



ALASKA JUSTICE FORUM

A PUBLICATION OF THE JUSTICE CENTER

Winter 2008 Supplement

UNIVERSITY OF ALASKA ANCHORAGE

Vol. 24, No. 4 Supplement

A Comparison of the American and Russian Constitutions

David Mannheimer

The twentieth century English philosopher and archaeologist Robin Collingwood held the view that it was impossible to understand a system of thought or analysis fully until one understood what questions the framers of that system were attempting to answer. Collingwood applied this mode of inquiry to philosophical studies, but his method is equally fruitful when the task is to understand the constitutions of nations.

In a general sense, of course, the constitution of every nation addresses itself to the same basic issues:

- How will the government be constituted, and how will authority be distributed within the government?
- How will political power be invested in leaders, transferred to new leaders, and revoked prematurely if need be?
- What will be the relationship between the government and its citizens? In particular, what will be the protected rights of the citizenry and the corresponding limits on the power of the state? And what will be the government's obligations to its citizens, and the citizenry's obligations to the government?
- What will be the relationship between the national government and the various sub-levels of government, as well as the government's relationship with the various cultural, civic, ethnic, and religious groups within society?
- How will the national income and resources be generated, distributed, and regulated?

Sometimes, the answers to these questions will be found in the explicit provisions of a nation's constitution; sometimes, the answers to these questions will be found in what the constitution does *not* say. And sometimes (as, for example, the United States Constitution's original provisions regarding slavery), a constitution will either explicitly or implicitly leave important questions unanswered—deferring the resolution of these issues to later political, or even

physical, battles.

But whenever a society asks itself such questions, the answers are not written on a blank slate. Instead, the political, social, economic, and physical conditions that the society already faces (or expects to face shortly) will ineluctably shape and limit the range of potential answers—that is, the range of answers that are both feasible and acceptable to members of the society.

The constitutions of the United States and the Russian Federation were written half a world and more than two hundred years apart. Despite this fact, the two constitutions appear to be remarkably similar on many levels.

Both provide a framework for nationwide governance of a diverse group of constituent states or regions that are acknowledged to be sovereign in their own right. Both constitutions establish a federal government comprising three independent branches—the executive, the legislative, and the judicial. Both constitutions provide for a bicameral legislature: a smaller upper house consisting of two representatives from each state

Editor's Note

A shorter version of this article by David Mannheimer appeared in the Winter 2008 print and online issues of the *Alaska Justice Forum*. It can be found at http://justice.uaa.alaska.edu/forum/24/4winter2008/a_constitution.html.

or region and a more numerous lower house comprising representatives elected by popular ballot. (Under the original version of the U.S. Constitution, senators were not elected by popular ballot; rather, they were chosen by the state legislatures.) Both constitutions reject the English system of direct parliamentary control over the executive branch. Instead, the American president and the Russian president are elected by nationwide ballot, separate from the elections for the legislature, and the president's authority is designed to be distinct from (and, at times, a counterpoise to) the legislature's authority.

Yet these surface similarities mask true differences—differences in the explicit

Acknowledgements

In researching this essay, I drew heavily on three recent books about modern Russian political and social history:

Leon Aron, *Russia's Revolution: Essays, 1989-2006* (American Enterprise Institute Press, 2007).

Daniel Yergin and Thane Gustafson, *Russia 2010* (Vintage Books, 1995).

Peter Baker and Susan Glasser, *Kremlin Rising: Vladimir Putin's Russia and the End of Revolution* (Potomac Books, 2007).

I also consulted a recent work on Russian intellectual history, James H. Billington's *Russia in Search of Itself* (Woodrow Wilson Center Press, 2004).

For the history of, and the arguments surrounding, the ratification of the American constitution, I relied primarily on the article, "A More Perfect Union: The Creation of the U.S. Constitution," which is available from the U.S. National Archives and Records Administration at their web site: www.archives.gov. This web article is based on a longer printed work of the same title written by Roger A. Bruns and published by the National Archives in 1986.

I obtained the English text of the Russian constitution from the Bucknell University web site: www.departments.bucknell.edu/russian/const/constit.html.

— David Mannheimer

provisions of the two constitutions and also differences in how seemingly equivalent provisions have been put into practice. The premise of this essay is that these differences can be understood only by studying the political, economic, and societal problems faced by the American and Russian peoples when they formulated their constitutions and by understanding the types of responses to these problems that were suggested by the two nations' cultural and legal backgrounds.

The Formulation of the U.S. Constitution

The United States Constitution was written in the summer of 1787. It was proposed to the states on September 17th, and it went into effect nine months later, on June 21, 1788, when the requisite ninth state, New Hampshire, voted to ratify it. As a practical matter, however, the American union did not become politically secure until the populous and commercially important states of Virginia and New York ratified the Constitution later that summer.

Two hundred thirty years later, we in the United States often take this document for granted. From a modern perspective, the choices made by the drafters assume an air of inevitability—as if the provisions of the American constitution were self-evident rules for governing a democratic society. We forget that the constitution was ratified only after vociferous and passionate debate and that it was forged at a time when many Americans distrusted any effort to establish a stronger central government, when the states often viewed each other as rivals, when the four major regions of the country—the north, the middle, the south, and the west—had very different economic interests, and when Americans had many differing ideas about how society should be organized.

The American Revolutionary War had been fought, not by a true national government, but by the joint effort of thirteen independent states. Although the states had created a national congress and the Continental Army, the separate states retained almost every aspect of fiscal and political sovereignty.

