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The Influences of the West on the 1993 Russian Constitution

By VICTORIA SCHWARTZ*

I. Introduction

In 1823, Thomas Jefferson wrote "[a] permanent constitution must be the work of quiet, leisure, much inquiry, and great deliberation."¹ Since then, many countries have drafted written constitutions, and although most participants in that process would likely describe the experience as full of inquiry and deliberation, few of their recollections would include "quiet" or "leisure." Certainly, that was the case with the 1993 Russian Constitution, a product of chaos and strife that formed as the Soviet Union fell and a new state emerged from its ruins.

In this article I explore the influences of the West on the 1993 Russian Constitution. After describing how these influences generally occurred, I examine the influence of Western ideas on particular portions of the Constitution. Although existing scholarly works identify Western influences on the Russian Constitution, these works do not trace how or why particular transplants occurred.² I

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2. See, e.g., JAMES H. BILLINGTON, RUSSIA TRANSFORMED 107 (1992) (writing "[t]he new constitution that was completed for the Russian Republic . . . was largely
attempt to fill that gap not as a normative matter, but as a descriptive matter by identifying particular transplants and explaining how and why they occurred.\(^3\) Much of the existing legal transplant literature seeks to explain why transplants succeed\(^4\) based on some normative external notion of success that goes beyond whether a particular constitution contains borrowed elements.\(^5\) By contrast, I limit myself to describing and explaining the influences on the text of the 1993 Russian Constitution. I do not purport to address whether the Russian Constitution "succeeded," or whether Western goals for influencing the Russian Constitution were achieved. Therefore, for my purposes, our story begins in 1990, with the first efforts to rewrite the Soviet Constitution, and ends in December 1993, with the ratification of the Russian Constitution. To the extent that society believes written constitutions make a difference, and recent efforts to draft written constitutions in Iraq and Afghanistan suggest it does, it continues to be important to understand the influences that shape written constitutions.

Since this article encompasses a single case study, I make no attempt to formulate a comprehensive theory of constitutional idea transplants, or legal transplants more generally.\(^6\) Without rejecting American in its inspiration.")\(^;\) Robert Sharlet, Legal Transplants and Political Mutations: the Reception of Constitutional Law in Russia and the Newly Independent States, 7 E. EUR. CONST. REV. 59 (1998) (claiming that although the U.S. model was the early favorite, as time went on the Russian writers turned to the models of continental Europe).


5. See Berkowitz, supra note 4, at 165 (pointing out the difference between a transplanted law on the books and whether the law is effectively enforced). See id. at 183-86 (measuring the success of legal transplants in terms of legality of the recipient which in turn is measured quantitatively by a complex formula involving the effectiveness of the judiciary, rule of law, the absence of corruption, the low risk of contract repudiation and low risk of government); compare THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 87 (1999) (assuming that transplant idea donors have set qualitative objectives for the constitution, such that success can be measured based on the extent to which the final constitution realizes these goals).

6. Many attempts at comprehensive theories to explain legal transplants already exist in the literature. Some of these include Mattei, supra note 3, at 7 (economic efficiency); R. Sacco, Legal Formats: A Dynamic Approach to Comparative Law, 39
existing theories or offering normative conclusions about the desirability of borrowing, I find that I can often explain the choices made by the framers of the 1993 Russian Constitution by the contemporaneous political situation within Russia.

In examining the influence of the West, this article uses three main sources of data. The first source consists of interviews with and writings by individuals in Russia who were involved in drafting the 1993 Russian Constitution. These interviews, which I conducted myself, explore the interactions the Russians had with the West, and the extent to which they believe they were influenced by the West. The second source consists of interviews with and writings by Western individuals who aided the Russians in writing their constitution. Finally, the last and least biased source consists of the various drafts of the Russian Constitution. By comparing various drafts at various points in the process, I can track the changes that occurred along the way, isolate the influences on a particular change, and substantiate claims regarding a particular influence.

II. Context in Which the Constitution was Written

A. History of the 1993 Russian Constitution

The events surrounding the breakup of the Soviet Union and the rise of Russia in its ruins have been well documented in historical and

AM. J. COMP. LAW 343, 398 (1991) (prestige); Jonathan M. Miller, A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process, 51 AM. J. COMP. L. 839, 842 (2003) (cost saving, external dictation, entrepreneurial individuals within the recipient country, and legitimacy generation); Berkowitz, supra note 4, at 167 (the way a country received its formal law); MONTESQUIEU, THE SPIRIT OF LAWS (1977) (inverse relationship between transferability and the environmental and social closeness of a given institution to the local habitat); Kahn-Freund, On Uses and Misuses of Comparative Law, 37 MOD. L. REV. 1 (1974) (political factors as obstacles to transplantation).

7. The term "West" is not limited to Western governments. Rather it includes all influences of Western origin including governments, leaders, NGOs, professionals and academics, as well as norms, ideas and documents.

8. Although it is possible the sample interviewed was biased because only pro-Western individuals would be willing to speak to an American, this does not seem to be a major concern. In obtaining the interviews the author compiled a list of all individuals known to have played a role in writing the constitution. No individual actually reached denied an interview, although some individuals could not be located.

9. Admittedly these individuals may have a tendency to exaggerate the role they played. This is considered in evaluating the information, and tempered by looking at actual correspondence to ensure a more accurate depiction of the events.
political literature. Nevertheless, there is no clear consensus regarding the history of the 1993 Russian Constitution. This account attempts to reconcile various versions from the literature with information gathered from interviews.  

The direct history of the 1993 Russian Constitution began on June 9, 1990, when the First Russian Congress of People's Deputies ("CPD") established a Constitutional Commission to revise the 1978 Brezhnev Constitution inherited from the Soviet Union. Thus, the original drafting committee was established under the CPD and not the President, a fact that would become crucial as events unraveled.

Boris Yeltsin, the chairman of the Supreme Soviet, formally led the Commission. The actual work of drafting the document, however, was headed by the Executive Secretary of the Commission, Oleg Rumyantsev, a key player in the story of the Western influences on the Russian Constitution. The Commission also included prominent jurists and legal scholars, including several who had been involved in earlier attempts to draft a new constitution for the USSR, as well as political scientists, philosophers, historians, and economists. Geopolitically, the Commission included representatives from each of Russia's regions plus fourteen elected deputies.

The Commission chose from its members a working group of fifteen to twenty people. The working group was relatively homogenous in terms of its sociopolitical orientation, as its deputies and lawyers were well known for their democratic stance. It was this group, rather than the larger Commission, that developed the draft of the new constitution.

The Commission presented an initial version of the constitution on October 12, 1990, and with Yeltsin's support, published it in


11. SMITH, supra note 10 (The Constitutional Commission was not convened until early 1992; however the majority of the literature agrees upon this earlier date).

