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## Russian Roulette: The Magnitsky Act's Implications for U.S.-Russian Relations in an Increasingly Precarious Legislative Game

HILLARY EVANS<sup>†</sup>

### INTRODUCTION

On December 28, 2012, Russian President Vladimir Putin signed the controversial Dima Yakovlev bill<sup>1</sup> into law, which the Duma had passed one week earlier.<sup>2</sup> Formally entitled the “Federal Law On Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation,” U.S. officials widely condemned the law for its banning of American adoptions of Russian children as well as halting those adoptions already in progress.<sup>3</sup> However, the adoption bill was only part of a broader scheme of several measures directed against the United States, which

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1. See generally “Dima Yakovlev’ Bill in No One’s Best Interests, AMNESTY INTERNATIONAL (Dec. 20, 2012), <http://www.amnesty.org/en/news/dima-yakovlev-bill-no-one-s-best-interests-2012-12-20-0> (discussing the bill and its potential impact); Jim Heintz, *Russia: Vladimir Putin Signs Bill Banning Americans from Adopting Russian Children*, HUFFINGTON POST (Dec. 28, 2012, 12:19 PM), [http://www.huffingtonpost.com/2012/12/28/russia-vladimir-putin-adoptions-bill\\_n\\_2374291.html](http://www.huffingtonpost.com/2012/12/28/russia-vladimir-putin-adoptions-bill_n_2374291.html).

2. *A Law on Sanctions for Individuals Violating Fundamental Rights and Freedoms of Russian Citizens Has Been Signed*, PRESIDENTIAL EXECUTIVE OFFICE (Dec. 28, 2012, 1:30 PM), <http://eng.kremlin.ru/news/4810>.

3. Gregory L. White, *Putin Signs Adoption Ban, Putting Pending Cases in Limbo*, WALL ST. J., Dec. 28, 2012, at A8.

hint at a more political motivation for its creation. In fact, along with prohibiting American adoptions of Russian children, the bill that Putin signed on December 28, 2012 also prohibits “those [U.S. citizens] guilty of violating the fundamental human rights and freedoms of Russian citizens” from entering Russia, permits Russia to freeze their assets (financial or otherwise), and prohibits them from engaging in business transactions and owning property in Russia.<sup>4</sup> The bill does not only target private citizens; it also suspends “the activities of non-profit organizations that receive cash and other assets from American citizens (organizations), and are involved in political activities in Russia” and non-profit organizations “implementing projects, programmes, or conducting other activities in Russia that act as a threat to Russian interests.”<sup>5</sup> Furthermore, the bill prohibits Russian citizens who are also U.S. nationals from being the leaders of “non-profit organization, or members or leaders of branches of international or foreign non-profit organizations involved in political activities in Russia.”<sup>6</sup>

This language is essentially a tit-for-tat reaction to the United States’ Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, more commonly known as the Magnitsky Act.<sup>7</sup> The Magnitsky Act is a follow-up to the Jackson-Vanik Amendment,<sup>8</sup> and is no less controversial or contentious than its predecessor, which was originally developed at the height of the Cold War to prohibit the granting of “most-favored-nation” (MFN) status to countries that restricted emigration.<sup>9</sup> In fact, both laws have managed to infuriate the Russian government in similar ways.<sup>10</sup> Essentially, part of the Magnitsky Act requires the

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4. PRESIDENTIAL EXECUTIVE OFFICE, *supra* note 2.

5. *Id.*

6. *Id.*

7. Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, 126 Stat. 1496; White, *supra* note 3 at A8.

8. 19 U.S.C. § 2432 (1974). For an explanation of the Jackson-Vanik Amendment, *see infra* Part II.A.

9. Robert H. Brumley, *Jackson-Vanik: Hard Facts, Bad Law?*, 8 B.U. INT’L L.J. 363, 363 (1990).

10. The Soviet Union furiously renounced the Amendment shortly after passage and viewed it as a flagrant interference in its domestic affairs, refusing to sign the 1972 trade agreement with the United States. Taunya L. McLarty, *MFN Relations with Communist Countries: Is the Two-Decade Old System Working, or Should It Be Revised or Repealed?*, 33 U. RICH. L. REV. 153, 172 (1999); Keith Loken, *Why Jackson-Vanik Should Be Abandoned*, 16 CURRENTS: INT’L TRADE L.J. 3, 6 (2007). Similarly, President Putin made it clear how he felt about the

President to submit to Congress a list of those who participated in the Magnitsky case or other human rights abuses.<sup>11</sup> Those placed on the President's list will be ineligible to receive a visa or will have their current visa revoked, as well as have their financial assets frozen.<sup>12</sup>

As a result, the passing and signing of the Magnitsky Act by the U.S. government involves a broader range of implications than just soured Russo-American political relations. In this comment I will consider and analyze various implications resulting from the passage of the Magnitsky Act, including lessons learned from the Jackson-Vanik Amendment; how this Act fits within the context of the rules of the World Trade Organization (WTO); and separation of powers concerns, specifically the ability of Congress to direct foreign affairs. To conclude I will discuss whether, in light of all the aforementioned implications, the Magnitsky Act will be more beneficial or detrimental as a rule of law.

#### I. BACKGROUND OF MAGNITSKY ACT

A brief overview of the background of the Magnitsky Act provides substantial insight as to why the Russian government would prefer it did not exist. Sergei Magnitsky was a Russian legal adviser to the foreign investment firm Hermitage Capital Management (HCM), who died at the age of 37 while in Russian police custody on November 16, 2009.<sup>13</sup>

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Magnitsky Act: by issuing an Executive Order directed towards the United States instructing Russia's Foreign Ministry to "pursue . . . policy . . . based on the principles of equality, non-interference in internal affairs . . . [and] to work actively on preventing unilateral extraterritorial sanctions by the U.S. against Russian legal entities and individuals," and by declaring the Magnitsky Act as "unfriendly . . . towards the Russian Federation." PRESIDENT OF RUSSIA, EXECUTIVE ORDER ON MEASURES TO IMPLEMENT FOREIGN POLICY (May 7, 2012, 6:20 PM), <http://eng.kremlin.ru/acts/3764>; *News Conference of Vladimir Putin*, PRESIDENTIAL EXECUTIVE OFFICE (Dec. 20, 2012, 4:40 PM), <http://eng.kremlin.ru/news/4779#sel=33:1,33:10;34:40,34:60>.

11. § 404, 126 Stat. at 1505.

12. *Id.* at §405.

13. Special Rapporteur on Independence of Judges and Lawyers, *Report of the Special Rapporteur on Independence of Judges and Lawyers*, Human Rights Council, U.N. Doc. A/HRC/17/30/Add.1 (May 19, 2011) (by Gabriela Knaul [hereinafter *Rep. of Special Rapporteur*]).

HCM was the largest foreign investor in the Russian stock market and its Hermitage Fund was rumored to be the “world’s leading public equity fund focusing on the Russian market.”<sup>14</sup> The company and its leadership were also known for their whistleblowing in regard to corruption in Russia.<sup>15</sup> In 2007, Russia’s Ministry of Internal Affairs (MVD) raided HCM’s Moscow office and the offices of its attorneys.<sup>16</sup> HCM applied to the United States District Court for the Southern District of New York for assistance in conducting discovery for use in a foreign proceeding.<sup>17</sup> In its declaration, HCM alleged that after investigation it had discovered several high-ranking Russian officials, businessmen, and private individuals comprising what it called a “criminal enterprise” that organized and perpetrated the raid on HCM.<sup>18</sup> Among others, the declaration named as criminal senior officers within the MVD, including a Lieutenant Colonel and a Major; senior officers in the Federal Security Service (the successor to the KGB); senior officers in various Tax Bureaus; and several judges, including those of the St. Petersburg Arbitration Court.<sup>19</sup> Among businessmen, the declaration named senior executives of Russian commercial banks as well as its shareholders and directors.<sup>20</sup> A potential unspoken and risky implication in this declaration was that President Putin, who was President at the time, knew of or was potentially involved in this raid.

