

ISSUE BRIEF

# Pushing Back Against Russian Aggression: Legislative Options

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DANIEL FRIED AND BRIAN O'TOOLE



**Economic Sanctions Initiative**

*Economic sanctions have become a policy tool-of-choice for the US government. Yet sanctions and their potential pitfalls are often misunderstood. The Economic Sanctions Initiative (ESI) seeks to build a better understanding of the role sanctions can and cannot play in advancing policy objectives and of the impact of economic statecraft on the private sector, which bears many of the implementation costs.*

The Atlantic Council's **Global Business & Economics Program (GBE)** promotes transatlantic leadership as defenders of open market democracies in a new era of great-power competition and works to find multilateral solutions to today's most pressing global economic opportunities and risks. Key challenges the program addresses include fostering broad-based economic growth, advancing understanding of the impact of economic sanctions, and defining the future shape of the rule-based trade order.

**U**S President Donald J. Trump's administration has found it challenging to maintain a consistent position with respect to Russian President Vladimir Putin's repression at home and aggression abroad. The US president's accommodating language about Putin; his mixed messages about Ukraine, a country defending itself against Russian attack; and frequent refusal to recognize Kremlin interference in the US election process seem at odds with the generally stronger position of the administration as a whole. Given this inconsistency, it may again fall to Congress to attempt to counter Russia's election interference, already ongoing in the form of disinformation; back Ukraine as its government seeks to deal with a Russian invasion; and contend with other forms of Kremlin aggression.

The authors of this issue brief are executive branch veterans and admit to general skepticism about making foreign policy through legislation, particu-



United States Senator Lindsey Graham (R-S.C.) is one of the co-sponsors of the Defending American Security from Kremlin Aggression Act (DASKA). Source: US Department of Defense

larly in nuanced matters that the executive is better structured to address. However, such legislation is sometimes needed. In 2017, in response to reasonable concerns that the new Trump administration was considering a unilateral rescission of Russia sanctions imposed after Russia’s attack on Ukraine in 2014, Congress passed the Countering America’s Adversaries Through Sanctions Act (CAATSA). CAATSA has its flaws, but it blocked a unilateral capitulation of US foreign policy and forced the administration to maintain pressure on Putin for his ongoing aggression, and we supported it on that basis.<sup>1</sup> Because Trump often appears to continue to regard Ukraine and Kremlin election interference in a partisan political context, and because the Kremlin challenge is real and may grow, legislation may again be needed.

Several Russia sanctions bills are in various stages of preparation in Congress and more may emerge. Two of the most notable—**DETER** [the Defending Elections from Threats by Establishing Redlines, introduced by US Sens. Marco

Rubio (R-FL) and Chris Van Hollen (D-MD)], and **DASKA** [the Defending American Security Against Kremlin Aggression Act, introduced by US Sens. Lindsey Graham (R-SC) and Robert Menendez (D-NJ)]—seek, wisely in our view, to use the threat of new sanctions to forestall new Russian aggression, if it reaches a certain level, rather than responding with retrospective sanctions to past Russian actions that could be seen solely as punitive. Legislation that moves forward must contend with how to deter election interference that is already ongoing in some form, and how to scope the sanctions response to be relevant and credible.

## DETER

At its title makes clear, DETER focuses on thwarting election interference alone. It thus has the advantage of simplicity and focuses on the Kremlin’s malign behavior that most directly attacks the United States. Its definition of election interference usefully includes actions both “hard”

<sup>1</sup> Daniel Fried and Brian O’Toole, *The New Russia Sanctions Law: What it Does and How to Make it Work*, Atlantic Council, September 19, 2017, <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/the-new-russia-sanctions-law/>.

(e.g., blocking or degrading of, or unauthorized access to, election and campaign infrastructure) and “soft” (e.g., disinformation or unlawful contributions or advertising).

