

David J. Kramer

The Magnitsky Act is the right thing to do

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Following the June 17, 2013 meeting between Presidents Obama and Putin in Northern Ireland on the margins of the G8 meeting, I participated in a debate on US-Russia policy at the Center for the National Interest in Washington. I criticized the joint communique issued by the two leaders after their bilateral meeting, which called for “mutual respect, equality, and genuine respect for each other’s interests”. I argued that the American President should not offer his respect for the abysmal way the Putin regime treats its own people nor should we pretend that beyond the issue of nuclear weapons are we equals. Our interests, I added, were not aligned for the most part, as evidenced by Russia’s support for the murderous Assad regime in Syria. There are certain issues where we can and should work together, such as counter-terrorism and non-proliferation, but as the “values gap” widens, cooperation will be increasingly difficult.

In outlining a different policy, I called for the Obama administration – and starting with President Obama himself – to be much more outspoken about the worst deterioration in human rights in Russia since the break-up of the USSR. I also urged full and effective implementation of the Sergei Magnitsky Rule of Law Accountability Act and argued for European passage of similar legislation. Through targeted imposition of a visa ban and asset freeze against Russian officials involved in gross human rights abuses, including but not

limited to the murder of 37-year-old lawyer Sergei Magnitsky, I maintained the West and the United States in particular had found the most effective way to hold accountable Russian officials involved in such egregious behavior. Moreover, the Magnitsky Act has significant support among Russian opposition and civil society groups as well as among broad segments of the Russian population, as shown by Levada Centre surveys.

Given my past and very public criticisms of the authoritarian behavior of the Putin regime, I was surprised to see the Russian ambassador to the United States, Sergei Kislyak, in the audience at the Center for the National Interest. During the question and answer part of the event, Kislyak criticised my description of the Russian leadership as a “regime” instead of a “government” and dismissed my claim that the Magnitsky Act exposed the Putin regime’s vulnerability. Kislyak alternated between dismissiveness of the Magnitsky Act’s importance and hostility toward its passage. His statement that the sanctions under Magnitsky – the asset freeze and visa ban – didn’t concern Russian officials at all seemed disingenuous at best, especially given his threats and those of other Russian officials in the summer of 2012 that passage of the Act would ruin the reset policy of the Obama administration and seriously damage US-Russian relations.

“Who are you (the United States) to pass judgment on Russians,” Kislyak demanded to know. He disputed my claim that the Dima Yakovlev law, which in December 2012 banned the adoption of Russian orphans by Americans, was Russia’s response to the Magnitsky Act, claiming that the Yakovlev bill was instead focused on protecting the welfare of Russian orphans in the US. We are concerned about Russian children who have died in the care of American families, he claimed, rejecting my argument that Russian children were sadly held hostage to Russia’s vindictive response to the Magnitsky Act.

Why then, I asked him, did his Russian colleague in Dublin publicly threaten to terminate the adoption by Irish citizens of Russian orphans if the Irish parliament had gone ahead with its own version of the Magnitsky Act? Were there instances of abuse of Russian orphans in Ireland, as there had been in the US, which would warrant such a public and ugly threat? Kislyak pretended to be unaware of such a development, but what happened in Dublin is clear proof that the Russian regime is very worried that European member

states will follow the American lead. Indeed, it makes the case even stronger for European enactment of some sort of sanctions against the Putin regime and those responsible for gross human rights abuses, in the Magnitsky case and other instances.

Given that corrupt Russian officials prefer to keep their ill-gotten gains in the West, the prospect of denying them the privilege to do so in Europe and the US is of grave concern to the Kremlin. This explains in part Putin's order to Russian officials to repatriate money back to Russia. But the very reason officials buy Western assets and use Western financial institutions is because they don't trust their own country's system and the absence of rule of law and predictability. If they can't enjoy their corrupt earnings overseas, Russian officials, judges, prosecutors and the like will have less incentive to engage in illicit behavior that accrues them profit. In other words, Magnitsky legislation not only punishes those who have already committed gross human rights abuses but also could discourage future Magnitsky cases from happening, and there are anecdotal reports that this is already having the desired effect.

When officials and analysts in the West say behavior such as that carried out in the Magnitsky case is unacceptable, it is not enough to simply express outrage and then go about business as usual; we must actually impose penalties, especially in the absence of rule of law and accountability inside Russia. To do nothing is to be complicit in a way in such egregious behavior. The Magnitsky Act, in other words, is as much about the West as it is about Russia. Allowing Russian human rights abusers the privilege of traveling to or making use of financial institutions in our countries implicates us in such abuses. The so-called realist camp argues that expressions of outrage over human rights abuses accomplish nothing, but then when steps are taken to impose penalties and consequences in a targeted way for serious human rights violations, realists don't approve of that either. A question they should answer is what would they do in the face of such abuses aside from looking the other way and going about business as usual?

Other critics argue that sanctions don't work, that singling out Russia is unfair when there are other regimes that engage in similar, even worse abuses. Still others argue that the Magnitsky Act will impinge on our ability to work together with Russia on a host of common challenges. Let's address these criticisms one at a time.

The history of sanctions against governments and against individuals is mixed. Those imposed against the apartheid regime were effective in bringing change to South Africa and sanctions against the Milosevic regime also had a positive impact. Sanctions in which I was involved when I worked in the State Department against the Lukashenko regime in Belarus secured the release of political prisoners in that country in 2008. In my Freedom House capacity, I recently visited Myanmar (Burma) where sanctions against the previous military junta did have an effect (though Chinese pressure on the junta also inadvertently pushed the regime in Yangon toward the West). Studies show sanctions are effective less than half of the time they are used. But one needs to understand that sanctions alone are not sufficient to turn a country into a democracy. Instead, their purpose is to penalize officials who engage in gross human rights abuses; after all, if such abuses are not stopped and political prisoners are not freed, then the prospects for a country's transition toward a democracy are close to zero.

