Magnitsky’s arrest on tax evasion charges, detained him for 11 months as a flight risk, refused repeated requests by doctors for medical treatment for Magnitsky, and transferred him to a prison with minimal medical facilities. In April 2011, the preliminary report of the Presidential Human Rights Council found that the charges against Magnitsky were fabricated by Interior Ministry and FSB officials. On June 1, 2011, President Medvedev ordered a new check into the Magnitsky case.

International reaction:

The Magnitsky case has become a new rallying point for human rights’ activists, both within Russia and internationally. On the first anniversary of his death, Magnitsky was posthumously awarded the 2010 Integrity Award by Transparency International. In late 2010, the European parliament called for 60 officials believed to be connected to Magnitsky’s death to be banned from entering the European Union.

* “Sergei Magnitsky one year on,” *The Economist*, November 16, 2010. <http://www.economist.com/node/21013016>.

[†] Among the positive outcomes that the EU commission has highlighted as coming from Medvedev’s focus on the case is Medvedev’s reform of Russia’s penitentiary system, the re-writing of the criminal code so that suspects of tax crimes could not be jailed, and the coming into force of a bill against corporate raiding.

The Canadian parliament resolved to deny visas to and freeze the Canadian assets of those allegedly involved officials. The EU parliament has also urged EU law enforcement agencies and member-states to freeze the assets of officials.[‡] Similar efforts were undertaken (unsuccessfully due to the congressional calendar and election cycle) in the United States in the 111th Congress (2010) and have been reintroduced in the 112th Congress in both chambers. Further highlighting the importance that the United States is placing on the case as an example of their continuing concern with the rule of law and human rights in Russia, Vice President Biden specifically referenced Magnitsky in March op-ed on the reset in the *International Herald Tribune*, saying: “Americans, Europeans, and Russians themselves, are less likely to invest confidently in a country where property rights are frequently violated, where fortunes can be lost because of legal abuses, where companies can be seized on a politician’s whim, and where a lawyer like Sergei Magnitsky can be arrested after accusing the police of fraud — and then die in detention before ever being tried.” These sentiments were closely echoed in Biden’s speech in Moscow that same month. In January 2011, the United Nations Special Rapporteur on Torture, Juan E. Méndez, opened an investigation into Magnitsky's treatment and death.

Background to the 2011 bills:

In April 2010, Senator Ben Cardin, Chairman of the Commission on Security and Cooperation in Europe (U.S. Helsinki Commission)[§], sent a letter to Secretary of State Hilary Clinton requesting “the immediate cancelation of U.S. visas held by a number of Russian officials [and their immediate family members] and others who are involved in significant corruption in that country and who are responsible for last year’s torture and death in prison of the Russian anti-corruption lawyer, Sergei Magnitsky, who testified against them.” Cardin passed along to Secretary Clinton a list of Russian officials involved in the case^{**} that Magnitsky’s colleagues and attorneys provided to the Helsinki Commission. The list includes senior officials from the Russian Interior Ministry, Federal Security Service, Federal Tax Service, Arbitration Courts, General Prosecutor Office, and Federal Prison Service, along with detailed descriptions of their involvement. In September 2010, Senator Cardin and Representative Jim McGovern (D-MA)^{††} introduced legislation into the Senate and House, respectively, to make those requests part of U.S. law. The bills were introduced two weeks after Russian human rights activists publicly appealed to the U.S. and European governments to sanction those Russian officials they believed to be responsible for Magnitsky’s arrest and/or death.^{‡‡} The bill was not voted on during the lame-duck session of the 111th Congress.

[‡] In May of this year, Swiss law enforcement officials froze the Credit Suisse bank accounts (with over Eur. 8 million) of one of the Russian officials alleged to have participated in the Hermitage tax swindle.

[§] The Helsinki Commission was created in 1976 as an independent U.S. government agency to oversee compliance with the Organization for Security and Cooperation in Europe’s Helsinki Final Act, as well as other OSCE commitments across all three OSCE dimensions (politico-military, economic and environmental, and human).. The commission is composed of nine senators, nine House members, and representatives (one each) from the departments of State, Defense, and Commerce. According to the Commission’s website, it “contributes to the formulation of U.S. policy on the OSCE and takes part in its execution, including through Member and staff participation on U.S. Delegations to OSCE meetings and in certain OSCE bodies. Members of the Commission have regular contact with parliamentarians, government officials, NGOs, and private individuals from other OSCE participating States. . . . The Commission convenes public hearings and briefings with expert witnesses on OSCE-related issues; issues public reports concerning implementation of OSCE commitments in participating States; and organizes official delegations to participating States and OSCE meetings to address and assess democratic, economic, security and human rights developments firsthand.”

^{**} Attached as an appendix.

^{††} McGovern is co-chair of the Congressional Tom Lantos Human Rights Commission.