12. The draft constitutions contain a list of contributors making its participants easy to verify.

November of the same year. After the draft’s publication, criticism from communist deputies and the Soviet media caused Yeltsin and his advisors to remove discussion of the draft from the agenda of the Second CPD scheduled for the end of 1990. In 1990, the Soviet Union still technically existed with Gorbachev as its leader. Thus, Yeltsin’s advisors felt if they did not tread carefully, the communists could regain power and reform attempts could unravel. Therefore, when the draft constitution faced criticism, Yeltsin elected to withdraw, rather than confront controversy at a politically difficult time.

As the Soviet Union collapsed, the Commission produced numerous additional draft constitutions for consideration by the CPD, and each time the CPD refused to adopt the draft. By 1992, the draft constitution had been amended many times, and the text was eclectic, full of compromises, less precise and politically less progressive than initial versions. Nevertheless, the working group continued to face criticism from the increasingly aggressive CPD, prompting repeated reworking of the draft with hopes of obtaining approval.

The Commission released yet another draft for consideration at the Sixth CPD in April 1992, however, ten days before the CPD convened, Izvestiya, one of the main newspapers in Russia, published an alternative draft prepared by Sergei Alekseev and Anatoly Sobchak. Both men were noted jurists and had been members of the commission working on a new constitution for the USSR in 1989. They were dissatisfied with the Commission’s draft because they felt it insufficiently protected civil rights, inadequately provided for separation of powers to avoid a return to dictatorial rule, and was unclear on “national-state structure.” Their draft relied heavily on the model constitution developed by Andrei Sakharov, a Nobel Peace Prize winning Soviet dissident and human rights activist, prior to his death in early 1990. Sobchak and Alekseev also advocated convening a Constituent Assembly to ratify a new constitution, arguing that the Congress lacked a popular mandate, having been

14. Sheinis, supra note 10, at 60.
15. Smith, supra note 10, at 87; see also Tolz, supra note 10 (confirming that the draft was published in Argumenty i Fakty, Mar. 12, 1992).
17. Smith, supra note 10, at 88.
18. Id. at 89.
elected by a flawed process in 1990. Most importantly, in contrast to the parliamentary system in the Commission's draft, Sobchak and Alekseev advocated a strong presidency.¹⁹

The draft prepared for the Sixth CPD also disappointed Yeltsin because it did not give him the magnitude of presidential powers he desired. Therefore in March 1992, Yeltsin instructed his chief legal adviser, Sergei Shakhrai, to draft an alternate proposal.²⁰ Shakhrai wrote the first variant of this constitution in April 1992, based on both Russian and Western influences.²¹ Angered by the weak role Shakhrai's draft gave parliament, the CPD refused to consider it, causing an initial break between the President and the Commission.

As the draft constitution faced these obstacles, the country continued to operate under the old Soviet Constitution, which had been amended by piecemeal measures over the years. As late as April 1992, the Sixth CPD added extensive new changes to the surviving Soviet Constitution, including several clauses from the Commission's working draft.

Faced with mounting criticism for rejecting the Commission by using his own legal advisers, Yeltsin returned to the Commission and tried to persuade it to amend its third draft to increase the President's powers. The Commission largely obliged Yeltsin by adding twenty proposed amendments, but it was insufficient, and the brief attempt at reconciliation was short lived. Despite the various amendments, the Commission draft could not gain the favor of Yeltsin or the CPD. At the Seventh CPD in December 1992, discussion of the draft was again tabled, and adoption of a new constitution was again postponed by a year, to the Tenth CPD, scheduled to begin in November 1993.

By January 1993, amidst growing conflict with the Russian parliament, Yeltsin officially broke with the Commission and assembled his own group of associates, including Shakhrai, to work on a draft more favorable to the President.²² Shakhrai took his draft, and with Yeltsin's permission, gave it to Alekseev, a prominent theoretical lawyer and co-author of the earlier Alekseev-Sobchak draft advocating a strong presidency. The pair met and realized the similarities between their visions. After extensive collaboration, they

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²⁰. Tolz, supra note 10, at 3.
²¹. Interview with Sergei Shakhrai, in Moscow, Russ. (July 2003).
²². Id.
published a new draft in March 1993. Unsurprisingly this draft also established a strong presidential system with clear differentiation of the powers of the President and Parliament.

In March 1993, the Eighth CPD refused to renew Yeltsin’s emergency powers and passed resolutions to sharply limit his authority over the economy and the government’s composition. This dramatically increased the conflict’s intensity. Then, on March 12, 1993, when Yeltsin stormed out after a turbulent appearance, the CPD protected its interests by amending the existing constitution to prevent the President from disbanding elected bodies. At the same time, the CPD voted against holding the constitutional referendum Yeltsin had proposed. In response, Yeltsin introduced special rule by the President, which in retrospect never materialized.

On April 25, 1993, Russia held a national referendum to poll the public for support of Yeltsin and the CPD. The day before the referendum, Izvestiya published the main principles of another constitutional draft, which Yeltsin fully supported. Following his victory in the national referendum, on April 30, 1993, Yeltsin published the full text of what came to be called “the presidential draft” in Izvestiya. This draft was substantially the same as that published by Shakhrai and Alekseev in March 1993, with the details now worked out by a group of well-known lawyers. With this move, Yeltsin definitively withdrew support from the draft the Commission’s working group had prepared. Although the new draft included more precise language, clear decisions on disputed issues, and changes to the powers of the President with respect to Parliament, the draft otherwise borrowed heavily from the Commission’s draft.

To further remove power from the CPD, Yeltsin transferred the power to draft the constitution to a newly established Constitutional Assembly. Held from June to July of 1993, the 762-member Assembly was divided into five groups and included representatives

23. Supra note 21.
25. Cohen, supra note 10, at 50.
26. Supra note 21.
27. Tolz, supra note 10, at 4 (explaining “[i]t retains about 60% of the Constitutional Commissions’ third draft.”).
28. The Constitutional Assembly is sometimes called a “Conference” in the literature, and thus can be easily confused with the Constitutional Commission.
29. The five working committees were Federal Organs of Power chaired by
from federal governmental bodies, the Commission, regional government bodies, local administrations, political parties, trade unions, public organizations, religious organizations, manufacturers, academia and entrepreneurs.

The Assembly based its work on both the April 30th presidential draft and the Commission’s draft. Additionally, it was presented with summaries of 2000 comments and proposals regarding the drafts. Shakhrai’s working committee used a table comparing the original Soviet Constitution, the Commission’s draft, and the Shakhrai draft. Shakhrai read a section and explained why it was written that way. Then the delegates examined alternative options. If the Shakhrai version was upheld they continued to the next section, otherwise, compromise was necessary.\textsuperscript{20} From the proposals made by the five committees, a Constitutional Arbitration Commission put together a single draft.