The targeted nature of the Magnitsky sanctions means they are not directed against Russia as the country, contrary to the rhetoric of the Putin regime and its stooges in the Duma and media. Instead, the sanctions are against individuals who engage in such behavior and are meant to prevent abuses in the future. They will not bring Magnitsky back to life, of course, but they may prevent another such case in the future. It is premature at best to conclude that Magnitsky sanctions will have no impact; especially if Europeans adopt them too, it is possible that they will resonate in Russia beyond initial expectations.

Then there is the argument that singling out Russia for such sanctions is unfair, even discriminatory. Regimes in Beijing and Riyadh are worse, the critics argue, and yet no such measures are being taken against them. That we don't impose sanctions against all regimes that engage in serious human rights abuses doesn't mean we should not adopt such measures against any countries. The reality in 2012 in the US Congress was that the Senate did consider a global version, but in order to have a bill that would pass both the House and the Senate, the act remained focused on Russia. I support efforts to widen the Magnitsky Act to other abusive regimes, but I backed the Russia-specific version initially passed by the House last year because it was the only version that would have passed during that Congress and because it made sense on its own merits. Indeed, while arguably not the worst abuser of human

rights, Russia certainly deserves special attention, and the Magnitsky case is particularly noteworthy given the utter defiance of Russian officials involved in the case. Those who investigated, arrested, and imprisoned Magnitsky – i.e. the very same ones whom Magnitsky implicated in fraud – were not only rewarded for their performance but also promoted. That Magnitsky was then tried and convicted posthumously of tax evasion in July 2013 – almost four years since his death – adds to the sense of outrage in the West and reflects a new low on the part of the Putin regime. The Magnitsky case has also unfolded against a backdrop of massive human rights abuses in Russia and a sweeping crackdown against civil society and the opposition.

Unlike China and Saudi Arabia, Russia is a member of the Organization for Security and Cooperation in Europe and of the Council of Europe, both of which entail commitments to human rights standards and permit outside monitoring of a country's domestic developments. Russia not only does not conform to the standards of the OSCE and Council of Europe but actively seeks to undermine them. Absent any cost to engaging in such defiance, Russia will see a green light to continue to engage in such abuses.

Those who worry that Russia is being unfairly singled out can take solace from the debate underway in the US about broadening the legislation to other countries with poor human rights records. Governments in Bahrain, Ukraine, and elsewhere will be nervous if they come under the microscope of the legislation. It is past time to put on notice regimes that believe they can abuse the human rights of their citizens and pay no price. And since the Magnitsky approach is targeted, it is not a sanction against a nation but those individuals who engage in such behavior. What is wrong with that?

The argument that Magnitsky will negatively affect our ability to work together with Russia on common interests is similarly unconvincing. To be clear, the biggest impediment to the ability of the United States and Russia to cooperate is the nature of the Putin regime. It is a rotten, corrupt, authoritarian regime driven less by a sense of national interests and more by corrupt interests. It sides with like-minded authoritarian regimes in Syria and elsewhere but also supports Lukashenko in Belarus (even if he and Putin cannot stand each other), the Castros in Cuba and others. Putin and the Kremlin actively seek to block Western and American efforts to promote democracy and freedom as

well as integration into Euro-Atlantic bodies around the world, but especially among Russia's neighbors. That is the greatest obstacle to better relations between Russia and the West, not passage of the Magnitsky Act.

A more principled policy is both possible and desirable for the US. In the 1970s, at roughly the same time when the Jackson-Vanik Amendment was passed over obstacles to emigration of Soviet Jews, the US and USSR signed several arms control agreements, proving that the West can walk and chew gum at the same time. Supporters of Magnitsky legislation aren't seeking revival of a Cold War with Russia, though Putin does his best to portray the situation that way; instead, we seek a principled position that doesn't rule out cooperation on counter-terrorism, dealing with Iran and North Korea, or negotiating further arms cuts. It is useful to recall whom Russia penalized for passage by the US Congress of the Magnitsky Act: Russian orphans. Notwithstanding Putin's relentless criticism and anti-American rhetoric, he directed his vengeance against defenseless Russian children. That says more about the nature of the Putin regime – and its defenders – than anything the West could do or say.

Critics of the sanctions should be asking how the Russian leadership allowed the Magnitsky case to reach such a point wherein the Congress, believing the Obama administration wasn't doing enough in pressing on the human rights situation in Russia, passed the legislation (over Obama administration objections). Why did the Russian leadership do nothing – and in fact worse than nothing – to address this case in a satisfactory manner? What did it have to hide? It took the Congress two years to pass the bill, two years in which the Russian leadership could have held accountable those involved in Magnitsky's murder; instead, they tried him after his death. A presidential commission when Dmitri Medvedev sat in the Kremlin concluded that Magnitsky was essentially murdered by being denied medical attention and being beaten on his last day of life. Nothing was done in response to this commission's findings. Instead, the Kremlin engaged in a massive cover-up and defied the international community. The United States Congress deserves praise for its action and criticism should be addressed to Putin and his cronies. Europeans need to show similar resolve in holding Russian officials to account. If they were to do so, even Ambassador Kislyak might change his tune and engage in some actual and constructive diplomacy.