HCM alleged that during the raid, MVD officers seized corporate records from both its Moscow office and the office of its

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14. Julia Lapitskaya, Note, *ECHR, Russia, and Chechnya: Two Is Not Company and Three Is Definitely A Crowd*, 43 N.Y.U. J. INT’L L. & POL. 479, 516 (2011); Konstantinos D. Magliveras, *The Magnitsky Rule of Law Accountability Act: An Extraterritorial Instrument With a Good Cause?* 29 No. 3 INT’L ENFORCEMENT L. REP. 68, 68 (2013).

15. Clifford J. Levy, *An Investment Gets Trapped in Kremlin’s Vise*, N.Y. TIMES (July 24, 2008), [http://www.nytimes.com/2008/07/24/world/europe/24kremlin.html?hp=&pagewanted=all&\\_r=0](http://www.nytimes.com/2008/07/24/world/europe/24kremlin.html?hp=&pagewanted=all&_r=0).

16. *Id.*; Thomas Firestone, *Criminal Corporate Raiding in Russia*, 42 INT’L LAW. 1207, 1213 (2008).

17. Decl. of Neil Micklethwaite ¶¶ 3–4, 16–18, In re Application of Hermitage Capital Management Limited for Judicial Assistance to Conduct Discovery for Use in a Foreign Proceeding, No. M19-116 (LTS) (S.D.N.Y. 2009), available at <http://www.robertamsterdam.com/Hermitage%20Micklethwaite%20Declaration.pdf> [hereinafter Decl. of Neil Micklethwaite].

18. *Id.*

19. *Id.* ¶ 6.

20. *Id.*

law firm.<sup>21</sup> HCM stated that the “criminal enterprise” then used to fraudulently re-register three of the Hermitage Fund’s investment companies from HSBC Private Bank, the original trustee of the Hermitage Fund, to certain members of its group.<sup>22</sup> The effect of this re-registering was essentially to replace the HSBC executive directors with members of the “criminal enterprise,” each of whom had prior criminal convictions.<sup>23</sup>

HCM then alleged that the “criminal enterprise” forged contracts that created approximately U.S. \$1 billion worth of false financial liabilities against the company.<sup>24</sup> These counterfeit contracts, dating from before the raid, would have been impossible to create without the sensitive documents seized by the MVD, yet were recognized by multiple judgments handed down by Russian courts.<sup>25</sup> That same year, HCM, under its new, fraudulent directors, applied to tax authorities for a \$230 million refund in overpaid taxes from the Russian government.<sup>26</sup> The refund request was granted immediately and the government routed money through banks and to bank accounts that were affiliated with members of the alleged “criminal enterprise.”<sup>27</sup> According to the HCM’s declaration,

The fraudulent rebate of U.S. \$230 million was authorized by Russian tax officials despite the fact that HSBC and Hermitage had filed comprehensive criminal complaints with Russian law enforcement authorities alerting them to the misappropriation of the Hermitage Companies, fabrication of fictitious liabilities against them, and the sham court judgments three weeks before the fraudulent tax refund request . . .

<sup>28</sup>

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21. *Id.* ¶ 7.

22. *Id.*

23. *Id.*

24. *Id.* ¶ 8.

25. *Id.* ¶ 8.

26. Lapitskaya, *supra* note 14, at 516.

27. Decl. of Neil Micklethwaite, *supra* note 17, ¶ 9.

28. *Id.* ¶ 10.

Soon thereafter, petitions were filed in Russian courts to “liquidate and bankrupt” HCM and its companies.<sup>29</sup>

HCM’s executives and lawyers were not left untouched during this time period. Many of them, including HMC’s CEO William Browder, were intimidated in the form of criminal charges.<sup>30</sup> Browder, whose visa was cancelled in 2005, was declared a “threat to national security” by the Russian government and investigated for tax evasion.<sup>31</sup> However, because he had stayed out of Russia since his

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29. *Id.* ¶ 11. What happened after these petitions were filed is more complex. In the words of HMC’s CEO William Browder,

“After committing the tax rebate fraud, the criminal group then attempted to destroy the evidence by liquidating our stolen companies. They first sold the stolen companies to a British Virgin Islands company called Boily Systems, and then Boily applied to liquidate our stolen companies. Once we discovered the transfer to Boily, our lawyers wrote to Commonwealth Trust Company, the company-formation agent in the British Virgin Islands, to determine who stood behind Boily and what was going on. Unfortunately, Commonwealth Trust stonewalled us at every step of the way. . . . As we later learned, some of the \$230 million found its way back to a Russian individual named Vladlen Stepanov, the ex-husband of the Russian tax official who authorized the illegal tax refund in 2007. In 2010, we found out that two companies that were owned by Stepanov received approximately €8 million into accounts at Credit Suisse Private Bank Zürich. It turns out that one of those companies was set up by Commonwealth Trust, and we also learned that Commonwealth Trust offered a written declaration to Credit Suisse that the company wasn’t involved in money laundering. . . . In terms of tracing the money, we have been able to trace \$135 million out of the \$230 million to eight different jurisdictions, and have written to the police and prosecutors in those countries. There are now six different countries that have criminal investigations opened into the money laundering: Lithuania, Latvia, Estonia, Cyprus, Switzerland and Moldova.”

Mary Campbell, *Q&A: Hermitage Capital Management Founder Takes on Russia’s Putin*, FINALTERNATIVES (May 29, 2013, 12:52 PM), <http://www.finalalternatives.com/node/23784?time=1379609401> (emphasis omitted).

30. Decl. of Neil Micklethwaite, *supra* note 17, ¶ 12.

31. *Id.* ¶ 25. Putin claims to not know Browder exists or the reasons for his exile, stating:

“I don’t know who this Mr. Browder is, as you say, why he cannot return to Russia . . . . Russia is a big country . . . . There might have been some kind of conflicts—conflicts with the authorities, conflicts in the business world, interpersonal conflicts. But that’s life, it’s complicated and varied. If a person thinks that his rights have been violated, let him go to court. We have a legal system that works, thank God.”

Levy, *supra* note 15.

visa was revoked, Browder managed to avoid official charges.<sup>32</sup> Sergei Magnitsky was not so fortunate.

In 2008, Magnitsky voluntarily testified in court against officials of the Russian Interior Ministry, accusing the officials of obtaining a fraudulent rebate of \$230 million.<sup>33</sup> One month later, on November 24, 2008, Magnitsky was charged with tax evasion and arrested in Moscow.<sup>34</sup> He was refused bail and a court date and was held in pre-trial detention for eleven months.<sup>35</sup> Although his lawyers filed complaints on his behalf for the arbitrary nature of his detention throughout this time period, their applications were all rejected.<sup>36</sup> At some point during his detention, Magnitsky developed gallstones and acute pancreatitis, and he asserted that he was repeatedly denied medical treatment for these conditions.<sup>37</sup> He also alleged harsh conditions inside the prison such as poor sanitation, social isolation, and lack of proper opportunities for defense by writing his complaints in a journal that was passed out by his lawyers every month.<sup>38</sup> On November 16, 2009, eight guards allegedly beat Magnitsky with rubber batons, and denied him medical treatment for one hour and eighteen minutes until he was dead.<sup>39</sup> Magnitsky died from heart failure less than a year after he was arrested.<sup>40</sup> A request for an

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32. Henry Meyer, *Russia to Charge Browder with Tax Evasion, May Seek Extradition*, BLOOMBERG NEWS (May 16, 2011, 7:14 AM), <http://www.bloomberg.com/news/2011-05-16/russia-to-charge-william-browder-with-tax-evasion-might-seek-extradition.html>.