The conclusion of the Revolutionary War saw the American states freed from British control but still surrounded on all sides by territory controlled by the major European powers—Great Britain, France, and Spain. Under the existing national charter (the Articles of Confederation), the American national government had no mechanism for settling disputes between the states, no power to tax, very little power to regulate commerce, and essentially no way to engage in foreign policy or to fund a war effort

without the active assent of the wealthiest states.

In addition to this political disarray, America had to deal with a looming economic disaster. The states (and, as a consequence, the Congress) were running out of hard currency, a flood of paper money was fueling extreme inflation, and both the business and the farm economies were foundering.

In 1786, prompted by the efforts of James Madison and Alexander Hamilton, Congress issued a call to the states to send delegates to a convention to consider a new national constitution. Although the need for change seemed great, the idea of altering the form of the national government was not universally popular. The political leadership of Rhode Island refused to send delegates to the constitutional convention, and Patrick Henry, the ardent proponent of independence and representative government, refused to join the Virginia delegation, declaring that he “smelt a rat.” The convention's early decision to conduct its debates in secret did little to assuage the fears of its critics.

Madison's notes of the convention debates reveal a lengthy, and at times seemingly irresolvable, conflict between the larger states and the smaller states concerning the scope of the new government's authority, and concerning how the states were to be represented in that new government—by population or with all states represented equally. In addition, there was bitter division between the northern and southern states on the questions of slavery and the regulation of navigation and foreign trade.

It took almost two months for the delegates to agree to the compromise that Americans now take for granted: a Senate with equal representation by state and a House of Representatives whose members are allotted by population. (To obtain the assent of the southern states, the Constitution specified that a slave was to be counted as three-fifths of a person when determining a state's representation in the House.) With the adoption of this compromise, the delegates finally became convinced that a new constitution was achievable, and they began working on the details.

The proposed constitution was put before the states in mid-September 1787. People waited to see whether it would garner the assent of at least nine states—the minimum needed for ratification under Article VII. People also waited to see whether the constitution would be ratified by the crucial states of Massachusetts, New York, Pennsylvania, and Virginia.

By October, a heated debate had started up across the country. In public meetings and in newspaper articles, the proponents of

the new government (the *Federalists*) and its opponents (the *Anti-Federalists*) waged a polemical war. Anti-Federalists argued that the new constitution undermined state sovereignty and that it gave too much power to a remote central government.

(It must be remembered that, in the late 1700s, the two cities that had served as the national capital—New York and Philadelphia—were almost as remote as London for most Americans. For example, in the year 1800, it took president-elect Thomas Jefferson three days to travel from his home outside of Charlottesville, Virginia to the new federal city of Washington, D.C. for his inauguration—a geographic distance of approximately 100 miles.)

The Anti-Federalists believed that their rights and liberties were better protected if primary sovereignty was exercised by state governments—governments that were more amenable to local pressure and control. They feared that a strong national government, beholden to no state, would allow the wealthy and well-born to control the country. The Anti-Federalists also pointed out that the new constitution lacked any provisions guaranteeing individual liberties.

In response, a trio of Federalists (James Madison, Alexander Hamilton, and John Jay) published the series of essays that would become known as the *Federalist*



Alaska Justice Forum

Editor: Antonia Moras
 Editorial Board: Allan Barnes, Sharon Chamard, Ron Everett, Pamela Kelley, Alan McKelvie, Deborah Periman, Marny Rivera, André Rosay, Lawrence Trostle
 Typesetting and Layout: Melissa Green

Justice Center, Robert Langworthy, Director

Published quarterly by the

Justice Center
 University of Alaska Anchorage
 3211 Providence Drive
 Anchorage, AK 99508
 (907) 786-1810
 (907) 786-7777 fax
 ayjust@uaa.alaska.edu
<http://www.uaa.alaska.edu/just/>

© 2008 Justice Center,
 University of Alaska Anchorage
 ISSN 0893-8903

The opinions expressed are those of individual authors and may not be those of the Justice Center.

The University of Alaska provides equal education and employment opportunities for all, regardless of race, color, religion, national origin, sex, age, disability, or status as a Vietnam-era or disabled veteran.

Papers. In these essays, they pointed out the dangers of weak national government and the virtues of the type of government embodied in the proposed constitution. Chief among these virtues, they argued, was the fact that the proposed constitution established several competing organs of power within the federal government. This principle of divided power—an idea advocated by the French Enlightenment thinker Baron Charles-Louis de Montesquieu—is now known to us as the doctrine of *separation of powers*, or the system of *checks and balances*.

Five states (Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut) quickly ratified the new constitution by wide margins. But the debate then moved to four pivotal states where the outcome was much less certain: Massachusetts, New Hampshire, New York, and Virginia.

In early February 1788, the new constitution squeaked through the Massachusetts ratifying convention by a vote of 187 to 168—only because the Federalists acknowledged the strength of one of the Anti-Federalists' main objections and agreed to append a resolution calling for the speedy enactment of a national bill of rights.

Despite the Massachusetts ratification, the fate of the new national government remained uncertain as the summer of 1788 approached. The predicted vote (based on the announced views of the delegates) was a tie in both New Hampshire (52-52) and Virginia (84-84). The outlook in New York was bleak: Nineteen delegates had announced in favor of the proposed constitution, and 46 against.

But the compromise reached in Massachusetts—the idea that the constitution would be ratified and then speedily amended to include a bill of rights—proved sufficient to carry the day for the Federalists.

On June 21st, New Hampshire ratified the constitution after five delegates changed their minds and decided to vote in favor. (The vote was 57 to 47.) Four days later, and acting without knowledge of the New Hampshire vote, Virginia also voted to ratify the constitution—89 to 79.