The result was a draft constitution closely resembling the early drafts proposed by the Commission. According to one of the participants in this process, 60 percent of the resulting draft was taken from the original Commission’s text;\textsuperscript{31} however, according to Shakhrai, 60 percent was taken from the presidential draft.\textsuperscript{32} Regardless, despite political difficulties, much of the Commission’s draft survived, with the major exception of a strong Presidency replacing the Parliamentary system. The interim draft passed the Assembly with 433 of 585 possible votes in late July 1993; however, it was not finalized until after the events of fall 1993.

Undismayed, on July 16, 1993, Rumyantsev published a report on the Commission’s progress, followed four days later by a CPD bill entitled “On the Procedures for Adopting the Constitution of the Russian Federation.” Intending to stop Yeltsin’s drafting procedures, the bill stated a new constitution must first be approved by the CPD and then by the entire nation in a referendum. To circumvent the President’s draft, the CPD intended to finally pass the Commission’s

\begin{footnotes}
\item 30. \textit{Supra} note 21.
\item 31. Interview with Professor Mamut, in Moscow, Russ. (July 23, 2003).
\item 32. \textit{Supra} note 21.
\end{footnotes}
The continued stalemate between Yeltsin and the CPD came to a head in the fall of 1993. On September 18, 1993, Yeltsin convened the Federation Council, a group created the month before from representatives of Russia’s regions; however, they refused to endorse his constitution. Desperate to circumvent the approaching Tenth CPD, on September 21, 1993, Yeltsin announced Decree no. 1400, "On the Step-by-Step Constitutional Reform of the Russian Federation," disbanding the Supreme Soviet, suspending elements of the operating constitution and forbidding the Constitutional Court from meeting until after new parliamentary elections. Naturally, the CPD rejected this decree as unconstitutional, and the majority of the Constitutional Court agreed. When Yeltsin refused to withdraw his decree, the CPD declared Yeltsin no longer fit to rule, and on September 23, 1993, approved Rutskoi, one of the CPD’s deputies, as Russia’s new President. Signaling opposition to Yeltsin, CPD leaders refused to leave their White House offices and, in a move eerily reminiscent of the August 1991 fall of the Soviet Union, encouraged people to defend the White House in the name of democracy and the constitution.

On October 3, 1993, Rutskoi directed a mob to storm the mayor’s office and the state television station. In response, Yeltsin ordered military forces to seize the White House. The next day, special military forces launched a massive artillery attack against the White House and its remaining occupants, including Rumyantsev. Within hours, Yeltsin controlled Russia.

After these events, the balance of power within Russia shifted, resulting in weakened support for both parliament and separation of powers. Undoubtedly, this political reality affected the political institutions in the still pending constitution, as Yeltsin’s newly acquired power allowed him to design new political rules for Russia.

On October 5, 1993, Yeltsin’s chief of staff, Sergei Filatov, proposed a constitutional referendum, and was assigned to convene a smaller version of the Constitutional Assembly to prepare a constitution reflecting the new political realities. The new draft further expanded presidential powers, giving the President power to appoint the Prime Minister, dismiss the government, and rule by executive decree. Then, in November 1993, Yeltsin further changed the draft constitution by dropping the federation treaty and reducing the status of republics and regions. With the notable exception of Rumyantsev, the same experts and deputies who had helped write the
Commission’s draft, also worked on the final constitutional text. On November 9, 1993, the new draft constitution was officially circulated throughout Russia, and on December 12, 1993, the Constitution of the Russian Federation was voted into effect.

If any clarity emerges from this complicated history, it is the complexity of determining a direct link between various drafts and the final adopted constitution. The drafts were rewritten, combined, and compromised so many times that specific influences are difficult to trace. The Russian Constitution approved in December 1993, incorporated major elements of the presidential draft constitutions, which in turn incorporated major elements of the Constitutional Commission drafts. Despite the chaos, Western actors and ideas played a role at various times within the complicated process of adopting the final constitution.

B. Western Influence

Western ideas influenced Russia’s constitution-writing process both indirectly and directly. First, many key Russian participants in the constitution writing process studied in the West. Second, the Russians used Western legal documents for their research and preparation. Third, many non-Western educated Russian participants learned Western norms and ideas through subsequent study. Finally, Western experts directly advised Russian individuals who were directly involved in the drafting process.

i. Western Education

Despite the Soviet Union’s barriers, many Russians had the opportunity to study in the West. In particular, after the Soviet Union opened up, numerous academic exchanges created a Western-educated Russian intelligentsia. These academic exchanges, not thought to have political consequences, provided Western exposure which affected the Russian establishment. For example, Alexander Yakovlev, the chair of one of the five working committees at the Constitutional Assembly, first learned about the possibilities of a free society as an exchange student at Columbia. Rumyantsev, the Executive Secretary and de facto head of the Constitutional Commission, studied in Hungary in his youth. He referred to this

33. Supra note 31.
34. See BILLINGTON, supra note 2, at 99-100.
35. See id.
experience as "the last factor that led to my involvement in politics, as I saw how there was more freedom in that country and more love of freedom. I listened to lectures and read books published there. Through these experiences, I began to understand many things."\[36\]

The Russian Minister of Justice of the Soviet Union also traveled to Great Britain to study its judicial system.\[37\]

**ii. Western Sources**

Additionally, the key participants in the writing of the Russian Constitution used various Western constitutions and legal sources as models. The Constitutional Commission's legal experts had mastered not only Russian constitutional history, but also the French, U.S. and German Constitutions.\[38\] The Commission also consulted articles regarding American constitutionalism. According to one historian, "[t]hey undoubtedly saw themselves as the Jeffersons and Madisons of Russia – scholar-politicians who would long be remembered as Russia’s founding fathers."\[39\] The Commission’s journal, *Konstitutionnyi Vekhik*, also documented the Commission’s strong interest in American constitutionalism, with articles on Alexander Hamilton, and American separation of powers.\[40\] The Commission examined several state constitutions as well, including Illinois, Oklahoma, and New Hampshire.\[41\]

Rumyantsev in particular was extremely familiar with and influenced by foreign constitutional documents. He began an article on “Russia’s New Constitution” with the first paragraph of the Declaration of Independence. He then revealed his knowledge of world constitutions, writing, “[h]istory shows, however, that many a worthy and enduring document has been produced in volatile, politically unstable situations. One example from two centuries ago is the U.S. Constitution of 1787. A more recent example is the Spanish Constitution of 1977.”\[42\] He unabashedly acknowledged foreign influences, admitting, “We had to search abroad and in other national

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37. Interview with Alexander Yakovlev, in Moscow, Russ. (July 2003).
38. Id.
40. Id. at 51.
histories. There is nothing peculiar about that."^{43}