33. *Rep. of Special Rapporteur*, *supra* note 13, ¶ 1013, at 168.

34. *Id.* ¶ 1014, at 168.

35. *Id.*; Decl. of Neil Micklethwaite, *supra* note 17, ¶ 13, at 7.

36. *Rep. of Special Rapporteur*, *supra* note 13, ¶ 1014, at 168.

37. *Id.* ¶ 1014–15.

38. William Browder, *Tortured to Death by Putin's Jackboot State: Inside the Rat-infested Gestapo-like Russian Prison Where Eight Guards Beat Lawyer Who Exposed Moscow's Gangster Regime*, DAILY MAIL (Mar. 11, 2012, 5:00 PM), <http://www.dailymail.co.uk/news/article-2227309/Tortured-death-Putins-jackboot-state-Last-words-Moscow-lawyer-death-screams--chilling-truth-Russias-terrifying-gangster-regime.html#axzz2KMB249Jz>; *see generally* English Translation of Complaint by Sergey Magnitsky to General Prosecutor Yuru Chaika, <http://russian-untouchables.com/docs/Prison-Diaries-Magnitsky-General-Prosecutor-Complaint.pdf> (English translation of Magnitsky's complaint provided by his supporters).

39. *Rep. of Special Rapporteur*, *supra* note 13, ¶ 1015, at 168.

40. Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, § 402(a)(8), 126 Stat. 1496, 1503.



independent autopsy was denied, and Magnitsky's body was only released to the family on the condition that it be buried immediately.<sup>41</sup>

There was a substantial and immediate public outcry after Magnitsky's death. The Public Oversight Commission for Human Rights Observance in Moscow Detention Centers (POC) issued a report in December 2009 concluding that Russia wrongfully deprived Magnitsky of his right to life.<sup>42</sup> Shortly after, President Medvedev declared that there would be a criminal investigation into Magnitsky's death, and in July 2011, Medvedev's Human Rights Council announced the results of its investigation.<sup>43</sup> The Council found that Magnitsky's "arrest and detention was illegal" among other things.<sup>44</sup> At the time this paper was written, no criminal convictions have been made in connection to the death "despite the fact that the POC report concluded that a number of investigators and penitentiary officials, including the lead investigator in the criminal case against Mr. Magnitsky, should have been investigated as well."<sup>45</sup> The United Nations has also issued several reports through its Commission on Torture and its Special Rapporteurs condemning

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41. *Rep. of Special Rapporteur, supra* note 13, ¶ 1015, at 168.

42. The Pub. Oversight Comm'n for Human Rights Observance in Moscow Det. Centers, *Review of the Conditions of the Detention of Sergei Magnitsky in the Pre-Trial Detention Centers of the City of Moscow*, WALL ST. J. at 19, <http://online.wsj.com/public/resources/documents/WSJ-20091229-MagnitskyReport.pdf>.

43. § 402(a)(8), 126 Stat. at 1503.

44. *Id.*

45. Comm. against Torture, Concluding Observations on the Fifth Periodic Rep. of the Russian Fed'n, Adopted by the Comm. at its Forty-Ninth Sess. (29 October-23 November 2012), ¶ 11, U.N. Doc. CAT/C/RUS/CO/5 (Dec. 11, 2012) [hereinafter Concluding Observations]. Although there were originally charges against the head doctor at the prison, Larisa Litvinova, those charges have since been dropped. § 402(a)(8), 126 Stat. at 1503. Curiously enough, Russia posthumously retried Magnitsky and his co-defendant Browder for tax evasion, a stunt hearkening back to the Stalinist era of in absentia trials. David M. Herszenhorn, *Dead Lawyer, a Kremlin Critic, Is Found Guilty of Tax Evasion*, N.Y. TIMES, Jul. 12, 2013, at A4. Although officials claimed the trial was to help Magnitsky's supporters clear his name, relatives say they did not ask for a retrial, and many predicted that the trial would serve to vindicate those Magnitsky and Browder accused of corruption. Andrew E. Kramer, *Russia Plans to Retry Dead Lawyer in Tax Case*, N.Y. TIMES, Feb. 8, 2012, at A4. They were right. On July 11, 2013, Sergei Magnitsky was found guilty of tax evasion, almost four years after his death. Herszenhorn, *supra* note 45. Browder was sentenced to nine years in prison. *Id.*

Magnitsky's death and calling for stricter investigations and adherence to international treaties and norms.<sup>46</sup>

Individual countries have also taken action against Russia and those involved in Magnitsky's death.<sup>47</sup> Several parliaments including those in the United Kingdom, the Netherlands, Sweden, and Poland, have passed resolutions "urging their governments to introduce sanctions on the Magnitsky case," while other parliaments such as those in Portugal, France, Spain, and Latvia, are drafting similar resolutions.<sup>48</sup> In response to these resolutions of EU member states, in October 2012 the European Parliament adopted recommendations to the European Council to establish "a common EU list of officials responsible for the death of Sergei Magnitsky," to ban these officials from the EU, and to freeze financial assets "they or their family may hold" in the EU.<sup>49</sup>

These recommendations are echoed in the text of United States' Magnitsky Act. This Act, introduced in the House of Representative by Representative Dave Camp in July 2012, became Public Law 112-208 when signed by President Obama on December 14, 2012.<sup>50</sup> The purpose of the Act is "[t]o authorize the extension of nondiscriminatory treatment (normal trade relations treatment) to products of the Russian Federation . . . and to require reports on the compliance of the Russian Federation with its obligations as a member of the World Trade Organization, and for other purposes."<sup>51</sup>

The Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 is divided into

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46. Concluding Observations, *supra* note 45, at 2, ¶ 5; *Rep. of Special Rapporteur*, *supra* note 13, at 167–68.

47. Common Visa Restrictions for Russian Officials Involved in the Sergei Magnitsky Case, EUR. PARL. DOC. (P7\_TA-PROV 0369) 79–81 (2012).

48. *Id.* at 80.

49. *Id.*; Magliveras, *supra* note 14, at 69. The EU is still considering whether to pass such a law. Dmitry Zhdannikov & Darya Korsunskaya, *Russian Tycoons Concerned as Magnitsky Fallout Spreads*, REUTERS (Jan. 25, 2013), <http://www.reuters.com/article/2013/01/25/us-davos-russia-magnitsky-idUSBRE9000RA20130125>.

50. *See supra* note 7; H.R. Res. 6156, 112th Cong. (2012) (enacted); Stephen Collinson, *Obama Signs Russia Rights Law Despite Putin Fury*, AFP (Dec. 14, 2012), [http://www.google.com/hostednews/afp/article/ALeqM5ifTJR\\_NiuSC0kkGDgBkKJjDDYSqQ?docId=CNG.1a7e217111e4906ef1b6b3e54e79e1b0.141](http://www.google.com/hostednews/afp/article/ALeqM5ifTJR_NiuSC0kkGDgBkKJjDDYSqQ?docId=CNG.1a7e217111e4906ef1b6b3e54e79e1b0.141).

51. Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, 126 Stat. 1496, 1496.

several titles. Title I of the Act repeals the Jackson-Vanik Amendment, also known as title IV of the Trade Act of 1975, due to Russia's becoming a member of the WTO.<sup>52</sup> Title II, section 201 requires reports on Russia from the United States Trade Representative on how the country is implementing its obligations as a member of the WTO.<sup>53</sup> If the Trade Representative believes Russia is not honoring its obligations, he is then required to present a report on the actions he plans to take and those he has taken to "encourage the Russian Federation to improve its implementation of the agreement."<sup>54</sup> Section 202 of the Act requires the Trade Representative and the Secretary of State to submit a report on measures taken and results achieved during the year preceding the submission with respect to promoting the rule of law in Russia, including "strengthening formal protections for United States investors in the Russian Federation," and "advocating for United States investors in the Russian Federation" among other things.<sup>55</sup> This section also requires the Secretary of Commerce to set up a phone line and website to allow United States entities inside and outside Russia to report instances of bribery and corruption, to submit reports detailing the number of instances where bribery or corruption has occurred, and report on actions taken by the Secretary of Commerce to help those that have reported bribery or corruption.<sup>56</sup>

Title IV introduces the Sergei Magnitsky Rule of Law Accountability Act.<sup>57</sup> In Section 402 of this title, Congress lists its findings in regard to multiple human rights abuses in Russia and discusses Magnitsky's case in detail.<sup>58</sup> The section then goes on to explain why Magnitsky's prosecution was "politically motivated," and concludes by claiming that the "Russian Government's suppression of dissent and political opposition, the limitations it has imposed on civil society and independent media, and the deterioration of economic and political freedom inside Russia are of

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52. *Id.* § 102.

53. *Id.* § 201.

54. *Id.*

55. *Id.* § 202.

56. *Id.*

57. *Id.* § 401.

58. *Id.* § 402. Besides Magnitsky's case, this section also discusses the detention of Mikhail Khodorkovsky as well as multiple unsolved murders of Russian journalists. *Id.*

profound concern to the United States Government and the American people.”<sup>59</sup>

The Magnitsky Act also includes significant provisions that set up the potential for foreign affairs conflicts between the President and Congress. In section 404, Congress requires the President to submit a list of “persons responsible for the detention, abuse or death of Sergei Magnitsky, participated in efforts to conceal the legal liability for the detention, abuse, or death of Sergei Magnitsky, financially benefitted from the detention, abuse, or death of Sergei Magnitsky, or [were] involved in the criminal conspiracy uncovered by Sergei Magnitsky” and well as other violators of human rights.<sup>60</sup> Sections 405 and 406 then detail the consequences of being on the President’s list.<sup>61</sup> In section 405, those people that are on the President’s list are ineligible to receive visas to the United States, and the Secretary of State will revoke the visas of those that already have them.<sup>62</sup> In section 406, the Act gives the President power under the International Emergency Economic Powers Act to “freeze and prohibit all transactions in all property and interests in property of a person who is on the list . . . if such property and interests in property come within the United States . . . .”<sup>63</sup> The Act ends with section 407, which orders the Secretary of State and the Secretary of the Treasury to submit a report on their actions taken to carry out Title IV of the Act, and efforts by the executive branch to encourage the governments of other countries to impose sanctions on Russia such as those found Title IV.<sup>64</sup>

On April 12, 2013, the Obama Administration released a list of 18 individuals who would be sanctioned under the Magnitsky Act.<sup>65</sup>

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59. *Id.*

60. *Id.* § 404.

61. *Id.* §§ 405–06.

62. *Id.* § 405.

63. *Id.* § 406(a)(1).

64. *Id.* § 407.

65. Listing Update, U.S. Dep’t of the Treasury, Magnitsky Sanctions Listings (Apr. 12, 2013), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20130412.aspx>. These individuals include: Letscha Bogatirov, Aleksey Drozanov, Kazbek Dukuzov, Pavel Karpov, Yelena Khimina, Dmitriy Komnov, Aleksey Krivoruchko, Artem Kuznetsov, Oleg Logunov, Andrey Pechegin, Sergei Podoprigrorov, Ivan Prokopenko, Oleg Silchenko, Yelena Stashina, Olga Stepanova, Dmitri Tolchinskiy, Svetlana Ukhnyalyova, and Natalya Vinogradova. *Id.*

Of these 18 people, 16 were involved with the Magnitsky case.<sup>66</sup> Although the list contained tax officials and district court judges among others, noticeably absent from the list were more senior officials in Putin's administration who were involved with Magnitsky's prosecution.<sup>67</sup> U.S. Representative James McGovern even called the list "timid," with "more significant omissions than names."<sup>68</sup> Although members of Congress have called for more Russians to be added to the list, U.S. officials did state that "the Obama administration had also chosen to deny visas to other Russian officials but kept their names in a classified annex," as allowed by the Act, perhaps alluding to higher-level officials.<sup>69</sup> Unsurprisingly, Russia retaliated with its own list of 18 Americans banned from the country, including former President George W. Bush and former Vice President Dick Cheney.<sup>70</sup>

After its controversial and sensitive history, it is reasonable to expect that the Magnitsky Act will have wide-reaching implications not only on Russian-American relations, but also on foreign policy between nations.

## II. IMPLICATIONS

Although the implications of such a controversial act are numerous, this paper will only focus on three specific areas concerning trade and the power of Congress to declare foreign policy.<sup>71</sup> First, Part A will discuss lessons learned from the history of the Jackson-Vanik Amendment, and how those lessons have impacted Russian-American relations as well as Russia's reception of

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66. Richard Solash, *U.S. Targets 18 Individuals on 'Magnitsky List,'* RADIO FREE EUROPE RADIO LIBERTY (Apr. 12, 2013), <http://www.rferl.org/content/united-states-publishes-magnitsky-list-russia/24956249.html>.

67. Jim Heintz, *Russia Responds to U.S. Magnitsky Act By Placing 18 Americans On Blacklist,* HUFFINGTON POST (Apr. 13, 2013), [http://www.huffingtonpost.com/2013/04/13/russia-responds-to-us-mag\\_n\\_3075795.html](http://www.huffingtonpost.com/2013/04/13/russia-responds-to-us-mag_n_3075795.html)

68. Solash, *supra* note 66.

69. *Id.*

70. Steve Gutterman, *Russian Bans 18 Americans in Retaliation for Magnitsky List,* REUTERS (Apr. 13, 2013), <http://www.reuters.com/article/2013/04/13/us-russia-usa-rights-idUSBRE93B0PU20130413>.

71. There are numerous implications to be discussed within the context of human rights, the Magnitsky Act, and the impact it will have on international human rights policies in general. Unfortunately, these implications are so numerous that they would require their own paper. As a result, the author has purposefully left out any substantial discussion of human rights implications as they relate to the Magnitsky Act.

the Magnitsky Act. Part B will address the relationship between the Magnitsky Act and the WTO, including the implications of the United States' creating legislation that strongly encourages Russia to honor its international trade obligations. Finally, Part C will discuss separation of powers concerns with regard to the Magnitsky Act and more specifically the ability of Congress to direct foreign affairs.