DETER outlines a *trigger mechanism* for action: by sixty days following a US election, the director of national intelligence (DNI), in consultation with the directors of the National Security Agency (NSA), the Central Intelligence Agency (CIA), and the Federal Bureau of Investigation (FBI); the secretaries of State, Treasury, and Homeland Security; and the attorney general, must determine with “a high level of confidence” whether a foreign government interfered in that US election and submit a report to Congress about that determination (Sec. 101). It is not clear whether current reported levels of Kremlin-connected disinformation targeting the US presidential election would reach DETER’s threshold. We would argue for setting a relatively high bar, e.g., a break-and-leak operation involving computer compromise and leaking stolen e-mails. This standard would not prevent Russian disinformation that is already ongoing, but would threaten harsh sanctions in response to more intrusive and aggressive Russian actions; it is not perfect, but there may not be a better option at this late stage in the 2020 electoral process.

**Sanctions provisions.** Should the DNI determine that the Russian government interfered in the US election, DETER (Sec. 202) mandates the following sanctions:

- ◆ Either (i) full blocking sanctions or (ii) prohibition of (or strict conditions on) US correspondent or payable-through accounts for two or more of the following large Russian state banks: Sberbank, VTB Bank, Gazprombank, Vnesheconombank (VEB), and Rosselkhozbank. *Full blocking sanctions on Sberbank and VTB, Russia’s largest banks, would risk unintended consequences, including significant blowback on the Western financial sector and legitimate global trade. The flexibility to select targets is important as it allows for some ability to calibrate impact;*
- ◆ A full prohibition of new US investments in the Russian energy sector or a Russian energy company. *The bill calls for regulations to define “new investment.” It would be important to craft these to target major new investments and not joint ventures in which Russian*

*participation is relatively minor in order, among other things, to forestall Russia forcing US investors out of otherwise worthy projects by injecting a small Russian ownership stake as a poison pill;*

- ◆ Full blocking sanctions on defense and intelligence sector entities. *This may not be impactful as sanctions have already been applied to these sectors;*
- ◆ Prohibition on transactions by US persons with new Russian sovereign debt. *This would seem to expand on the limited sovereign debt sanctions the Trump administration imposed in response to Russia’s attempted assassination of former Russian spy Sergei Skripal in the United Kingdom in 2018. Sovereign debt sanctions are a logical expansion of existing financial sanctions and supported by many observers, including the authors;<sup>2</sup>*
- ◆ Blocking sanctions on Putin’s cronies or others who contributed to the electoral interference. *These would be useful targeted sanctions that do not expand upon the current sanctions architecture on Russia, though attribution might be a challenge; and*
- ◆ DETER also includes the same waiver review provision as CAATSA, which would allow Congress to overturn the president’s decision to issue any of the waivers granted for a “vital national security interest,” which in practice is a relatively low bar. *The CAATSA review provision is a significant infringement on executive branch authority to execute foreign policy authorities and would be a major hurdle to waiving or rolling back any sanctions imposed. We appreciate Congress’s concern about premature sanctions relief, but believe that removing sanctions must remain a viable option should their original purpose be achieved.*

DETER also calls for an *update* to the *Kremlin Report* on Putin’s cronies mandated by CAATSA Section 241 (DETER Sec. 102) and a *parallel report on the wealth of Putin and others identified in the updated Kremlin Report* (DETER Sec. 201). Both reports have value in identifying the structure of Putin’s network of cronies and agents; the Trump administration prepared a solid classified *Kremlin Report* in early 2018, but bungled the public rollout of the unclassified version, vitiating much of its potential impact.<sup>3</sup>

2 Daniel Fried, Brian O’Toole, and David Mortlock, “New Russia Sanctions: Justified, but Feeble and Awkward,” *New Atlanticist*, August 5, 2019, <https://www.atlanticcouncil.org/blogs/new-atlanticist/new-russia-sanctions-justified-but-feeble-and-awkward/>.

3 Anders Åslund, Ashish Kumar Sen, and Daniel Fried, “Kremlin Report: A Missed Opportunity to Check Russian Aggression,” *New Atlanticist*, January 30, 2018, <https://www.atlanticcouncil.org/blogs/new-atlanticist/kremlin-report-a-missed-opportunity-to-check-russian-aggression/>.