Sergei Shakhrai, the main author of the presidential draft, also studied Western constitutions to help him prepare his draft.\textsuperscript{44} He knew French and German history proficiently, and had studied the German and American constitutions. He did not just have basic familiarity with these documents, but rather knew them by heart.\textsuperscript{45}

During the Constitutional Assembly deliberations the Russians referenced foreign constitutional texts. Drawing from their collection of sixteen sets of world constitutions, the Assembly particularly examined the constitutions of Mexico, India, Germany, and the United States.\textsuperscript{46} The journal devoted to the Assembly's drafting process stated, "Excerpts from the French and German constitutions in Russian translation were published along with articles on selected features of the Belgian, Spanish, and even Indian constitutional arrangements."\textsuperscript{47}

\textit{iii. Western Norms}

Finally, many Russian academics studied Western history and political theory and were aware of and influenced by Western norms and ideas. Many legal scholars served on the various drafting committees and they were the "most likely jurists to be knowledgeable about Western European and common law legal systems, having been exposed to works of Western legal philosophy and having participated in international scholarly conferences."\textsuperscript{48} These legal scholars associated with the Institute of State and Law heavily influenced the Commission in pushing for legal reforms based on expertise with the legal systems of the United States, France, Germany, Scandinavia, Poland and Hungary.\textsuperscript{49}

For example, Alexander Yakovlev penetrated the language barrier and read forbidden books about U.S. history.\textsuperscript{50} According to Yakovlev, "even then, studying the law was not a complete waste of time. The great Western legal tradition was transmitted in this way.
When I was a student, I even learned about the Roman legal tradition. In particular, Yakovlev was impressed by common law because you could throw legal codes out the window and eliminate law, but you cannot throw out a system of precedents.

Yakovlev was not unique in his fascination with Western legal tradition. Rather, “Bourgeois Legal Theory” was consistently among the most popular Soviet law school courses. According to the director of the Institution of Training Prosecutorial investigators,

We were supposed to read the works of Locke, Hobbs, Rousseau, and Jill so we could criticize them from a Marxist-Leninist perspective. But, everyone simply wanted to learn about these works and Western legal traditions because we wanted to introduce them in this country someday.

iv. Direct Western Influences

In addition to the indirect ways in which Western ideas influenced the Russian framers, there were examples of the West taking a more active role. This more active role did not take place at the highest governmental levels, but rather by the involvement of NGO’s and individual advisors.

a. Lack of Influence by United States Government

Despite evidence that the State Department felt aiding constitutional efforts was essential, the United States government did not play a direct role in drafting the 1993 Russian Constitution. In 1992, the State Department wrote,

[B]ecause of the importance of Central and Eastern European legal reforms to the American foreign policy agenda, we believe that when U.S. Government funds are supporting an effort to provide basic assistance to a foreign government related to the shaping of a Constitution or the design and implementation of basic laws establishing a legal system, it is imperative that the U.S. Government be involved on a cooperative basis.

Nevertheless, the U.S. Government did not oversee any coordinated

52. Supra note 37.
53. SMITH, supra note 10, at 78.
54. Correspondence Concerning the Rule of Law Program in Central and Eastern Europe, U.S. Department of State (Feb. 21, 1992) (on file with author).
effort to influence constitution writing in Russia.

This may be because, as Russia began constitution writing, President George H. W. Bush cautiously pursued maintaining the status quo and supporting Gorbachev. By 1989, Gorbachev had accepted free elections in Eastern Europe, the fall of the Berlin wall, Soviet withdrawal from Afghanistan, and a pullback from the third world. Since Gorbachev delivered on prioritized issues, the Bush administration did not want to undermine him. Bush wrote in his diary, "My view is, you dance with who is on the dance floor... you don't try to influence the succession, and you especially don't do something that would give the blatant appearance of encouraging destabilization." Bush condemned the coup as unconstitutional: "It seems clearer all the time that contrary to official statements coming out of Moscow that this move was extra-constitutional; outside of the constitutional provisions for constitutional change." Therefore, the key constitutional issue was upholding the Soviet Constitution to support Gorbachev, not writing a new Russian constitution: "We are not giving up on the restoration of the constitutional government in the Soviet Union itself."

After Yeltsin had clearly won, Bush avoided Russian domestic politics, focusing instead on nuclear weapons, borders, and the economy. Democracy was not high on the administration’s priorities, and Bush "did not offer Yeltsin advice about how to write a new constitution. The idea would not even have crossed his mind."

b. NGO Participation

Although the U.S. government avoided direct involvement in Russian Constitution writing, they encouraged such efforts via Non-Governmental Organizations ("NGOs").

Unlike the administration’s silence, the Senate discussed changes needed in the Russian Constitution in 1992. Senator Bradley argued, "To minimize the risk of state oppression reemerging under the guise of reform, [Russia needs] a constitutional bill of individual rights and a viable legal structure. A new constitution and new elections could

56. Id. at 25.
57. Id. at 31-32.
58. Id. at 33.
59. Id. at 37.
also provide a better basis for legislating reforms unburdened by the Communist past. Although this speech did not directly influence anything occurring in Russia, it may have led to greater willingness to support NGO projects in this area.

The same year, Kenneth Starr, then solicitor general, wrote an article to persuade U.S. judges and lawyers to assist the Russians with their constitution. He emphasized that the U.S. should not impose a constitution upon Russia, explaining,

The U.S. won the Cold War, but the new Russia is not a vanquished postwar Japan waiting for a Western-style constitution to be imposed upon it. As Russia is now doing, every newly freed society must take its own road toward democratic rule through constitution-building. But, to paraphrase Lenin, what can be done on this side of the Atlantic to assist these young Russian reformers?

Starr felt the best approach was to develop a legal culture as “the need is even greater for the American bench and bar to help, voluntarily, Russia and the other new republics in building a law-based society.” Starr wanted Americans to teach Russians about civic life so they could make decisions themselves. He wrote,

[T]here is a growing danger that in that process, we in the West are overlooking the hard, cold fact that Russian constitution-building remains very fragile. The antidote is this: Redoubling the effort to establish concrete linkages between the U.S. Russian legal community. That is the most direct – and appropriate – way to bear witness to Russia’s continuing Constitutional Convention.

Appealing to American financial interests, Starr claimed, “Constitution-building is emphatically not a revenue-producing enterprise, but its ultimate moral and economic awards will be abundantly great – not only for Russia and other republics, but also for American business.”