*A. The Jackson-Vanik Amendment*

The volatile history of the Jackson-Vanik Amendment has implications for not only Russia's reception of the Magnitsky Act, but also its long-term effectiveness. The Jackson-Vanik Amendment to Title IV of the Trade Act of 1974 was originally included at the height of the Cold War to prohibit the granting of "most-favored-nation" (MFN) status to countries that restrict emigration.<sup>72</sup> More specifically,

[i]f a country denies its citizens the right or opportunity to emigrate, imposes more than a nominal tax on emigration or emigration documents, or imposes more than a nominal tax, levy, fine, fee, or other charge on any citizen as a consequence of the desire of such a citizen to emigrate, then that country is ineligible under U.S. law for MFN treatment.<sup>73</sup>

Although in 1972 President Nixon began the process of negotiating with the Soviet Union on a bilateral trade agreement that would grant MFN status to the country, negotiations were derailed shortly after the Soviet Union imposed an exit tax on those trying to emigrate, costing as much as 40,000 rubles for scientists and their families.<sup>74</sup> The Jewish community in the United States perceived this as a tax against Soviet Jews and began campaigning against it, leading several Congress members including Senator Henry Jackson and Representative Charles Vanik to come up with the idea of linking trade and emigration together in a policy that would discourage the Soviet Union from restricting Jewish emigration and encourage the lifting of such restrictions.<sup>75</sup> As a result, the Jackson-Vanik

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72. Brumley, *supra* note 9, at 363.

73. Kevin M. Cowan, *Cold War Trade Statutes: Is Jackson-Vanik Still Relevant?*, 42 U. KAN. L. REV. 737, 742 (1994).

74. Brumley, *supra* note 9, at 365.

75. *Id.*; Cowan, *supra* note 73, at 742.

Amendment was born, voted into law, and remained law until repealed by the Magnitsky Act.

Not surprisingly, the Soviet Union furiously renounced the Amendment shortly after passage and viewed it as a flagrant interference in their domestic affairs.<sup>76</sup> The most immediate consequence of Russia's anger was that it refused to sign the 1972 trade agreement with the United States.<sup>77</sup> One potential implication of this was that the United States had potentially hurt its own economic interests as a result of the Amendment.<sup>78</sup> This belief might have had some credence—the United States did not sign another comprehensive trade agreement with Russia until 1990.<sup>79</sup> Furthermore, it is unclear as to whether the Amendment actually ended up promoting Jewish emigration or not.<sup>80</sup> Although some believe that the Amendment provided “key leverage” in persuading the Soviet Union to loosen its emigration policies, others believe that several different factors and pressures independent of the Amendment occurred during this time period, potentially contributing to an increase in Jewish emigration.<sup>81</sup> Either way, by 1990 the number of Jewish emigrants from the Soviet Union had substantially increased and continued to remain high through the decade.<sup>82</sup>

The reaction of the Soviet Union to the Jackson-Vanik Amendment lends insight into why the Russian government responded so angrily to the Magnitsky Act and how it will continue to respond in the future. As made clear in the 1970's, Russia does not appreciate other countries' meddling in its foreign affairs. This was emphasized on May 7, 2012 when President Putin, having just been inaugurated, issued an Executive Order towards the United States instructing his Foreign Ministry “to pursue the policy of ensuring a stable and predictable cooperation based on the principles of equality, non-interference in internal affairs and respect for mutual interests . . . [and] to work actively on preventing unilateral extraterritorial sanctions by the U.S. against Russian legal entities and

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76. McLarty, *supra* note 10, at 172.

77. Keith Loken, *Why Jackson-Vanik Should Be Abandoned*, 16 CURRENTS: INT'L TRADE L.J. 3, 6 (2007).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

individuals.”<sup>83</sup> Although the Magnitsky Act had not yet been passed, several versions of it had been introduced to the House, leaving no doubt as to what Putin meant.<sup>84</sup> This sentiment was echoed again in Putin’s news conference on December 20, 2012, when he pointedly stated, “This is undoubtedly an unfriendly act towards the Russian Federation. . . . [T]he issue here has nothing to do with officials. It’s a matter of one anti-Soviet, anti-Russian law being replaced with another. . . . [W]e [understand] it as U.S. lawmakers making it clear to us who’s the boss here, and keeping a certain level of tension. If Magnitsky did not exist, they’d have found another pretext.”<sup>85</sup> Another retaliatory, almost spiteful, measure Russia took was to retry Sergei Magnitsky and William Browder for tax fraud, posthumously and in absentia respectively, as if to demonstrate Putin’s contempt for the U.S. legislation that held those responsible for Magnitsky’s detention accountable.<sup>86</sup> Finally, as stated previously, on December 28, 2012 Putin passed the “Federal Law On Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation,” or the Dima Yakovlev bill, imposing a wide range of sanctions against United States citizens, non-profit organizations, and even those citizens wishing to adopt a Russian child.<sup>87</sup>

Because Russia has responded so negatively to the passing of the Magnitsky Act, it is plausible that the Act could have the same immediate implications as the Jackson-Vanik Amendment did in 1974. First, negotiations, agreements, and treaties could be impeded, if not halted altogether. Certainly there will be a tension involved that has been created due to the Magnitsky case. This tension has already manifested in recent and escalating events such as the Edward

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83. *Executive Order on Measures to Implement Foreign Policy*, PRESIDENTIAL EXECUTIVE OFFICE (May 7, 2012, 6:20 PM), <http://eng.kremlin.ru/acts/3764>.

84. *See e.g.*, Sergei Magnitsky Rule of Law Accountability Act of 2012, H.R. 4405, 112th Cong. (2d Sess. 2012), *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR04405:@@@X/home/LegislativeData.php?n=BSS;c=112> (a version introduced to the House).

85. *News Conference of Vladimir Putin*, PRESIDENTIAL EXECUTIVE OFFICE (Dec. 20, 2012, 4:40 PM), <http://eng.kremlin.ru/news/4779#sel=33:1,33:10;34:40,34:60>.

86. S. Adam Cardais, Ioana Caloianu & Molly Jane Zuckerman, *Magnitsky Convicted of Tax Fraud, Karadzic Genocide Charge Reinstated*, DOW JONES FACTIVA (July 12, 2013), <http://www.tol.org/client/article/23861-magnitsky-convicted-of-tax-fraud-karadzic-genocide-charge-reinstated.html>.

87. PRESIDENTIAL EXECUTIVE OFFICE, *supra* note 2.



Snowden incident,<sup>88</sup> the crisis in Syria,<sup>89</sup> cancelled bilateral negotiations between Presidents Obama and Putin,<sup>90</sup> and Putin's op-ed in the New York Times.<sup>91</sup> Because both Obama and Putin have stated that they intend to work together to seek further reductions in each country's respective nuclear weapons, these talks could also potentially feel the ill effects of resentment resulting from the passage of the Magnitsky Act.<sup>92</sup> As a result, the adversarial, retaliatory nature

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88. Alastair Jamieson, *Obama Faces Showdown with Putin at G-20 Summit Over Syria*, NBC NEWS (Sept. 5, 2013, 11:59 AM), [http://worldnews.nbcnews.com/\\_news/2013/09/05/20336921-obama-faces-showdown-with-putin-at-g-20-summit-over-syria?lite](http://worldnews.nbcnews.com/_news/2013/09/05/20336921-obama-faces-showdown-with-putin-at-g-20-summit-over-syria?lite). In August 2013, Russian officials granted temporary asylum to Snowden, who had leaked classified information from the NSA and consequently fled the United States, in spite of appeals from the White House requesting Russia return Snowden to the U.S. to face justice. *Id.*; Press Briefing, Press Sec'y Jay Carney, The White House (July 12, 2013, 1:10 PM), <http://www.whitehouse.gov/the-press-office/2013/07/12/press-briefing-press-secretary-jay-carney-7122013>.