In early July, Congress received word that the requisite number of states had ratified the new constitution, and a committee was appointed to put it into effect. The crucial state of New York, however, had still not decided what to do.

On July 26, 1788, New York held its vote. Even though the delegates knew that the Constitution had already been ratified by nine states (and that a “no” vote would leave New York out of the new national government), the New York vote was still extremely close: 30 to 27, a difference of

only three votes. Again, it was the promise of a bill of rights (and a threat of secession by the southern counties of the state) that helped procure a Federalist victory.

The Federalists' promise of a bill of rights came to fruition the following year, under the guidance of James Madison, who was elected to the House of Representatives from Virginia. In 1789, the first Congress approved and sent to the states the ten amendments that we now refer to as the Bill of Rights. By December 1791, these amendments had been ratified by the requisite three-quarters of the states.

The Formulation of the Constitution of the Russian Federation

The Constitution of the Russian Federation was written in the fall of 1993, at a time of political crisis—an impasse between the Russian president, Boris Yeltsin, and the Russian Parliament. To explain this crisis, it is necessary to back up eight years, to 1985.

In 1985, Russia was part of the Soviet Union—which, legally speaking, was a federation of fifteen socialist republics, of which Russia was the largest. On paper, each republic (and the Union as well) had a parliamentary form of government. But the real power (in fact, almost total political and economic power) lay in the hands of the Communist Party—and, ultimately, the small group of party leaders who comprised the *Politburo* (the Political Bureau) of the party.

In the spring of 1985, Mikhail Gorbachev was selected by the Politburo as the General Secretary of the Communist Party—in effect, the ruler of the Soviet Union. Gorbachev was heir to a political and economic totalitarianism that began with the Bolshevik Revolution in November 1917 (late October in the Russian calendar—hence it is referred to as the *October Revolution*), and that reached its zenith under Joseph Stalin, who was undisputed master of the Soviet Union from 1928 until his death in 1953.

In the Soviet Union, the Communist Party held a complete monopoly on political activity, and it controlled all the structures of government. The government, in turn, owned all industry and business (except for the black market). Essentially every adult in the Soviet Union was employed by the state. Moreover, the types of goods produced, the levels of production, and the price of every good and service was set by state decree.

Membership in the Communist Party was the path to advancement. The nation was run by an elite group of Communist political leaders, administrators, and managers known collectively as the *nomenklatura*. Opposition to the Communist Party, or

hindrance of its leaders or policies, was the path to prison, exile, or death for millions of Soviet citizens.

Mikhail Gorbachev was a committed Communist, but he wanted to reform the economic and political system. During the Cold War era, while the world economy was being transformed by electronics (computers, media, and communications), the Soviet economy remained focused on heavy industry and the military. As a result, the Soviet economy began to stagnate in the 1970s, and by the 1980s the Soviet Union could no longer bear the cost of its empire.

Gorbachev set to work to reorganize the moribund Soviet economy—a policy that became known as *perestroika* (restructuring). In 1987, at Gorbachev's direction, the government enacted laws that relaxed central control over business enterprises, allowed private banking, allowed citizens to establish private shops and kiosks, and allowed joint economic ventures with Western investors.

But these reforms actually set the Soviet economy on a downward spiral. Central planning of the economy was gone, but the old monopolies still existed, and the existing pricing system was still irrational (i.e., unconnected to the true cost of, or demand for, goods and services). The economy got worse, and shortages appeared.

The next year, despite the worsening economic situation, Gorbachev began to liberalize the political climate in the Soviet Union, under the banner of *glasnost* (openness or liberalization). He encouraged open criticism of government actions and policies, and he declared that the state itself was required to follow the law—that the Soviet Union should become a government of laws (*pravovoe gosudarstva*), and not a government of arbitrary state power. He also suggested that the Communist Party might relinquish its leading role—in other words, that it should be legal for people to organize other political parties. In 1990, Gorbachev had the Soviet constitution amended to achieve this goal.

To further advance this new view of the Soviet state and to break the power of the Communist old guard, Gorbachev revived the *soviets*—the national and provincial legislatures that were the remnants of the democratic bodies that existed during the early stages of the Russian Revolution (March to November 1917), before the Bolsheviks consolidated their power. (*Soviet* is the Russian word for council.) The Communists had retained these legislatures as a parliamentary facade—to rubber-stamp the decisions of the Communist leadership—but Gorbachev insisted that they again become true representative bodies.

Gorbachev engineered his own election as President of the Supreme Soviet—that is, the national parliament—so that his official basis for running the country was not his position as head of the Communist Party’s Politburo, but rather his position as head of the parliament.

Gorbachev’s aim in all of these efforts was to steer the Soviet Union toward a new, revitalized future—still under Communist leadership, but with substantial political and economic freedom. This was not to be. Instead, the Soviet Union began to fall apart.

The chief architect of its dissolution was Boris Yeltsin, a Communist leader who had briefly been Moscow party chief and a member of the Politburo under Gorbachev—until Gorbachev dismissed him in 1987 for criticizing the conservative members of the Politburo and the slow pace of reform.

Gorbachev’s political reforms allowed Yeltsin to do something that would have been unthinkable under Communist totalitarianism: After being dismissed from the Politburo (and from his job as Moscow party chief), Yeltsin returned to political power despite the wishes of the Soviet leadership.

With the revival of the provincial legislatures, Yeltsin successfully ran for a seat in the Russian Soviet (i.e., the Parliament of the Russian Republic). And in 1990, he was elected speaker of that body.