The National Endowment for Democracy (NED) retained


62. Id.

63. Id.

64. Id.
Russian contacts from its human rights efforts in the Soviet Union, and was therefore perfectly situated to provide democracy assistance in the early 1990s, in the form of grants to Russian organizations. In one such grant, Freedom House, with a grant from the NED, provided computer equipment to the Russian Constitutional Commission to draft the new constitution for the Russian Federation. Although the grant was only $15,000, by providing technical support NED developed a friendly relationship with the framers that could only help with good will for attempts to influence the Russian Constitution more directly.

The Federal Bar Association and the American Bar Association also had a presence in Russia in the early 1990s. In the summer of 1992, Starr headed a delegation to Moscow and Alma Ata intended to encourage Russia's efforts. Involvement occurred at the highest levels, with Alfred Belcuore, president of the FBA, and J. Michael McWilliams, president of the ABA, going to Russia to encourage reform, offer suggestions on draft provisions, and make crucial U.S.-Russian legal connections. The FBA also accepted Rumyantsev's request to organize a conference in Moscow to educate Russians on constitutionalism.

Another NGO which played a key role during the early 1990s was the National Democratic Institute for International Affairs ("NDI"). Although mostly focusing on local governance and electoral reform, in December 1991, NDI held a conference in Moscow entitled "Democratic Governance in a Time of Crisis" designed as an exchange of practical ideas on democratic governance among Americans, Europeans, Latin Americans, and Russians. "In Russia, too little is understood about the ways in which political institutions and processes function in democratic societies. NDI hopes that the international delegation will employ its diverse experiences and expertise to assist Russian reformers as they proceed along the difficult road of economic and political reform." Five workshops addressed topics in constitutional design including the role

66. Id.
68. Id.
69. NAT'L DEMOCRATIC INSTITUTE FOR INT'L AFFAIRS, DEMOCRATIC GOVERNANCE IN A TIME OF CRISIS BRIEFING BINDER (1991) (on file with author).
70. Id.
of the judiciary, and strategies for executive-legislative relations.

In the grandest example of NGO assistance, the FBA Section of International Law, Freedom House, the NED, and the ABA Section of International Law and Practice sponsored a videoconference entitled "Symposium on the Russian Constitution." Held on November 30, 1990, the symposium enabled Russian scholars and members of the Constitutional Commission to discuss their first draft constitution with American constitutional experts. The formal list of participants for the two hour video-conference included Professors Harold Berman, Albert Blaustein, Thomas Buergenthal, Dick Howard and Herman Schwartz, attorney Bruce Fein, President of NED Carl Gershman, attorney Neil Kritz, Solicitor General Kenneth Starr, and Judge Stephen Williams of the U.S. Court of Appeals for the D.C. Circuit. Fein recalled that Yeltsin and his advisors asked questions and the American experts responded. The participants then shared drafts, ultimately culminating in a final document. According to Fein, the discussion centered on general ideas of the constitution: "where we thought there were flaws, what they had to think about."*72

**c. Western Expert Influences**

Some of the most significant influence came from experts operating in their individual capacities. Because the Russians usually initiated these interactions, they were more receptive to the advice given. Even Yeltsin acknowledged the influence of foreign advisors. In his November 9, 1993, speech introducing the constitution's final draft, he stated, "The draft constitution was assessed by experts in our country and abroad."73 The end of the original Constitutional Commission's draft lists individuals who worked on the constitution, with the following acknowledgement attached: "4. Materials and suggestions submitted by foreign experts: A. Blaustein (United States) A. La Pergola (Italy) A. Rapachinskiy (United States)."74

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72. Interview with Bruce Fein, in Wash., D.C. (June 20, 2003).
74. Draft of the Constitution of the Russian Federation 140 (unpublished draft, undated, but presumed to be October 1990, on file with author) (English translations provided to author by NED and Judge Stephen Williams) [hereinafter, *Draft Constitution*].
The first foreign expert listed, Albert Blaustein, was a professor at Rutgers Law School, a notorious constitutional consultant, and a draftsman of over two-dozen constitutions. Blaustein’s involvement with the Russian constitution began when Rumyantsev sought his help. Blaustein eagerly agreed to advise on the new document and began meeting with Russia’s Constitutional Commission. In July 1990, Rumyantsev visited Blaustein and they toured Philadelphia. According to Blaustein, this trip had a profound influence on Rumyantsev: “He really was inspired. You could see it in his face.”

A year later Blaustein and Rumyantsev were reunited in Moscow. A Philadelphia newspaper wrote, “The two are playing a key role in writing a new constitution for the Russian Republic.” Although the story may have exaggerated Blaustein’s role by portraying the men as partners, Blaustein did play an important advisory role. Blaustein explained that “[Rumyantsev] sought guidelines on what should be included in a modern constitution. At his request, I prepared a constitutional outline which was then translated into Russian as the working Commission agenda.” If the article exaggerated Blaustein’s role, he did not. As he clarified, “I am not here to tell them what to do. These people need a Russian constitution. I am basically here to answer questions.” In pursuing this role, Blaustein “never imposed his view” and preferred the “job of facilitator.”

Nor did Blaustein emphasize the U.S. Constitution as a necessary model, or try to impose the United States’ legal system. Blaustein understood such tact was particularly essential in Russia where leaders were sensitive to accusations of imitating the West. He explained, “I am a comparative constitutionalist possessing an American passport. The American constitutionalist who knows only

78. Id.
80. Id.
82. Id.
the American Constitution can play only a confined, restricted role.”

Instead, Blaustein answered questions on subjects from creating an appeals court system to constitutionally limiting the Russian military. He helped draft the free speech section and debated the shape of the Russian legislature with the commission’s members.

The second expert listed was Antonio La Pergola, an attorney in Rome who spoke good English and was also on the Italian constitutional court. He was the Italian equivalent of Blaustein, providing advice to the Constitutional Commission and Rumyansev in particular.

The third foreign expert listed, Andrzej Rapaczynski, also played an important role as advisor to Rumyansev. A lifelong academic with a background in philosophy, Rapaczynski also advised Poland regarding their constitution and legal system. Rapaczynski authored a memorandum to Rumyansev, dated August 18, 1990, but sent September 10, 1990, which was translated and distributed to the deputies working on the constitution. The accompanying letter stated that the memorandum was “in accordance with your request,” indicating Rumyantsev solicited it. The memorandum presented basic points Rapaczynski felt “should be considered in preparing the constitution of the Russian Federation.” The memorandum included advice on the legal and political status of the constitution, the amendment process, constitutional terminology, the parliament and government, the president, federalism, and human rights.