89. Jamieson *supra* note 88. The tension between the United States and Russia, an ally of the Assad regime, over the escalating Syrian civil war, which has left over one hundred thousand Syrians dead and over two million refugees, reached a fever pitch after an August 21, 2013 chemical weapons attack that killed hundreds of people, including women and children. *Id.*; *Deaths, Refugees, and Damage: Syria's Crisis in Figures*, YAHOO NEWS (Sept. 4, 2013), <http://news.yahoo.com/deaths-refugees-damage-syrias-crisis-figures-161611459.html>; Rick Gladstone & Nick Cumming-Bruce, *U.N. Leader Admits Failure to Halt Syrian Atrocities*, N.Y. TIMES, Sept. 12, 2013, at A13.

90. Jessica Yellin, Jake Topper & Tom Cohen, *Obama Cancels Talks with Putin Ahead of G-20 Summit*, CNN (Aug. 8, 2013, 6:38 AM), <http://www.cnn.com/2013/08/07/politics/obama-putin/index.html>. This author also recently had the opportunity to view a bilateral discussion between a Russian minister and a United States government agency, post-Snowden. Although the discussion did not involve the contentious topic of Snowden, there was palpable tension between countries at points throughout the day.

91. Vladimir Putin, *A Plea for Caution from Russia*, N.Y. TIMES, Sept. 12, 2013, at A31. Putin's op-ed was met by much criticism from U.S. politicians (including a rebuttal op-ed by Senator McCain) for its condemnation of American "exceptionalism." Thomas Grove, *Senator McCain Attacks Putin on Russian Website*, REUTERS (Sept. 19, 2013), <http://www.reuters.com/article/2013/09/19/us-russia-usa-mccain-idUSBRE98I0AB20130919>; Jethro Mullen, *Vladimir Putin's Comments on American Exceptionalism, Syria Cause a Fuss*, CNN (Sept. 12, 2013), <http://www.cnn.com/2013/09/12/politics/putin-syria-editorial-reaction/index.html>.

92. President Barack Obama, State of the Union Speech (Feb. 12, 2013), available at <http://www.politico.com/story/2013/02/state-of-the-union-2013-president-barack-obamas-speech-transcript-text-87550.html>.

of recent legislation and political maneuvers indicate that a return to Cold War rhetoric and behavior is certainly possible.<sup>93</sup>

Other lessons from the Jackson-Vanik Amendment indicate that the future of the Magnitsky Act looks shaky. Due to Putin's retrial of Magnitsky instead of trying those responsible for his death as well as his passage of sanctions against United States citizens, it appears that any progress hoped for by the United States as well as other international organizations in regard to justice for the abuse and death of Magnitsky is unlikely. If the status quo is maintained, the Magnitsky bill will potentially continue to be a point of tension and aggravation in U.S.-Russian relations, just as the Jackson-Vanik Amendment was.<sup>94</sup> Before the Amendment was repealed, officials in Russia "complained that Russia remain[ed] under the shadow of Jackson-Vanik," a sentiment that is likely to resurface again depending on the length of time this Act is in effect.<sup>95</sup> If this Act does not produce the results desired and continues to increase tension between Russia and the United States, the resentment incurred could undermine U.S.-Russian relations for years to come, possibly leading to calls for its repeal.

#### B. *The Magnitsky Act and the WTO*

The Magnitsky Act ultimately repealed the Jackson-Vanik Amendment, a law that made certain countries' normal trade relations (NTR) status conditional, because it was incompatible with Russia's recent accession to the WTO.<sup>96</sup> Article I of one of the governing documents of the WTO, the General Agreement on Tariffs and Trade (GATT), prevents member countries from discriminating against other member countries, and requires all member states to treat each other equally, stating,

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93. See, e.g., David Francis, *Putin Just Took the Iron Curtain Out of Mothballs*, FISCAL TIMES (Aug. 8, 2013), <http://www.thefiscaltimes.com/Articles/2013/08/08/Putin-Just-Took-the-Iron-Curtain-Out-of-Mothballs> (explaining how Putin has violently quashed dissent using methods similar to those used in Soviet Russia).

94. Loken, *supra* note 77, at 7.

95. *Id.*

96. Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, 126 Stat. 1496; Loken, *supra* note 77, at 7.

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.<sup>97</sup>

Because Russia became a member of the WTO on August 22, 2012, the United States was expected to extend unconditional MFN/NTR status to Russia as is required under GATT and the WTO Agreement.<sup>98</sup>

The Magnitsky Act makes it clear that one of its main purposes and a condition of its repeal of the Jackson-Vanik Amendment is to ensure that Russia complies with its obligations under the WTO. The first sentence of the Act declares an important purpose to be to “require reports on the compliance of the Russian Federation with its obligations as a member of the World Trade Organization.”<sup>99</sup> This language points to important implications in the context of the relationship between Russia and the United States under the WTO Agreement.

The first implication is that the Magnitsky Act is designed to set up a foundation for the United States to make claims against and potentially challenge Russia in the WTO. By requiring the United States Trade Representative to submit reports to Congress on the

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97. General Agreement on Tariffs and Trade art. 1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

98. *Accessions: Russian Federation*, WORLD TRADE ORGANIZATION (2013), [http://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_russie\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm); Loken, *supra* note 77, at 7. Although members of the WTO agreed to extend MFN/NTR status to all other members, if a WTO member decides it cannot comply with this obligation, it can invoke the non-application provision of the WTO Agreement. H.R. REP. NO. 112-632, pt. 1, at 4 (2012). However, Congress determined that it would be the most beneficial to the United States economy to extend MFN status to Russia so as to reap the benefits of Russia's concessions as a new member state of the WTO. *Id.*

99. 126 Stat. at 1496.

extent to which Russia is implementing the WTO Agreement and its annexed agreements, Congress is ensuring that, should the need arise, the United States is immediately prepared to file a dispute in the WTO.<sup>100</sup> Furthermore, the Magnitsky Act mandates that if the Trade Representative finds that Russia is not fully implementing the WTO agreements, he is to include in the report the actions he plans to take to encourage Russia to improve its implementation.<sup>101</sup> These actions most likely will include addressing the issue to the WTO in the form of filing a dispute claim, because the Trade Representative deals with the WTO on a regular basis. In this way, the Magnitsky Act ensures that the process of a WTO challenge against Russia is already set in motion as soon as the Trade Representative files a report. The Trade Representative must also file a separate report describing the “enforcement actions” he has taken “to ensure the full compliance of the Russian Federation with its obligations as a member of the World Trade Organization.”<sup>102</sup> Although this appears similar to the previous requirement of reporting on his plans to encourage Russia, this part of the Act conveys a stricter tone, indicating that the Trade Representative and the United States must take actions to ensure Russia’s compliance with the WTO. This raises even more questions as to whether it is the duty of the United States to take it upon itself to ensure Russia’s compliance with the WTO, outside of filing disputes with the WTO and solving those disputes within the organization, and whether it is a violation of any WTO agreement for the United States to do so.

These questions indicate that the United States, through the Magnitsky Act, could potentially undermine the dispute settlement system of the WTO by taking action against Russia if it finds Russia to be unsuccessfully implementing its obligations as a member of the WTO. In the Understanding of Rules and Procedures Concerning the Settlement of Disputes agreement of the WTO, it is stated that “[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”<sup>103</sup> Furthermore, “WTO members have agreed that if they

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100. *Id.* § 201.