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**EO 13848 on election interference.** The DETER Act, we were told, inspired the Trump administration to issue on September 14, 2018, Executive Order 13848, which calls for a DNI report assessing foreign election interference and provides mandatory sanctions on persons responsible and discretionary sanctions on one of “largest business entities” in the financial services, defense, energy, technology, and transportation sectors of the offending country’s economy. The administration aimed to have EO 13848 serve as an alternative to legislation—a reasonable effort which may have taken some of the momentum out of DETER, which takes a more aggressive approach with its broad financial sanctions. However, EO 13848 has been used only once, against the Internet Research Agency (the St. Petersburg troll farm responsible for interference in the 2016 and 2018 US election campaigns), its funder Yevgeny Prigozhin (who had already been sanctioned), and associated targets. The mixed signals from the administration about its commitment to expose and act against Russian election interference, which recent DNI testimony indicates is ongoing, and disinformation have weakened EO 13848’s impact as an alternative to legislation.

The sanctions suggested by DETER and EO 13848 are of similar design, but different orders of magnitude. *The principal value added of DETER, compared to EO 13848, is that it would act as a credible threat of sanctions escalation in response to Kremlin electoral interference, reducing the president’s wild card role in responding to Russian threats.*

## DASKA

DASKA is more advanced in the legislation process—it was reported out of the Senate Foreign Relations Committee last

December 12—and thus arguably the Russia sanctions bill most able to move fast should political will in the Senate materialize. It attempts to be far broader in combatting Russian aggression than DETER. It also has been drafted with careful consideration of its side effects and was done so to avoid the harried conclave that produced CAATSA with several critical drafting errors and other unintended consequences.

**Scope.** DASKA targets malign Russian activity, including election interference and aggression against Ukraine; seeks to create a firewall against precipitous US withdrawal from NATO (reflecting early concern, now somewhat diminished, about Trump’s view of the alliance that has maintained general European security for more than seventy years); strengthens the public diplomacy structure at the State Department (Sec. 202); strengthens cyberspace and digital economy policy offices at the State Department (Sec. 211), charging them with combatting Russian disinformation and cyber security challenges; and recreates the office of the State Department’s coordinator for sanctions policy (Sec. 622), an office created in US President Barack Obama’s second term and abolished early in the Trump administration.<sup>4</sup> DASKA Title III covers chemical weapons nonproliferation and is explicitly tied to the Russian government’s use of a nerve agent in the attempted assassination of Skripal and his daughter, Yulia. Title IV covers cybercrime. Title V expands the definition of election interference and includes visa bans for individuals engaged in it.

**Sanctions provisions.** Like DETER, DASKA (Title VI) mandates contingency (not retroactive) sanctions. These include sanctions for election interference, though the definition of interference does not explicitly include disinformation, thus setting a potentially higher bar than DETER, whose definition does. Critically, DASKA’s targeting of Russian financial institutions is limited to those that aided in election interference, setting a very high bar for such a drastic measure. DASKA also calls for sanctions in response to an escalation of Russian military aggression against Ukraine or in response to a Russian regime-directed assassination on US or NATO member state territory.

The triggers for sanctions related to election interference or Russian offensive military operations against Ukraine would be a positive finding in a joint report to Congress by the secretary of state and the DNI, which is more appropriate than DETER’s reliance solely on a report from the DNI, an apolitical body, as

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4 Daniel Fried served from 2013 to 2017 as the first and so far only sanctions coordinator at the State Department.





Vladimir Putin, President of the Russian Federation, speaks at the World Economic Forum's Annual Meeting in Davos. Source: Wikimedia Commons

a trigger. The triggers for sanctions related to assassination would be a DNI determination to Congress in consultation with the affected NATO member government.