In a subsequent November 7, 1990, memorandum to “The Working Group of the Constitutional Committee of the Russian Federation,” Rapaczynski commented on selected provisions of the October 1990 draft Constitution referring to specific articles and suggested changes. Rapaczynski followed this with a document in

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83. Blaustein, supra note 79.
84. Montaigne, supra note 77.
85. Unfortunately, due to practical limitations, I was unable to interview La Pergola.
86. Supra note 81.
89. Id.
90. Supra note 87.
91. Memorandum from Andrzej Rapaczynski to the Working Group of the Constitutional Committee of the Russian Federation (Nov. 7, 1990) (on file with
which he analyzed three areas of constitutional reform for the Committee to prioritize: the structure of the central authorities of the new Russian state, the relations between the central government and ethnic or territorial components of the Russian federation, and the relations between the Russian state and its citizens. Rather than proceeding article by article as he had done before, Rapaczynski made broad conceptual suggestions addressing his concerns and praises in an article-like format. On November 10, 1990, Rapaczynski sent a memorandum with additions to his earlier remarks addressing the proposed structure of the central authorities of the Russian Federation in the "parliamentary variant." Finally, Rapaczynski wrote a speech for the Constitutional Committee on November 12, 1990. Unfortunately, the speech was never delivered because of Yeltsin's last minute change of mind; however, the fact that such a speech was scheduled shows that Russians were entertaining outside voices as they prepared their constitution.

Although to a lesser degree than Blaustein and Rapaczynski, other American experts edited and commented on various drafts of the Constitutional Commission. For example, Harold Berman commented on various aspects of the constitution, largely praising the efforts of the Russians. An Emory Law School Professor, Berman had published a prize winning book on the formation of Western legal thought which had been published in many languages, including Russian. Berman had also studied in Russia at the Institute of State and Law, where he founded and co-directed a program of instruction in American law for Russians.

Attorney Roslyn A. Mazer wrote a letter dated November 19, 1990, to Carl Gershman, the president of NED, in which she thanked him "for the draft of the Russian Constitution and the invitation to Lipset's talk. I hope to make it on the 29th. I do plan to read the Russian draft... Did you have any thing formal in mind in terms of my comments or is there a need to do it sooner?" Presumably

93. *Supra* note 91.
Gershman asked Mazer to comment on the early draft constitution to be incorporated into a response to the Russians.

Similarly, Bruce Fein got involved because he had worked with Blaustein on some joint projects. Therefore, when Rumyantsev was in the United States, Blaustein and Fein spoke with him, and Fein gave him specific advice. A Harvard Law School graduate, Fein made himself a constitutional law consultant and was involved in the constitutional revisions of three-dozen countries, including Spain, South Africa, Cyprus and Mozambique.

Professor Herman Schwartz had been involved in drafting a new constitution for the Czech Republic, and therefore was asked to participate in the November 1990 videoconference. As a result of this initial involvement, Schwartz started going to Moscow regularly through June 1993. He worked with the Constitutional Commission and in particular with Valerii Zorkin, one of the experts, and later head of the Russian Supreme Court, in addition to Rumyantsev. Schwartz analyzed and commented on many drafts, dealing with a range of issues. Nevertheless, Schwartz summed up his own involvement as "some influence, [but] not very much."

Judge Stephen Williams also became involved with the Russian constitution through the NED videoconference. Although his involvement was minimal, he did draft two sets of comments on the draft constitution of the Russian Federation.

Individuals from other countries also played a role in Russia. In addition to La Pergola representing Italy, there were scholars from Germany, Austria and France. These experts were invited unofficially, usually because they had friends working on the Russian constitution, so that they would discuss it informally, and give advice in that form.

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96. Supra note 72.
99. Supra note 31.
III. Western Influences on Particular Constitutional Provisions

To better understand how the foregoing Western influences interacted with the writing of the Russian constitution, it is useful to examine specific examples. This section examines Western influences on the structure of government, federalism, and the bill of rights.

A. Structure of Government

i. Presidency

One of the most divisive aspects of the drafting of the Russian Constitution was the role of the President. When the Russians began writing the Constitution, the USSR still existed, and they debated whether to even have a President. The idea for a Russian presidential office came from democratic circles immediately after the first session of the CPD in Spring 1990, when it became obvious that they controlled a minority of seats in the new parliament. In May 1990, the new CPD narrowly elected Boris Yeltsin as Chairman, as the result of his support for Russian sovereignty, on which Russian democrats, nationalists and mid-level communists all agreed. As other issues arose, Yeltsin’s majority weakened, and by March 1991, a petition had been circulated to remove him as chairman.

Under the threat of such a vote, Yeltsin’s allies envisioned the presidency as a tool to protect him from the conservative CPD. Polls revealed Yeltsin was more popular with the general population than with deputies, leading him to believe he could win an electoral mandate and place himself in a stronger political position. Therefore, “[t]he push to create a Russian presidency was in response to a concrete political situation and was not the result of a carefully-plotted strategy or philosophy about the need for a separation of powers or checks and balances.”

Although the motivation was political, momentum for the presidency was propelled by Western notions of separation of power and checks and balances. Yakovlev recalled,

101. Id. at 34.
I was asked particularly to present to the Congress of People’s Deputies the idea of the presidency... I was telling the people that the presidency we need is not to have a president as the chief of everything in the country. We must have a president as the chief of the executive branch, and so we first of all must very clearly make these three divisions of power separate, legislative, executive and judicial. And I asked why the president is the head of the executive branch? What does he execute? He executes law. And so we need the president as the head of the executive branch.102

Gorbachev’s allies opposed the Russian presidency because it would weaken the Soviet president who had not won a direct election. The directly elected conservative deputies, however, could not oppose another direct election. They were unsure of Yeltsin’s popularity, and how the people would respond to their opposition. Instead of openly resisting the idea, they decided to make the new presidency largely symbolic. Since the CPD had exclusive power over amending the Russian constitution, they felt they could constrain Yeltsin’s powers through the amendment process.

The Russians held a referendum on the presidency in March 1991, prior to delineating the powers of the president, or incorporating those powers into the remnants of the Soviet Constitution. The referendum succeeded with 69.9 percent voting in favor of the presidency. Three months later, Yeltsin was unambiguously elected Russia’s first President. In this manner, the Russians created the presidency outside the constitution-writing process. Although Yeltsin’s opponents still hoped to create a balance of power favoring the CPD, institutional persistence would make it difficult to eliminate the presidency.

Having created a presidency, the Russians still had to choose between a parliamentary system, a presidential system, or some variant of the two models. The main American advisers did not blindly push the American model in which the president holds nearly the entire executive power. Rapaczynski wrote that he “would not advise the creation of an American-style presidency in Russia. The American system, admirable as it is in the United States, has not been successfully transplanted anywhere in the world.”103 Rather, Rapaczynski questioned whether Russia should follow a German model where the president is a representative figurehead or a French

102. Supra note 37.
103. Supra note 87.
model where the president has considerable power. Rapaczynski did not advise between these choices, but presented the conditions under which each model may be preferred, and left it to the Russians to decide.104

As the result of the political situation that created the presidency, the CPD and therefore the Constitutional Commission were predisposed toward a weak presidency. When their American advisors also did not advocate an American-style presidency, they followed their inclination and did not choose an American-style strong presidency.