101. *Id.*

102. *Id.*

103. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 402 [hereinafter DSU].

believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally.”<sup>104</sup> According to Article 23 of that same agreement,

When Members seek redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding. In such cases, Members shall: (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements have been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding . . . .<sup>105</sup>

This Article appears to indicate that nations should not take it upon themselves outside of the dispute settlement system of the WTO to make any findings as to whether another nation is in compliance with any WTO agreement, or to ensure that one nation is complying with the Agreement. The Magnitsky Act explicitly tells the Trade Representative to make such a finding, present it to Congress, and then to take actions to ensure compliance based on the assumption that Russia has been violating its obligations as a member of the WTO. On its face, this order seems to defy the provisions to solve WTO disputes multilaterally, not unilaterally, as well as to make determinations of compliance only in accordance with the dispute settlement process. Furthermore, this creates the impression that not only does the United States flout the dispute settlement rules of the WTO, it also takes on the responsibilities of an international organization by meddling in the business of other countries at the expense of violating its own international obligations.

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104. WORLD TRADE ORG., UNDERSTANDING THE WTO, 55, (3d ed. 2005).

105. DSU art. 23.

### C. *Separation of Powers Concerns*

Whenever both the legislative and the executive branch are involved in creating foreign policy, separations of powers concerns arise. However, there is not one single source that clearly defines the doctrine of separation of powers. As such, several sources, such as the Constitution, scholarly writing, and case law must be read together in order to effectively discuss how the doctrine operates within the context of the Magnitsky Act.

#### 1. Interpreting the Separation of Powers Doctrine

There is no explicit definition of separation of powers within the Constitution. However, the doctrine was derived from Articles I, II, and III of the Constitution, which set forth the rights and duties of Congress, the President, and the Judiciary, respectively. Specifically, Article I, Section 1 of the Constitution states, “All legislative Powers herein granted shall be vested in a Congress of the United States....”<sup>106</sup> Likewise, Article II, Section 1 states, “The executive Power shall be vested in a President of the United States of America.”<sup>107</sup> This language indicates that each branch of government has its own powers and that these powers shall vest in that particular branch of government and nowhere else.

In order to clear up some of the confusion as to which constitutional powers belong to whom, different scholars and judges have elaborated upon the powers given to the President versus the powers given to Congress. Article I, Section 8 of the Constitution clearly sets out the legislative branch’s power to direct foreign policy, stating that it has the powers to “regulate Commerce with foreign nations,” and to “lay and collect Taxes, Duties, Imposts, and Excises,” among other things.<sup>108</sup> According to Justice Alito’s concurrence in *Zivotofsky v. Clinton* as well as the majority opinion in *Henderson v. Mayor of City of New York*, this power to regulate foreign commerce also includes the right to “regulate the entry of persons into this country.”<sup>109</sup> Essentially, Article I “gives Congress

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106. U.S. CONST. art. I, §1.

107. U.S. CONST. art. II, §1, cl. 1.

108. U.S. CONST. art. I, § 8, cl. 1, 3.

109. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1436 (2012) (Alito, J., concurring); *Henderson v. Mayor of City of New York*, 92 U.S. 259, 270–71 (1875).

almost all the enumerated powers over foreign affairs, and [A]rticle II gives the President almost none of them.”<sup>110</sup>

As a result, the powers given to the President by the Constitution are not as clear-cut as those given to Congress. In fact, “[c]onsidered only for affirmative grants of power, the president’s Article II authority would appear to be quite limited.”<sup>111</sup> However, although the presidential powers are not as explicitly defined as the legislative powers found in Article I, the President still has broad foreign affairs powers. More specifically, the President has “powers to create international obligations for the United States in his capacity as the nation’s ‘constitutional representative’ in foreign affairs.”<sup>112</sup> As American Jurisprudence states, “Foreign policy is the province and responsibility of the executive, and the conduct of foreign affairs is exclusively vested in the executive branch although it is also said that the conduct of the foreign relations of the United States is committed by the Constitution to the executive and the legislative—the political—departments of the government.”<sup>113</sup> The President has the undefined power to recognize a foreign government, as well as the powers to negotiate international agreements, respond to foreign events as spokesperson, initiate United States policy, represent the United States at international organizations, waive obligations made by other countries to the United States, interpret treaties in the first instance, withdraw the United States from treaties, and authorize the use of force abroad in pursuit of United States’ interests.<sup>114</sup>

Despite the limited amount of enumerated presidential powers found in the Constitution, Presidents have generally had an expansive view of their foreign affairs powers, and have “aggressively resisted congressional encroachment on their perceived prerogatives,” which has been reflected in case law.<sup>115</sup> Justice Sutherland illustrated this view in his opinion in *United States v. Curtiss-Wright Export Corporation*, when he quoted John Marshall’s speech to the House of

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110. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1292 (1988).

111. Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 311 (2006).

112. *Id.* at 316.

113. 16 AM. JUR. 2D *Constitutional Law* § 252 (2013).

114. *Id.*; Richard F. Grimmett, *Foreign Policy Roles of the President and Congress*, U.S. DEP’T OF STATE (June 1, 1999), <http://fpc.state.gov/6172.htm>; Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1002 (2013).

115. Galbraith, *supra* note 114, at 1002.

Representatives: “the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>116</sup> Moreover, in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>117</sup> although the Court ultimately decided that President Truman’s actions exceeded his constitutional authority when he issued an executive order directing the Secretary of Commerce to take possession of and operate most of the country’s steel mills,<sup>118</sup> the concurrences of several justices indicated that a President’s power is not limited to the powers expressly granted in Article II. As Justice Jackson stated in his concurrence, “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>119</sup> Ultimately, Justice Jackson’s concurrence had a profound effect on separation of powers jurisprudence, as demonstrated in *Dames & Moore v. Regan*,<sup>120</sup> where the Court explicitly used the concurrence to uphold President Carter’s executive orders concerning Iran during the Iranian hostage crisis.<sup>121</sup>

When courts do have to get involved in separation of powers issues, they tend to defer to past practice in order to make their decision.<sup>122</sup> *Youngstown* is also important because Justice Frankfurter’s concurring opinion articulated the importance of historical practice as a part of interpreting presidential power when he said, “In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”<sup>123</sup> In this way, presidential powers have increased over time as reliance on past practice has validated whatever particular power the President is

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116. 299 U.S. 304, 320 (1936).

117. 343 U.S. 579 (1952).

118. *Id.* at 582, 587.

119. *Id.* at 635–38 (Jackson, J., concurring).

120. 453 U.S. 654 (1981).

121. *Id.* at 668–69.

122. Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1098–99 (2013).

123. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952)).



attempting to assert.<sup>124</sup> By considering the presence or absence of past practice in resolving separation of powers disputes, theoretically either the President or Congress can come out ahead.<sup>125</sup> However, “past practice has furthered gradual accretions of presidential power because the President, as a unitary actor unhindered by the collective action challenges that constrain Congress, has both the incentives and the abilities to push the boundaries repeatedly.”<sup>126</sup> As such, the executive branch tends to come out ahead.

## 2. Separation of Powers Concerns Within the Magnitsky Act

Because there is no explicit separation of powers between the President and Congress, it is unclear how a court would rule should such a challenge arise from the Magnitsky Act. By analyzing language within the Magnitsky Act that may implicate the separation of powers doctrine, I hope to not only identify specific provisions that could potentially raise separation of powers concerns, but also to discuss provisions that could result in serious conflict between the executive and legislative branches. I will first address provisions of lesser concern that are still worth mentioning, and then I will discuss a provision of greater concern.