Sanctions triggered by affirmative reports would include:

◆ *In response to a finding of Kremlin election interference (Sec. 602):*

- ◇ Mandatory full blocking sanctions against political figures, oligarchs, and parastatal entities facilitating corrupt activities on behalf of Putin (Sec. 602/235). *Because they are conduct-based, the number of sanctions under this provision is apt to be small;*
- ◇ Full blocking sanctions against any person engaged in a significant transaction with persons supporting or facilitating malicious cyber activities

*(Sec. 602/236). This targets funders of election interference; though it is unlikely to cut off all such funding, it could reveal a useful set of facilitators beyond the well-known Prigozhin, who funded the St. Petersburg troll farm IRA;*

- ◇ A menu of lesser but significant sanctions (drawn from CAATSA Sec. 235) against persons investing in a Russian-owned or controlled liquefied natural gas (LNG) export facility located outside Russia (Sec. 602/237). *This may not target many existing facilities, but may discourage such facilities in the future;*
- ◇ Blocking sanctions against new Russian sovereign debt over fourteen days (Sec. 602/238). *This has been considered a likely next option in financial sanctions since the end of the Obama administration. The Trump administration imposed a narrow*

*set of sovereign debt sanctions in August 2019 in response to the attempt to assassinate Skripal; these blocking sanctions would go further, though the impact would be modest to moderate; and*

- ◇ Full blocking sanctions against Russian financial institutions that have supported election interference (Sec. 602/239). *As noted above, this is a strong measure, but the bar for determination is set high.*
- ◆ In response to a finding of renewed Russian offensive military operations in Ukraine (Sec. 603):
  - ◇ A menu of significant (but not full blocking) sanctions (drawn from CAATSA Sec. 235<sup>5</sup>) against persons who invest in new oil or natural gas projects outside Russia that include a Russian state or parastatal ownership over 33 percent or a majority of the voting interest, and are greater than \$250 million in value (Sec. 603/239A); and
  - ◇ The same menu of sanctions against provision of goods, services, technology, financing or support over \$1 million (or \$12 million in one year) for crude oil production projects inside Russia (Sec. 603/239B). *These sanctions are logical extensions of current restrictions on development of new Russian or Russian-controlled energy resources. The 33 percent share threshold is a departure from the usual 50 percent level used in sanctions designations.*<sup>6</sup>
- ◆ *In response to a determination by the secretary of state that Russia is interfering with freedom of navigation in the Kerch Strait or elsewhere inconsistent with international law (Sec. 603/239C), imposition of full blocking sanctions on the Russian shipbuilding sector for a minimum of three years. The administration should be careful about implementing this provision due to the potential for unintended consequences.*
- ◆ *In response to a finding of assassination, imposition of full blocking sanctions as provided in the Global*

*Magnitsky Accountability Act (Sec. 611). Attribution will be a challenge, but this is worthy mandate.*

## ASSESSMENT

**Is legislation needed?** Both DETER and DASKA bills attempt to push the Trump administration to take a stronger, more consistent stance against the Kremlin's malign behavior. They are both, by their nature as legislations, blunter instruments than we prefer, but the case for these bills flows from the president's inconsistency on Russia policy (and on Ukraine) and the resulting weakening of a credible deterrent to continued Russian aggression. While the Trump administration has advanced some sanctions against Russia, those have seemed more reluctant actions than proactive engagement with a Moscow bent on undermining the transatlantic alliance and democracy as a form of government. Ukrainian President Volodymyr Zelenskyy and his team are hopeful about making some progress in negotiations with Russia over a Donbas settlement, but signs that the Kremlin is prepared to respond constructively are mixed, especially with Washington sitting largely on the sidelines. The United States must disabuse Putin of the notion that he can attack the US elections or Ukraine without consequence.

**The attribution problem.** Both bills depend on a DNI (plus multiagency) process or a DNI/secretary of state determination of malign Russian behavior as the trigger for action. While attribution can be complex, it is possible to detect some forms of Russian election interference. Independent civil society researchers (as well as the intelligence community) have done so in the past and have already been making their judgments known during the current US election cycle. Detection of Russian offensive military operations should prove even simpler.

The problem is whether the administration will make a straight and timely call. We understand the argument for assigning this task to the DNI. Reliance on the DNI seems unreliable, however, after Trump dismissed his acting DNI reportedly due to unhappiness over an intelligence assessment of Russian electoral interference and replaced him

<sup>5</sup> Sections 231 and 235, Section 231 of the Countering America's Adversaries Through Sanctions Act of 2017," US Department of State, Bureau of International Security and Nonproliferation, accessed February 2020, <https://www.state.gov/countering-americas-adversaries-through-sanctions-act-of-2017/sections-231-and-235/>.