As the political situation changed, Yeltsin wanted a stronger presidency than that proposed by the Commission. Therefore, when he asked Sergei Shakhrai, his chief legal advisor, to create a counterproposal, his sole specific instruction was to create a strong presidential republic put into the law in a way that it could not easily be changed.105 Furthermore, many Western economic advisors preferred a strong President who would be more capable of heading economic reforms. Even once Yeltsin had chosen a strong presidency, the Russians had a variety of options, and the West had potential influence within the political limitations.

This combination of politics and outside influences led to the model chosen, which, according to Giorgi Satarov, a member of the presidential group, was most similar to the French model.106 Nor was the resemblance to the French model accidental. The experts understood the difficulties and lack of stability inherent in writing a constitutional text, and they sought stability. They considered a parliamentary republic, but they felt Russia was not ready for one. Russia was ready in principle for a presidential republic.107 When Yeltsin sought to delineate the scope of his presidential role, Yakovlev had some de Gaulle speeches translated into Russian, and asked Yeltsin’s advisers to give him the speeches. Yakovlev believes Yeltsin became enchanted with de Gaulle and had his advisors structure the constitution based on the de Gaulle presidency.108

Shakhrai acknowledged that in writing the presidential draft he used the French model, and that ideologically the Russian and French

104. Supra note 87.
105. Supra note 21.
106. Interview with Giorgi Satarov, in Moscow Russ. (July 22, 2003).
107. Supra note 31.
108. Supra note 37.
models were very similar. As discussed above, both Yakovlev and Shakhrai were extremely familiar with the French system. A French influence occurred because key Russian actors were familiar with the French system, admired it, felt it applied to the Russian situation, and borrowed from it. Therefore, while political considerations led to the strong presidency, the specific French form of that strong presidency resulted from indirect Western influences on the Russian drafters.

Although the main structure was modeled after the French system, various aspects of the presidency drew upon a variety of Western sources. For example, the presidential draft "clearly absorbed a number of features of the American system such as the presidential prerogative to control the executive; the right of the president to veto any law enacted by the parliament, subject to the overruling vote of a two-thirds majority; and the right to be elected in nationwide elections for a six-year term in tandem with a vice president who would automatically become speaker of the parliaments' upper chamber." The impeachment section also resembles its American counterpart. The debate regarding impeachment was evenly balanced within the Supreme Soviet of the Russian Federation. This allowed Yakovlev to successfully advocate the American system, which he admired due to his respect for the United States Constitution. Yakovlev explained:

In the final draft of the constitution, far-reaching changes were made in the procedure for impeaching the president. Again, I had cause to speak on this topic. I reminded my audience that an impeachment procedure exists in the United States, but that in Russia the grounds for removing the president from office were much more broadly defined.

Yakovlev influenced the constitution through his role as head of a work-group at the Constitutional Assembly by giving a speech discussing the impeachment procedure of the United States as a model for the Russian procedure:

In my presentation to the Assembly I stressed that a sharp distinction should be made between actions by the president that the Constitutional Court rules unconstitutional and actions that

109. Supra note 21.
110. LUDWIKOWSKI, supra note 73, at 58-59.
111. Supra note 37.
112. YAKOVLEV, supra note 51, at 176.
form the basis for impeachment. While the first is a normal process of constitutional control, the second should be limited to high treason or other serious crimes. I cited Article 2, Section 4, of the United States Constitution, and thus succeeded in having the grounds for impeachment of the president reformulated along these lines in the final draft of the constitution.113

Yakovlev's claims are consistent with the text of the drafts themselves. The earliest 1990 draft dealt with presidential impeachment in Article 5.3.4. Section 2:

The President may be removed if he commits a criminal violation of the Constitution or the laws (variant: "if he commits a particularly dangerous state crime"). The decision to initiate impeachment proceedings against the President based on such charges may be taken by either of the chambers of Parliament by a two-thirds vote. The matter is then submitted to the Supreme Court, which must issue its ruling. The final decision, based on the Supreme Court indictment, must be approved by the other chamber. The impeachment of the President must be approved by at least two-thirds of the votes.114

The variation in this section confirms Yakovlev's claim that the original drafters did not have a consensus regarding exactly how impeachment should work. The original draft allowed the initiation of impeachment procedures if the president committed a criminal violation of the Constitution, or if he committed a particularly dangerous state crime. A criminal violation of the Constitution could consist of anything the constitutional court found unconstitutional. Yakovlev advocated restricting impeachment to something closer to the second variant, a particularly dangerous state crime, such as treason. Judge Williams also showed that the definitions of these words concerned him by underlining the words "criminal violation" in his version of the draft.115 The final constitution reads, "The President of the Russian Federation may be impeached by the Federation Council only on the basis of charges put forward against him of high treason or some other grave crime."116 This supports Yakovlev's

113. YAKOVLEV, supra note 51, at 176-77.
114. Draft Constitution, supra note 74, at 65.
116. Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 93, § 1 [hereinafter Konst. RF].
claim that the Russians incorporated his American-influenced advice.

The Russians also struggled to determine what branches of government may initiate and approve impeachment. The 1990 draft stated that the Supreme Court must indict the President, and that the indictment "of the President must be approved by at least two-thirds of the votes." As noted in the margin notes of Judge Williams's copy of the draft constitution, it is unclear whether this refers to the first or second chamber.\(^{117}\)

Yakovlev's Western influences again affected this aspect of the impeachment provisions, as this section was also disputed within the Supreme Soviet. As a result of his respect for the United States, Yakovlev advised that the Russians adopt the American system of impeachment, with the Supreme Court, and both chambers of the Supreme Soviet being necessary for impeachment.\(^{118}\) The actual Russian constitution verifies Yakovlev's influence as impeachment must be confirmed by "a ruling of the Supreme Court of the Russian Federation"\(^ {119}\) and decided upon by "two-thirds of the total number in each of the chambers."\(^ {120}\)

Both aspects of the impeachment example demonstrate that when a particular provision is disputed, Western norms can sway the balance via an indirect influence.

Within the broad realm of presidential powers, discussion arose regarding the amount of power a President should have in a state of emergency. The Soviet Union constantly struggled with the problem of a state of emergency. The State Committee for the State of Emergency, which was created to address this problem, ultimately turned against Gorbachev in the August Putsch of 1991. In addition, the state of emergency was constantly evoked as a threat to consolidate power during the Yeltsin-parliament showdown.\(^ {121}\) As a result of these experiences, the Russians maintained strong opinions regarding states of emergency, and were only partly receptive to Western advice on this topic.