### a. *Provisions Of Lesser Concern*

The provisions of lesser concern within the Magnitsky Act that may implicate the separation of powers doctrine deal less with the President and more with those in his cabinet and the greater executive branch of government. The first area of concern is where Congress orders the Trade Representative to issue a report on enforcement actions he has taken to “ensure the full compliance” of the Russian Federation to the obligations of the WTO.<sup>127</sup> Although Congress does not directly order a member of President Obama’s cabinet to take action against Russia, this provision implies that the executive branch must take some sort of enforcement action if and when Russia does not abide by the WTO rules. Some might see this provision as trespassing on the executive branch’s territory by telling it what

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124. An illustration of this is the President’s issuance of a constitutional signing statement when signing a bill into law. *Id.* at 1107. This could indicate that the President is attempting “to prevent historical gloss from developing in a way that might limit presidential authority.” *Id.* at 1108.

125. Galbraith, *supra* note 114, at 1004.

126. *Id.*

127. Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, § 201(b), 126 Stat. 1496, 1499.

foreign policy should be and on what conditions it should be made, and could raise a separation of powers challenge.

A second area of concern is at the end of the Magnitsky Act, where Congress orders the Secretary of State and the Secretary of the Treasury, members of the executive branch, to submit to Congress a report on “efforts by the executive branch to encourage the governments of other countries to impose sanctions that are similar to the sanctions imposed under this title.”<sup>128</sup> In a manner similar to the previous concern, this provision implies that the executive branch must be making efforts to persuade other countries to impose certain sanctions, and as a result, some could argue that Congress overstepped the line by telling the President and the executive branch how to direct and create foreign policy, thereby disregarding the principle of separation of powers. Although these instances of separation of powers concerns may seem small or insignificant, they are important to mention when discussing the implications of the ability of Congress to direct foreign affairs through its passage of the Magnitsky Act.

*b. Section 404(a)*

The Magnitsky Act also contains a section implicating separation of powers issues that are of greater concern; namely the requirement in §404(a) that the President must exclude certain Russian people because of the fact that Congress did not like what happened to Sergei Magnitsky. This section provides in part: “Not later than 120 days after the date of the enactment of this Act, *the President shall submit* to the appropriate congressional committees a list of each person who the President determines, based on credible information—(1) is responsible for the detention, abuse, or death of Sergei Magnitsky. . . .”<sup>129</sup> The bolded language indicates that the creation of such a list is not discretionary—it is a mandatory action that the President must take, as dictated by Congress. There is no other option. Although later on in §404(d) the President has the ability to remove a person from the list “if the President determines and reports to the appropriate congressional committees . . . that (1) credible information exists that the person did not engage in the

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128. *Id.* § 407(2).

129. *Id.* § 404(a)(1) (emphasis added).

[alleged] activity; (2) the person has been prosecuted appropriately . . . or (3) the person has credibly demonstrated a significant change in behavior,” and/or somehow atoned for and renounced such activities, this does not change the fact that the President must still create a list of individuals to face mandatory sanctions by the United States, and cannot remove those individuals from the list except for the reasons set forth by Congress.<sup>130</sup>

This provision implicates greater separation of powers concerns because it has the potential to raise considerable conflict between the executive and legislative branches. If the provision’s legitimacy were ever challenged in court, the judicial branch, upon deciding to hear the case, would have to determine on the merits whether the Magnitsky Act infringed upon the foreign affairs powers of the President. As stated previously, because the President has so few explicit powers, the case is not clear-cut. On one hand, as the Court in *Henderson* and the concurrence by Justice Alito in *Zivotofsky* stated, Congress’s power to regulate foreign commerce also includes the right to regulate the entry of people into the United States.<sup>131</sup> On the other hand, the President retains broad foreign affairs powers, and as pointed out in *Curtiss-Wright*, the President is “the sole organ of nation in its external relations.”<sup>132</sup> Therefore, the Magnitsky Act implicates a serious conflict between the two branches of government in this specific area of foreign affairs, particularly if the President were to refuse to submit such a list. Should the President claim the power to create a list of individuals to face mandatory sanctions as his exclusive power, a legitimate separation of powers claim could arise; one which would have to be closely scrutinized by the Court.

#### CONCLUSION

Sergei Magnitsky’s abuse and death while in prison on false charges were deplorable, and the political nature of the crimes against him raise a large number of human rights concerns for those who oppose the Russian government. It is reasonable for countries to desire to impose some kind of legislation or obtain some measure of justice to ensure that this does not continue to occur. However, the Magnitsky Act seeks to impose punitive measures on an area that Russia considers to be a purely domestic concern. Although Congress

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130. *Id.* § 404(d).

131. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1436 (2012) (Alito, J., concurring); *Henderson v. Mayor of City of New York*, 92 U.S. 259, 270–71 (1875).

132. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

appears to have the power to pass this law, it does not necessarily make it an effective law. In some ways it simply replaces the Jackson-Vanik Amendment and creates the same hostile feelings that the Russian government felt back in the 1970's when the Amendment was first enacted.

At the time of this note's publication, instead of obtaining justice for Sergei Magnitsky and those who have suffered human rights violations, the Act has just inflamed tensions between two governments with an already unstable relationship, provoking a back-and-forth legislative game to the detriment of both countries. For example, in the two years since this paper was first drafted, several major events have occurred that have placed Russia and the United States directly at odds against each other. First, as mentioned previously, the Edward Snowden incident occurred,<sup>133</sup> followed by the crisis and debate over intervention in Syria, cancelled bilateral negotiations, and a scathing op-ed written by Putin.<sup>134</sup> Most recently, a series of aggressions between the two countries erupted over the crisis in the Ukraine and Russia's subsequent intervention, ultimately resulting in a second round of Magnitsky-like sanctions by the United States on leading Russian figures and institutions.<sup>135</sup> These tensions have yet to lessen.<sup>136</sup>

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133. See *supra* note 89 and accompanying text.

134. See *supra* notes 90–92 and accompanying text.

135. Interestingly, William Browder weighed in on the sanctions resulting from Russia's intervention in the Ukraine, stating, "This is exactly what the Magnitsky Act was created for." Adam Taylor, *The Man Behind the Magnitsky Act Explains Why Now is the Time to Go After the Russian Elite's Assets*, WASH. POST (Mar. 3, 2014, 7:07 PM), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/03/03/the-man-behind-the-magnitsky-act-explains-why-now-is-the-time-to-go-after-the-russian-elites-assets/>.

136. In fact, U.S. officials are considering adding additional sanctions to those already in place, due to the Pentagon's report that a Russian attack aircraft made 12 close passes (within 1,000 yards) near an American destroyer in the Black Sea; a move considered to be both "provocative and unprofessional." Peter Baker, *With Ukraine Tensions Mounting, U.S. Weighs New Sanctions Against Russia*, N.Y. TIMES, Apr. 15, 2014, at A8.; *Russian Fighter Jet Ignored Warnings and 'Provocatively' Passed U.S. Navy Destroyer in Black Sea for 90 Minutes, Getting as Close as 1,000 Yards*, DAILY MAIL (Apr. 14, 2014, 3:47 PM), <http://www.dailymail.co.uk/news/article-2604590/Russian-fighter-jet-ignored-warnings-provocatively-passed-U-S-Navy-destroyer-Black-Sea-90-minutes-getting-close-1-000-yards.html>.

For these reasons, it would appear that the Magnitsky Act is more detrimental than beneficial to American foreign relations. Perhaps it would be better for the U.S. and the international community to use other mediums through which they can hold Russia accountable for Magnitsky's death, such as human rights treaties Russia has signed and the international court system. In this way, the United States can seek justice for Sergei Magnitsky, while still attempting to repair its tenuous relationship with the Russian Federation.