<sup>6</sup> While it is beyond the scope of this paper, a US and Western response to a renewed Russian military offensive against Ukraine should include more than sanctions.

with a political ally.<sup>7</sup> Making a call with policy implications arguably should not be put on the DNI, as an apolitical body, even in the anomalous current circumstances. *Congress may wish to assign the designation responsibility to the president, perhaps on the basis of an independent assessment of the facts sent to the both houses of Congress.*

**Are the bills' sanctions the right ones?** Both bills draw from a set of sanctions escalatory measures—covering finance, energy, and the cyber sector—that have been discussed by sanctions experts in and out of government since the end of the Obama administration. We provide specific comments on individual provisions above but generally believe that DASKA's sanctions are more measured and thus more implementable. DETER's sanctions on financial institutions are simply too harsh and risk too much spillover to US and Western financial markets to be implementable. That maximalism also undermines the provision's utility as an effective deterrent as it is almost inconceivable that such sanctions would be imposed without significant carve-outs or other methods of blunting potential blowback to US and European interests.

The bills also differ over whether the US government should focus on one big problem—election interference—or more areas of potential Russian aggression. While an argument can be made for focus, we prefer DASKA's attempt at a more comprehensive approach, going after the major areas of potential Kremlin aggression rather than just one.

◆ For the sake of addressing all major areas of potential Russian aggression, *we suggest adding to DASKA contingency sanctions should the Kremlin again use gas supplies as a political weapon.* Last December, Congress passed the PEES (Protecting Europe's Energy Security) Act, introduced by US Sens. Ted Cruz (R-TX) and Jeanne Shaheen (D-NH), using the threat of sanctions in an effort to block the Nord Stream II gas pipeline, which many believe could give Russia the ability again to withhold gas from Ukraine or from Central Europe. PEES has slowed Nord Stream II and could derail it altogether (though that is less likely).<sup>8</sup>

DASKA could add a provision for discretionary sanctions should the Russian government use gas cutoffs or significant reductions to coerce or exercise political leverage over Ukraine or any European Union member

state. The sanctions could include financial restrictions on Gazprom; escalation of technology restrictions for gas and oil exploration equipment and LNG facilities; and intensified financial restrictions on all Russian energy development projects.

Our bottom lines are these: in a best-case scenario, we would prefer no sanctions legislation at all. An administration should have discretion in the foreign policy realm to act and should earn that discretion through consistent policy application that is communicated promptly to Congress. However, a best case is no longer available. Unevenness on the part of the administration, especially its top-level injection of domestic partisan calculations into responses to real Russian threats with respect to Ukraine and US elections, despite the best efforts of many skilled career and political appointees, has made Russia sanctions legislation a needed second-best alternative.

DASKA and DETER are both serious pieces of legislation; we prefer DASKA as the more comprehensive and measured option. With admitted regret, we support its passage. If a subsequent bill emerges, we hope that it incorporates the best elements of both and benefits from this and other analyses.

## ABOUT THE AUTHORS

**Brian O'Toole** is a senior fellow with the Atlantic Council's Global Business & Economics Program. Brian writes regularly on sanctions and foreign policy issues for the Economic Sanctions Initiative and is a recognized expert on economic and financial sanctions. Previously, Brian worked at the US Department of the Treasury from 2009 to 2017.

**Ambassador Daniel Fried** serves as the Weiser Family Distinguished Fellow at the Atlantic Council. In the course of his forty-year Foreign Service career, Ambassador Fried played a key role in designing and implementing American policy in Europe after the fall of the Soviet Union.

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7 Rozina Sabur, "Donald Trump Dismisses US Intelligence Briefing Warning Russia is Working to Boost His Re-Election," *Telegraph*, February 21, 2020, <https://www.telegraph.co.uk/news/2020/02/21/us-intelligence-chief-replaced-clash-donald-trump-russian-bid2/>.

8 Protecting Europe's Energy Security Act of 2019, S.1441—116th Congress (last update July 31, 2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1441>.







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