2011 Senate bill:

S. 1039 -- Sergei Magnitsky Rule of Law Accountability Act of 2011 (introduced May 19, 2011)

- Directs the Secretary of State to publish and update a list of each person the Secretary has reason to believe:
 - 1) is responsible for the detention, abuse, or death of Sergei Magnitsky, participated in related liability concealment efforts, or committed those frauds discovered by Sergei Magnitsky, including conspiring to defraud the Russian Federation of taxes on corporate profits through fraudulent transactions and lawsuits against the Hermitage foreign investment company and to misappropriate entities owned or controlled by Hermitage; or
 - 2) is responsible for extrajudicial killings, torture, or other human rights violations committed against individuals seeking to promote human rights or to expose illegal activity carried out by officials of the government of the Russian Federation. Makes an alien on such list ineligible to enter or be admitted to the United States. Revokes any visa issued for such person. Authorizes the Secretary to waive such prohibition if in the U.S. national interest. Requires congressional notification of any such waiver.
- Directs the Secretary of the Treasury to:
 - 1) instruct domestic financial institutions and agencies to take specified measures if the Secretary makes a money laundering determination relating to such conspiracy, and
 - 2) freeze and prohibit U.S. property transactions of an individual who is on the list or who acts as an agent for a listed individual. Authorizes the Secretary to waive such actions if in the U.S. national interest. Requires congressional notification of any such waiver. Subjects a person who violates, attempts to violate, or causes a violation of such money laundering or asset provisions to specified penalties.
- Directs the Secretary of the Treasury to prescribe regulations requiring each financial institution that is a U.S. person to:
 - 1) audit the assets within its possession or control to determine whether any such assets are required to be frozen pursuant to this Act, and
 - 2) submit a report to the Secretary containing the audit's results and a certification that such assets have been frozen. Subjects a financial institution that violates such regulations to specified penalties.

Submitted by Senator Benjamin Cardin (D-MD). The bill's cosponsors are:

Jon Kyl (R-AZ)
John McCain (R-AZ)
Roger Wicker (R-MS)
Mike Johanns (R-NE)
Mark Kirk (R-IL)
Marco Rubio (R-FL)
Kelly Ayotte (R-NH)

Dick Durbin (D-IL)
Sheldon Whitehouse (D-RI)
Jeanne Shaheen (D-NH)
Mark Begich (D-AK)
Richard Blumenthal (D-CT)
Thomas Udall (D-NM)
Barbara Boxer (D-CA)—joined as cosponsor 5/23
Robert Casey, Jr, (D-PA)—joined as cosponsor 5/23
Joseph Lieberman (I-CT)

2011 House bill:

H.R.1575 -- Justice for Sergei Magnitsky Act of 2011 (introduced April 15, 2011)

To make certain individuals ineligible for visas or admission to the United States and to revoke visas and other entry documents previously issued to such individuals, and to impose certain financial measures on such individuals, until the Russian Federation has thoroughly investigated the death of Sergei Leonidovich Magnitsky and brought the Russian criminal justice system into compliance with international legal standards, and for other purposes.

VISA LIMITATIONS ON CERTAIN PERSONS FROM THE RUSSIAN FEDERATION.

(a) Ineligible for Visas-

(1) IN GENERAL- Except as provided in paragraph (2), an alien is ineligible to receive a visa to enter the United States and ineligible to be admitted to the United States who the Secretary of State determines to be--

(A) an individual who engaged in any act that was instrumental in causing the death of Sergei Leonidovich Magnitsky;

(B) an individual who conspired to defraud the Russian Federation of taxes on corporate profits because of fraudulent transactions and lawsuits against the foreign investment company known as Hermitage;

(C) an individual who engaged in any act that was instrumental in concealing the legal liability of any person for the detention, abuse, or death of Sergei Leonidovich Magnitsky; or

(D) the spouse, son, daughter, or parent of an alien described in subparagraph (A), (B), or (C).

TERMINATION- The provisions of this subsection shall cease to be effective on the date that the Secretary of State transmits to the Congress a statement certifying that the Secretary has determined the following:

(A) That the Government of the Russian Federation has conducted a thorough and impartial investigation into the arbitrary detention, systematic abuse, and resultant death in custody of Sergei Leonidovich Magnitsky, and that the individuals responsible have been brought to justice according to the laws of the Russian Federation and pursuant to the international legal obligations of the Russian Federation.

(B) That the Government of the Russian Federation has taken significant steps to bring the criminal justice system and penal system of the Russian Federation into compliance with applicable international legal standards.

(C) That the Government of the United States is confident that the investigation described in subparagraph (A) was properly conducted, transparent, and free of political influence.

FINANCIAL MEASURES.

(b) Blocking of Assets- The Secretary of the Treasury shall freeze and prohibit all transactions in all property and interests in property of an individual described in section 3(a)(1), or of any person acting as an agent of or on behalf of such an individual, that are in the United States, that come within the United States, or that are or come within the possession or control of United States persons, including their overseas branches.