In June 1990, under Yeltsin’s leadership, the Russian Republic declared that it was a *sovereign* member of the Soviet Union and that the laws of the Republic took precedence over the laws of the Soviet Union. In other words, there were now two national governments laying competing claims to sovereignty within Russia. The following year, in June 1991, Yeltsin became the first democratically elected President of the Russian Republic. That same year, the other fourteen Soviet republics followed Russia’s lead and declared their sovereignty—still technically within the framework of the Soviet Union.

The last nail in the coffin of the Soviet Union was the Russian Republic’s insistence that it controlled all tax revenues generated in Russia. By mid-1991, the Soviet government was strangling for lack of money.

At this point, Gorbachev realized that his reforms were moving in a direction he had not foreseen—the impending collapse of the Soviet Union as a unified government. He turned to the conservatives to aid him in his battles with the resurgent Russian Republic. But it was too late: The conservatives had already decided that Gorbachev was leading the Soviet Union to disaster—and that if the situation was to be saved, Gorbachev would have to go.

On August 18, 1991, while Gorbachev was away from Moscow, vacationing in the Crimea, the conservatives staged a coup. They arrested Gorbachev and held him incommunicado. They then attempted to re-assert Soviet power. Early in the morning of August 19th, the official Soviet news agency, TASS, announced that Gorbachev had “serious health problems” and could no longer govern, and that Vice-President Gennady Yaneyev had assumed leadership of the country.

But the political situation was beyond the plotters’ control. The citizens of Russia—and, perhaps more important, the military units within Russia—were no longer willing to rally to the cause of the Soviet Union.

The leaders of the coup made the mistake of failing to cut off internal communications within Russia—allowing the citizens to quickly discover what was going on and to mobilize resistance. When the coup began, Yeltsin was in his dacha in the country. The coup leaders sent police to arrest him, but the police mistakenly went to Yeltsin’s apartment in Moscow. This allowed Yeltsin to remain free and return to Moscow, where he and his supporters barricaded themselves inside the Russian House of Parliament, known as the White House (*Bielyi Dom*). From the White House, Yeltsin maintained telephone contact with the rest of Russia—indeed, the rest of the world. He denounced the coup as unconstitutional, and he called for mass resistance from the citizens of Russia.

At the command of the coup leaders, troops formed a cordon around the Russian White House. But in between these soldiers and the parliament building, tens of thousands of protesters assembled to create a protective buffer for Yeltsin and the other leaders of the Republican government.

The leaders of the coup now discovered that they did not have the undivided support of the military. The chief of a tank battalion surrounding the White House declared his unit’s loyalty to the Republican leadership. Yeltsin then donned a bullet-proof vest, emerged from the barricades, and climbed up on one of the tanks, proclaiming defiance to the coup. By the end of the day, more troops, including an elite commando division, were coming over to the Republican side.

The coup leaders now decided to end the standoff with an armed assault, but key commanders and military units failed to obey them. On August 20th, as citizens raised the white, blue, and red banner of the Russian Republic, the troops surrounding the White House abandoned their siege. The coup had failed.

When the coup collapsed, Yeltsin per-

ceived that the remnant of the Soviet government was no longer in a position to govern, and he began taking steps to have the government of the Russian Republic take its place as the true sovereign within the Russia territory. At the end of August, Yeltsin and the Russian Parliament suspended the operations of the Communist Party within Russia, and also seized the Party’s property.

Without much fanfare, the Soviet Union now dissolved. Its constituent republics had declared independence; it had no income; and it had no military power. In December 1991, the Soviet Union ceased to exist as a legal entity. On December 25, Mikhail Gorbachev submitted his resignation as head of a government that no longer had a territory to govern. “Given the current situation,” he said, “I am ceasing my activities as president of the Union of Soviet Socialist Republics.” With Gorbachev’s resignation, the Soviet Union was gone. The Russian Republic was the undisputed sovereign of Russia.

But this did not mean that all was well in Russia. In the fall of 1991, Yeltsin had selected economist Yegor Gaidar to lead the effort to transform the Russian economy into a capitalist economy. Gaidar’s reforms soon led to disaster. The economy, already weakened by six years of Gorbachev’s half-measure reforms, rapidly became worse with the collapse of the Soviet Union’s inter-republic trading structure, as all of the member republics declared their independence.

The downward plunge of the Russian economy was catastrophic: Investment dropped by half, industrial production plummeted, and riotous inflation wiped out people’s savings. In the eighteen months between January 1992 and June 1993, prices rose nearly ten thousand percent.

This economic turmoil became the major factor driving a political wedge between Boris Yeltsin and the Russian Parliament. As the Russian economy collapsed under Yeltsin and Gaidar’s new economic reforms, the lower house (the Congress of People’s Deputies) began to openly criticize Yeltsin’s leadership, and his former allies became his political enemies.

One crucial fact of political life in Russia was that even though a peaceful revolution had produced the fall of the Soviet Union, that revolution produced remarkably little change in the identity of the people in power. The former ruling class of the Soviet Union—the Communist *nomenklatura*—was not exiled, imprisoned, or shot. Instead, the *nomenklatura* made the switch to the new mode of government: They acceded to democracy, but they retained control over the country’s industry and economic resources—and, in the rural areas of the country, they continued to exercise

effective political control as well.

(Even the leaders of the August 1991 coup escaped retribution. Although they were soon arrested, they were never brought to trial. Instead, in February 1994, the Russian Parliament passed a law that granted them amnesty.)

Because the *nomenklatura* was heavily represented in the Russian Parliament, one major point of contention between Yeltsin and his political adversaries was whether Russia would have a strong president or a strong Parliament. Another major question was whether Moscow would remain the political center of the Republic. In the summer of 1993, various Russian provinces and cities began declaring themselves independent so that they could take advantage of the special privileges granted to the so-called *autonomous regions* under the constitution that Russia had inherited from the Soviet Union.