(e) Termination- The provisions of this section shall cease to be effective on the date that the Secretary of the Treasury transmits to the Congress a statement certifying that the Secretary has determined the following:

(1) That the Government of the Russian Federation has conducted a thorough and impartial investigation into the conspiracy (described in section 3(a)(1)(B)) to defraud the Russian Federation of taxes on corporate profits, and that the individuals responsible have been brought to justice according to the laws of the Russian Federation and pursuant to the international legal obligations of the Russian Federation.

(2) That the Government of the Russian Federation--

(A) has taken significant steps to bring the criminal justice system of the Russian Federation into compliance with applicable international financial and banking standards; and

(B) has substantially strengthened statutory protections for individuals who disclose evidence of illegal government activities.

Introduced by Jim McGovern (D-MA). Co-sponsors are Steve Cohen (D-TN), Alcee L. Hastings (D-FL), Sue Wilkins Myrick (R-NC), Joseph R. Pitts (R-PA), Christopher H. Smith (R-NJ) and Frank R. Wolf (R-VA).

Analysis:

The Cardin bill goes beyond his April 2010 letter to Secretary Clinton that called for a visa ban in that it adds an asset-freeze provision. It also goes beyond the House bill in its scope—in addition to the provisions against those officials called out as being responsible for Magnitsky’s arrest and death, the Cardin bill also seeks to require the Secretary of State to compose a list of officials responsible for “extrajudicial killings, torture, or other human rights violations committed against individuals seeking to promote human rights or to expose illegal activity carried out by officials of the government of the Russian Federation” and then impose a visa ban and asset freeze on these officials and their immediate family members. That is to say, it vastly broadens the number of officials who could be subject to visa restrictions and assets being frozen. Not surprisingly, the Russian foreign ministry has described the Magnitsky bills as “regrettable.”

The large number of Senate sponsors of the bill (15) point to considerable support in the Senate for the bill’s passage. The Senate co-sponsors now include the whips from both parties (Kyl and Durbin), which also point to the bill’s likely passage, as well as leading voices from the Judiciary and Foreign Relations committees. Additionally, Jim McGovern has attracted 6 co-sponsors in the House since first introducing his bill in September 2010, including members of the House Judiciary and Foreign Affairs committees. If both houses pass their respective versions of the Magnitsky bill, then the bills would likely go to a conference committee for reconciliation before becoming U.S. law.^{§§}

The Magnitsky bill is being touted as a possible “replacement” for Jackson-Vanik, meaning that with Magnitsky on the books, those in the House and Senate who have linked Russia’s graduation from Jackson-Vanik to human rights issues have new political cover to vote for Russia’s graduation. With the administration committing to work for Russia’s graduation from Jackson-Vanik, the Magnitsky bill offers a possible way forward from the Jackson-Vanik issue that continues to bedevil the bilateral relationship. And although finally graduating Russia from Jackson-Vanik would remove an important symbolic irritant in the relationship, replacing Jackson-Vanik with Magnitsky will not illicit a positive reaction from Russia.

The effect of Jackson-Vanik on the relationship is, at least until Russia’s accession to the WTO, symbolic—there is no material harm to the relationship because Russia has been granted annual waivers from the amendment’s provisions and thus enjoys normal trade relations with the United States. The Magnitsky bill, however, would more effectively allow the U.S. government to highlight Russian human

^{§§} Since both the House and Senate must pass identical versions of a bill for it to become law, “disagreements” on bills are either resolved through conference committee or through the use of amendments. Because the latter process is often cumbersome, conference committees are most frequently used to reconcile competing bills, which are then sent back to both houses for approval.

rights' practices and offer some mechanism for sanctioning individuals viewed as abusing human rights in Russia. Currently, the United States has no such mechanism. Additionally, the mechanism that has been proposed in the Senate version of the legislation allows lawmakers to propose individuals for inclusion in the "blacklist" compiled by State, giving Congress a new path to become involved in the U.S.-Russia bilateral relationship and could thus provide a new mechanism for critics of the "reset" to influence the relationship. And, as mentioned above, the Senate version of the bill directs sanctions to be applied against a potentially much larger swath of Russian officials than those involved in the Magnitsky case. The United States would move from what is, in essence, an ineffective tool to punish Russian officials for human rights lapses (Jackson-Vanik) to a much more effective tool should those officials want or need to travel to the United States or hold assets in the United States.

The Magnitsky bill would also be harder to dismiss as a relic of the Cold War as it is far removed from Cold War-era issues (such as trade law) but is inspired by a relatively recent and well-known case in Russia; one that continues to dominate headlines as a litmus test for President Medvedev's sincerity about promoting the rule of law in Russia. It would more effectively put the issue of human rights in Russia in the U.S political discourse—something that Russian officials are not eager to see happen.