In the spring and summer of 1993, an effort was already underway to draft a new constitution for Russia, but this effort was stymied by the lack of consensus as to what kind of government Russia should have.

The Russian Parliament took the offensive by enacting legislation that rescinded privatization, put control of reforms in Parliament's hands, and restricted the powers of the president. Once again, there were two competing governments in Russia, but this time the competitors were the president and the Parliament. These two branches of government were in a deadlock, and there was no apparent way to end the crisis, because the old Soviet-era constitution provided that *both* the president and the Parliament were sovereign—but without providing a mechanism to resolve their inevitable differences.

In the fall of 1993, while Parliament was considering a variety of measures that would have reduced Yeltsin to a figurehead president, Yeltsin struck first. On September 21, he dissolved both houses of Parliament. He admitted to the citizenry that the constitution did not give him the power to do this, but he declared that, because he was "the guarantor of the security of our State," he was "obliged to propose a way out of this deadlock," and to "break this ruinous, vicious circle."

The Parliament—led by Yeltsin's vice-president, Alexander Rutskoi, and Speaker Ruslan Khasbulatov—resisted. Parliament issued an edict deposing Yeltsin and installing Rutskoi in his place. In response, Yeltsin ordered troops to surround the White House (i.e., the Parliament building).

Thus began a siege of the White House that was a replay of August 1991. Many of the Parliamentary deputies inside the building were the same ones who had joined

Yeltsin in resisting the Communist coup in 1991—but this time, Yeltsin was the one directing the siege from outside the building.

Events climaxed two weeks later when Speaker Khasbulatov and Vice-President Rutskoi sent armed supporters to seize the Moscow mayor's office and a television transmitter. Yeltsin responded with greater military force—sending tanks to the Parliament building and bombarding it with cannon shells until it caught fire, thus forcing the surrender of the deputies and their supporters.

Yeltsin now seemed to be firmly in control of the government. He submitted his new constitution to the Russian people—one modeled after the French constitution, which conferred great power on the president. On December 12, 1993, in a nationwide referendum, this proposed constitution was adopted.

But Yeltsin's triumph was bittersweet. He had focused his campaign efforts on securing passage of the constitution, while his political enemies had focused their attention on control of the Parliament. In the parliamentary elections, the Communist Party (which was re-legalized in late 1992) and the right-wing, ultra-nationalist Liberal Democratic party of Vladimir Zhirinovski did very well, while the reform parties friendly to Yeltsin's policies did poorly.

During most of Yeltsin's tenure as president, the Russian Parliament was dominated by political parties which were not under Yeltsin's control—and were often implacably opposed to his policies and his power. These parties were aided in their opposition by the civil liberties that Yeltsin himself had institutionalized in the new constitution—especially, freedom of speech and of the press, freedom to organize politically, and legislative immunity. Yeltsin never sought to return to the repressive government of Soviet days. With the possible exception of the eight months between March 1917 (the overthrow of the Tsar) and November 1917 (the Bolshevik takeover), Yeltsin's years in power were the freest and most tolerant period that Russia had known up to that time.

A Comparison of the U.S. Constitution and Constitution of the Russian Federation

As I mentioned at the beginning of this article, the American and Russian constitutions have several important similarities. Both establish a federal government for a group of constituent states or regions that are acknowledged to be sovereign in their own right. Both constitutions structure the federal government in three branches—the executive, the legislative, and the judicial.

Both provide for a bicameral legislature: an upper house consisting of two representatives from each state or region and a more numerous lower house of elected representatives. Finally, both provide for a president who is selected by nationwide ballot.

And yet, there are significant differences between the two constitutions. These differences are mainly attributable to two factors: the very different political problems facing the two nations when they drafted their constitutions and the different political traditions that shaped the drafters' choices and emphasis.

The American constitution was drafted as an arm's-length agreement among these thirteen newly independent states. The people of these states were clearly linked in interest, and while they recognized the need for national cooperation, especially in matters of commerce and defense, they had just fought a long and costly war to free themselves from a distant king and parliament. They already enjoyed functioning, representative governments in their respective states—and many, if not most, Americans were distrustful of efforts to establish a new, strong, centralized government. Moreover, rivalries and conflicts existed between the small and large states, between manufacturing interests and agricultural interests, between the eastern states and the growing western populations, and between the slave states and the free. Each group feared that their opponents would take control of a new national government and use that power to impose their particular political and economic policies.

To allay these fears and to solve these political problems, the drafters of the American constitution created a federal government whose power was intended to be limited strictly to the enumerated areas of authority. And to try to protect the states and the people from arbitrary or authoritarian use of this federal power, the drafters turned to the French philosopher Montesquieu's idea of a government containing several competing organs of power—a principle now known to us as the doctrine of *separation of powers*—the system of *checks and balances*.

The drafters of the Constitution of the Russian Federation faced a strikingly different political problem.

Russia was already a nation. The eighty-nine provinces and regions of the Russian Federation had been under a unified political authority for more than one hundred fifty years (first under the tsars, and then under Soviet rule), but in 1993, Russia had just regained its independence from the recently dissolved Soviet Union. The country was undergoing extreme political and economic turmoil, made intolerable by a stalemate

between the presidency and the Parliament. Because Russia's existing constitution (inherited from Soviet days) declared that *both* the president and the Parliament were sovereign, it did not provide a mechanism for resolving their inevitable differences. The people who drafted the Russian constitution in the summer and fall of 1993 were motivated by the threat that the federation would fall apart.

On the other hand, the Russian people had just emerged from seventy years of communist totalitarianism. If the federal government was reconstituted so that it had sufficient strength to hold the country together, there was a danger that newly-won civil and economic liberties would disappear.

The drafters' response was to craft a constitution that (1) clearly declared or re-affirmed federal supremacy over the constituent provinces and regions; (2) gave the presidency great power—to try to make sure that the government would not again be paralyzed by irreconcilable differences between the executive and legislative branches; and (3) contained numerous explicit guarantees of the civil and economic rights and liberties to be enjoyed by Russian citizens.

Federal Supremacy

Both the American constitution (Article VI) and the Russian (Articles 4, 5, 15, 71, 76, and 77) explicitly provide for federal supremacy within specified spheres of federal authority. Indeed, it is hard to imagine that any federal government could function without such supremacy. The two constitutions, however, define that sphere of federal authority quite differently.

In the U.S. Constitution, the areas of federal supremacy are primarily set forth in Article I, Section 8 (which lists the areas of authority that are affirmatively granted to Congress), Article I, Section 10 (which lists the areas of authority that are prohibited to the states), and Article III, Section 2 (which lists the types of litigation entrusted to the federal courts).

In general, these provisions give the federal government pre-eminent authority in matters of interstate and international commerce, national defense, and international relations. They also give the federal courts the power to adjudicate disputes between states and between states and foreign governments. These were the areas where Americans most keenly felt the weakness of the pre-existing confederation and where they perceived the greatest need for a federal government able to enforce a nationwide uniformity of law and policy.

Under the Russian constitution, the federal government is granted a much more

expansive role. Article 71 gives the federal government jurisdiction over some four dozen aspects of government, including:

- “regulation and protection of the rights and liberties of [the] citizen;”
- establishing “procedure[s] for the organization and activities” of the three branches of federal government;
- “determining...policy and . . . programs in the fields of state structure, the economy, the environment, and the social, cultural and national development of the Russian Federation;”
- “federal power grids, . . . federal transport, railways, [and] information and communications;” and
- “law courts; the Procurator’s office; [and] criminal [and] criminal procedure . . . legislation[.]”

Moreover, Article 72 of the Russian constitution gives the federal government and the provincial/regional governments joint jurisdiction over many other governmental functions, including:

- “issues [concerning] the possession, use, and management of land, mineral resources, water, and other natural resources;”
- “protection of the environment and ecological safety;”
- “general questions of upbringing, education, science, culture, physical culture, and sports;”
- “coordination of health issues, protection of the family, motherhood, fatherhood, and childhood, [and] social protection including social security;”
- “administrative, . . . labor, family, housing, land, water, and forestry legislation;”
- “[the membership of] the judiciary and law-enforcement agencies, the bar, [and the] notariate;” and
- “establishment of general guidelines for the organization of . . . bodies of state power and local self-government.”

Although Article 72 declares that these foregoing concerns fall within the joint authority of the federal and the provincial/regional governments, Article 76 states that, in these areas of joint jurisdiction, “federal laws shall be issued and, in accordance with them, laws and other regulatory acts of [the constituent provinces, and regions] shall be adopted.” In other words, the federal government's laws on these matters are controlling.

The Presidency

Both the American and the Russian constitutions provide for a president to be elected by nationwide popular vote, but

while the American contains a detailed description of the powers (and the limitations on the power) of Congress, it devotes very little space to defining the authority of the president. The Russian, on the other hand, contains a lengthy description of the powers of the president and very little description of the authority of the Parliament.

The powers of the American president are set forth in Article II, Sections 2 and 3. The president is the commander-in-chief of the armed forces (and of the state militias, “if they have been called into the service of the United States”). In addition, the president has the authority to appoint, with the consent of the Senate, all officers of the federal government (i.e., all officers whose manner of selection is not otherwise specified in the constitution). (Article II, Section 2 allows Congress to enact statutes that eliminate the requirement of Senate approval for specific federal officers and that authorize the “Heads of Departments” or the “Courts of Law” to appoint certain federal officers instead of the president.)

Beyond this, the American president is empowered (1) to require the principal heads of the departments of the federal government to report on any subject relating to their duties, (2) to grant pardons and reprieves, (3) to convene the Congress “on extraordinary occasions,” and (4) to “receive ambassadors and other public ministers [of foreign countries].” The president is also directed to “take care that the laws be faithfully executed.”

In contrast, Article 80 of the Russian constitution declares that the president “shall be the head of state” and “the guarantor of the Constitution . . . and of human and civil rights and freedoms.” The president is directed to “take measures to protect the sovereignty of the Russian Federation, its independence and [its] state integrity,” to “ensure concerted functioning and interaction of all bodies of state power,” and to “define the basic domestic and foreign policy guidelines of the state.”

Under Article 83, the president has complete power to appoint all officers of the federal government except the prime minister (an office described as the “Chairman of the Government of the Russian Federation”). Article 83 specifies that the Duma (i.e., the lower house of Parliament) must consent to the president's choice for prime minister.

However, under Article 111, if the Duma refuses to accept the president's nominee for prime minister three times in succession, the president is authorized to appoint the prime minister unilaterally, dissolve the Duma, and call for new elections. Similarly, under Article 117, if the Duma gives a vote of “no confidence” in the prime minister's

government twice in a three-month period, the president is given the choice of either dismissing the government or dismissing the Duma and calling for new elections.

Article 85 gives the president the power to suspend the operation of a law “pending the resolution of the issue in the appropriate court” if the president believes that a law passed by a constituent province or region violates the federal constitution or any federal law or that it violates “human and civil rights and liberties.”

And under Article 90, the president is empowered to “issue decrees and executive orders [that are] binding throughout the territory of the Russian Federation,” so long as these decrees and orders “[do] not contravene the Constitution . . . or federal laws.”

The Rights of Citizens

Americans are justly proud of our Bill of Rights—the first ten amendments to the United States Constitution, which deal with issues such as freedom of speech, freedom of the press, freedom from unreasonable government searches and seizures, the right to jury trial, the right to the assistance of counsel and to confront government witnesses in criminal cases, and the right to fair compensation when the government exercises its authority to take private property. The Russian constitution, however, guarantees a far greater array of liberties and rights for its citizens.

It would be a mistake to view the American Bill of Rights through a twenty-first century lens: These ten amendments were not intended to be federal guarantees of individual liberties in the sense that the federal government could enforce these liberties on the states. Rather, when the Bill of Rights was proposed and adopted in the late 1700s, it was seen as a series of restrictions on federal power—measures designed to make sure that the new federal government could do nothing to alter state law on these subjects. It was designed to prohibit the federal government from otherwise infringing the rights that Americans believed they had inherited from English common law.

For instance, the First Amendment prohibits the Congress from establishing a religion—i.e., selecting a religion to be officially favored by the federal government, which could be supported by federal taxes (in other words, money taken from people who did not necessarily agree with that religion). This provision was viewed as a salutary limit on federal power, but it was not intended to apply to the states. At the time the United States Constitution was adopted (and until 1818), the State of Connecticut was, in many respects, a theocracy. The

Congregationalist Church was the established church, and all citizens were obliged to support it. No one thought that the enactment of the First Amendment required any change in Connecticut’s state government.

It would take two more centuries—encompassing a civil war, the enactment of the Fourteenth Amendment, and a series of Supreme Court decisions in the 1950s and 1960s—before the Bill of Rights would assume its modern role in American law as a set of federally guaranteed rights and liberties.

In contrast, the Constitution of the Russian Federation explicitly commits the federal government to protect a whole panoply of civic rights and benefits—and not just political and religious rights. The Russian constitution also guarantees the types of economic and social benefits that Russian citizens received (or, at least, were theoretically entitled to) under the socialist framework of the Soviet Union.

Many of the rights guaranteed by the Russian constitution correspond to rights that Americans have come to expect under the Bill of Rights.

For instance, Article 14 guarantees that there will be no state-sponsored or mandatory religion, and Article 28 guarantees an individual’s right to practice any religion, “or to profess no religion.” Article 13 guarantees “ideological pluralism;” in other words, it guarantees that there will be no state-sponsored or mandatory political/social ideology (as there was under the days of Soviet rule). Similarly, Article 30 protects the right of association—both political association and economic association (e.g., trade unions). Again, to prevent a return to Soviet practices, Article 30 declares that “[n]o one may be coerced into joining any association.”

Article 29 guarantees “freedom of speech and thought”—although it expressly forbids “[p]ropaganda or campaigning to incite social, racial, national, or religious hatred and strife.” This same article also guarantees freedom of the media, it forbids censorship, and it guarantees public access to information. Article 44 guarantees “freedom of literary, artistic, scientific, intellectual, and other . . . creative activity.” Article 31 guarantees the right to assemble peaceably and to hold political meetings, rallies, and demonstrations. Article 33 guarantees the right to petition the government.

Articles 19 and 32 guarantee the legal equality of all people. Article 19 commits the federal government to be the guarantor of “the equality of rights and liberties regardless of sex, race, nationality, language, origin, property or employment status, residence, attitude to religion, convictions,

membership of public associations or any other circumstance.” Article 32 guarantees all citizens equal access to state services and the right to participate in government.

Article 22 guarantees an individual’s right to “freedom and personal inviolability,” and it declares that the government cannot hold a person in custody for more than forty-eight hours without a court order. Article 23 guarantees the right to privacy, and it provides that the government cannot infringe the privacy of “correspondence, telephone communications . . . and other communications” without a court order.

Article 25 states that the government cannot “enter a home against the will of the persons residing in it except under a court order or in other instances provided by federal law.”

Articles 46 and 47 guarantee equal access to the courts as well as judicial protection of citizens’ rights. Article 48 guarantees the right to counsel, and Article 49 guarantees the presumption of innocence in criminal cases. Article 51 guarantees the right against self-incrimination. Article 50 forbids repeated conviction for the same offense, and it also guarantees defendants the benefit of the exclusionary rule: the government cannot rely on “evidence obtained in violation of federal law.” Article 54 forbids *ex post facto* laws.

Articles 35, 36, and 44 guarantee the right to hold private property (including land and intellectual property) as well as the right of inheritance. Article 35 also guarantees fair compensation for people whose property is taken by the government. And Article 37 forbids forced labor—similar to the American Thirteenth Amendment’s prohibition on “involuntary servitude.”

While these constitutionally guaranteed rights are familiar to Americans, the Russian constitution also protects many other rights that are not found in, or at least are not explicitly guaranteed by, the American constitution.

Article 24 declares that it is forbidden “to gather, store, use, or disseminate information on the private life of any person without his or her consent.”

Article 21 declares that no person shall be subjected to torture “or any other harsh or humiliating treatment,” nor “subjected to medical, scientific, or other experiments without his or her free consent.”

Article 26 guarantees all citizens the right to choose their “national identity”—that is, the right to decide their racial or ethnic affiliation (instead of having the government decide this).

Articles 34 and 37 guarantee the right of private enterprise and the right to choose one’s occupation freely.

Article 37 also guarantees the right to work under safe and hygienic conditions and forbids wage discrimination. It guarantees “the right to rest and leisure,” by requiring all work contracts to adhere to federal law regarding the maximum work week, days off and holidays, and paid, annual vacation.

In addition, Article 57 contains an *ex post facto* clause that restricts the government’s authority to tax: “Laws instituting new taxes or worsening the condition of tax payers shall not have retroactive force.”

Article 27 guarantees freedom of movement and residence within the Russian Federation, as well as the right to travel outside the Russian Federation (and to return from these travels).

A series of constitutional provisions guarantee a social safety net to all Russian citizens. Article 39 guarantees social security payments to people in their old age, and it also guarantees payments to people in financial need because of “disease, loss of a breadwinner, [or the need] to bring up children.” Article 40 guarantees a home—that is, a place to live—to all citizens, and it requires the government to provide housing to people who cannot afford it. Article 43 guarantees all children the right to an education through secondary school and the right to free higher education if they pass a competitive entrance examination.

Article 41 guarantees the right to health care and medical services. Article 42 commits the government to provide compensation to people who have been injured or who suffer ill health because of violations of environmental laws.

Article 52 guarantees the rights of crime victims—both the right of “access to justice” and the right to receive “compensation for injury.”

Although Article 68 declares that Russian is the state language of the Russian Federation, this same article also guarantees other ethnic groups “the right to preserve their native language and to create the conditions for its study and development.”

Article 61 guarantees Russian citizens that they will not be extradited to another country, and Article 63 forbids the federal government from extraditing a non-Russian citizen to another country if that person is being persecuted for political views or facing prosecution for “actions (or inaction) that would not qualify as criminal under the law of the Russian Federation.”

The American Emphasis on Procedure

There is one more distinction between the American and Russian constitutions that should be discussed: the American’s emphasis on matters of procedure.

As explained earlier, the American con-

stitution created a federal government that was founded on the doctrine of *separation of powers* or *checks and balances*. To implement this doctrine, the American drafters relied on a legal premise inherited from England—the premise that, in the long run, fairness is ensured by the procedures that decision-makers must follow, rather than by the identities of the decision-makers.

If you examine the United States Constitution as it was originally submitted to the states (that is, before the addition of the Bill of Rights), you will discover that more than half of the text is devoted to matters of procedure—how the Congress, the president, and the judges of the federal courts are to be selected and removed from office; the procedural rules under which these three branches (especially the Congress) are to operate; and the methods for amending the constitution in the future.

This emphasis on details of procedure (especially the details regarding the selection of senators, representatives, and the president) is directly attributable to the long tradition of parliamentary government inherited from England, as well as the drafters’ belief that procedural rules would provide a crucial guarantee that the states would not be overwhelmed by the federal government and that different states and political factions would always have their fair opportunity to influence the federal government.

The Russian constitution is different in this regard. The Russian drafters had no corresponding tradition of parliamentary government and procedural guarantees to draw from—because the preceding seventy years of Soviet rule, and the three-and-a-half centuries of tsarist rule before that, were characterized by the arbitrary and dictatorial use of state power rather than legislative rule and procedural regularity.

Not until 1988—that is, only five years before the drafting of the Russian constitution—did Mikhail Gorbachev advocate reforming the Soviet Union into a government of laws (*pravovoe gasudarstva*). This goal—the rule of law—is explicitly embodied in Articles 1, 3, 11, and 15. The drafters, however, were not sure what this rule of law would look like, so they left many important details to future development.

Thus, for example, Article 77 declares that “federal law”—that is, statutory law—will control the “organization of the legislative and executive [branches of government]” in the constituent provinces and regions of the Russian Federation.

Article 78 authorizes the executive branch of the federal government to “set up their own territorial structures [i.e., governmental districts] and appoint respective officials [for these districts].”

Under Article 81, “[t]he procedure for electing the President of the Russian Federation shall be determined by federal law.”

Article 95 provides for a bicameral legislature. It declares that the upper house (the Federation Council) comprises two representatives from each province and region—one from the legislative branch and one from the executive branch—but it does not further specify their manner of selection. Similarly, Article 95 declares that the lower house (the Duma) consists of 450 elected deputies—but, again, it does not further specify the manner of their selection. Instead, the following article (Article 96) declares that “[t]he procedure for forming the Federation Council and the procedure for electing deputies to the State Duma shall be established by federal law.”

Article 114 enumerates the various powers of the Russian federal government, but the last clause declares that the federal government shall also “exercise any other powers vested in it by . . . federal laws [or] the decrees of the President of the Russian Federation.”

Article 128 specifies that the judges of the Russian Federation’s three highest courts—the Constitutional Court, the Supreme Court, and the Supreme Commercial (*Arbitrazh*) Court—are nominated by the president and confirmed by the Federation Council. But all other judges in the Russian Federation “shall be appointed by the President of the Russian Federation in accordance with procedures established by federal law.” Moreover, Article 121 states that a judge’s powers may be terminated or suspended “under procedures and on grounds established by federal law.”

In other words, the Russian constitution is much more open-ended on the questions of how federal officials are to be selected, what tenure these officials will have, how the federal and provincial/regional governments are to be organized, and what powers the federal government will wield.

* * *

My aim in this essay has been to compare the American and Russian constitutions, but not to assess their relative worth, since each constitution has bequeathed both benefits and problems to the nation that adopted it. Rather, my hope has been to point out that each constitution reflects the drafters’ earnest attempt to address the major political problems confronting their society at the time. The solutions embodied in each constitution were shaped by the political, social, and economic tools that history and culture had provided to each country.

David Mannheimer sits on the Alaska Court of Appeals.