The Western advisors correctly realized a state of emergency traditionally allows leaders to go above the law to obtain unauthorized power, and wanted to ensure this did not happen. Early

\(^{117}\) Williams, *Text Comments*, supra note 115.

\(^{118}\) *Supra* note 37.

\(^{119}\) Konst. RF, *supra* note 116, art. 93, § 1.

\(^{120}\) Konst. RF, *supra* note 116, art. 93, § 2.

\(^{121}\) McFAUL, *Unfinished Revolution*, *supra* note 10, at 188-89.
on, Blaustein asked the Russians, "What are the limitations which you will want to prescribe for a state of emergency?" Similarly, in response to the early draft constitution Rapaczynski wrote,

I do not understand why you give this power to the President when the Parliament is actually sitting. It seems to me that a parliamentary emergency law could be passed very quickly, and the parliamentary control may be very important. While parliamentary approval within three days may seem to be nearly the same thing, in fact the state of emergency (especially if it involves mass arrests etc.) can change the atmosphere very quickly and effectively. I think the delay of a few hours is worth it . . . Please consider this very carefully.

The drafters partly followed Rapaczynski’s advice to limit state of emergency situations by leaving the circumstances and procedures under which the president can impose a state of emergency to be determined by Federal Constitutional Law and not the constitution itself. The final constitution reads: “Under the circumstances and procedures envisaged by the Federal Constitutional Law, the President of the Russian Federation shall impose a state of emergency on the territory of the Russian Federation or in areas thereof with immediate notification of the Federation Council and the State Duma.” Given Yeltsin’s conflicts with the Parliament, and his control over the constitution-writing process, understandably the Russians did not limit the state of emergency to the situation when the parliament was not in session.

ii. Legislature

Like the presidency, the Russians already had a parliament before they adopted their new constitution. This meant that there would inevitably be a parliament in the new system as well; however, the Russians had many models from which to choose.

Rapaczynski took for granted that the Russian parliament would have two chambers elected similarly to the American model: “I presume that, given the federal nature of the state, the Russian parliament will have two houses, with the lower house being popularly elected and the upper house representing the states.” In

122. Blaustein, supra note 79.
123. Supra note 91.
124. Konst. RF, supra note 116, art. 88.
125. Supra note 91, at 7.
giving this advice, however, he was taking into account the realities of the Russian system, and specifically the federal nature of the state.

As assumed, the original draft constitution set up a Federal Parliament with two chambers, the Chamber of People's Representatives and the Federal Council.126 As suggested, the former was elected by citizens of the Russian Federation on the basis of a uniform standard of representation, while the latter consisted of an equal number of representatives from each republic and federal territory.127

The final constitution also has two houses: "The Federal Assembly shall consist of two chambers – the Federation Council and the State Duma."128 The final constitution does not specify how the two chambers would be determined. Although the Federation Council was intended to represent the various regions, the constitution does not specify an exact election procedure, but rather provided for it to be determined by a law separate from the constitution. This may be due to the difficult political situation involving the regions.

Although Rapaczynski supported a two chamber American style parliament, he did not advocate the American system of distributing power between the two chambers, explaining, "the American system, in which the two houses have approximately equal powers, is too cumbersome and should not be reproduced."129 Instead, he proposed "that most of the legislative power be vested in the lower house, with the upper house being able to do not much more than to slow the legislative process." This balance of power more closely resembles the British Commons and House of Lords than the American legislative bodies. The Russians partially took this advice. Although the Federal Council was given significantly more power than the House of Lords, the final constitution allowed the lower house to override the upper house's objections with a super-majoritarian vote.

The Russians followed Rapaczynski's advice regarding the legislative branches more closely in other areas. In response to the original constitutional draft, Rapaczynski advised that the number of deputies should be specified as well as limited:

I would specify the number of deputies (either directly or by stating

126. Draft Constitution, supra note 74, at ch. 5.4.
127. Draft Constitution, supra note 74, at 69.
128. Konst. RF, supra note 116, art. 95, § 1.
129. Supra note 91, at 7.
how many people per one deputy). I would also very strongly urge you not to follow the Soviet practice of making the Parliament very numerous, since it only serves to weaken that body. I think that 450 is the maximum number.

The Russians took Rapaczynski's advice to heart, and the Duma consists of precisely his recommended maximum number of 450 deputies.

Finally, the Russians had to determine the extent to which they wanted a truly autonomous legislature, with parliament as a distinct branch from the executive, and true separation of powers between the branches. This principle does not exist in many non-American Western systems. In the British and German systems, the prime minister and cabinet must be members of parliament. By contrast, in the U.S. presidential system, no member of one branch of government may serve on either of the other two branches at the same time so as to ensure the separation of powers. The most recent French constitution provides for a combination presidential-parliamentary system, where the prime minister and the cabinet may not sit in parliament, yet the lower house of parliament may censure the government and cause it to resign. The Russian system combines these models, drawing heavily on the French variant.

The Russian Constitution forbids any member of the lower house to serve in either the executive or judicial branches while serving in the lower house of parliament, but is silent as to whether a member of the upper house may do so. Adopting the French model, the lower house may censure the government. Similarly, as in France, the lower house may not censure the President in domestic and foreign affairs.

In addition to the question of parliamentary members’

130. Supra note 91, at 7.
131. Konst. RF, supra note 116, art. 95, § 3.
133. But see supra note 72 (explaining that even if the Russian constitution set up an autonomous lower branch on paper, determining whether a legislature is truly autonomous has more to do with how procedures are set up, and less to do with the constitution itself. Unlike the U.S. system, the Russians did not develop the idea of the informing power rather than the legislating power of Congress by means of oversight hearings, inquiries, and subpoenaing executives).
134. Monticone, supra note 132, at 10-11.
participation in other branches of government, other provisions help determine the degree of parliamentary autonomy. Generally, the provisions addressing the autonomy of the Russian parliament combine the French and American systems: "As far as the distribution of power is concerned, the drafters initially attempted to duplicate the American system of checks and balances, but they ended up with a model that combines French and American features." This is particularly true in provisions such as whether the President can veto laws or dissolve the parliament. "The Russian president has a right to veto laws, which the French president lacks, and the right to dissolve parliament, which has not been vested in his American counterpart." The Russians may have reacted to the traditional socialist idea of parliamentary superiority, by using limits on the parliament to help achieve a separation of power, in order to prevent an overly strong parliamentary system. More likely, this may reflect Yeltsin's increasing power over the course of the drafting process, and his fear of parliament's powers under the circumstances. Under that explanation, the political situation caused the Russians to borrow from the aspects of various Western models that gave less authority to the parliament.

The Russians had a variety of legislative models. In certain cases the Russians took the advice of their Western advisors on specific provisions, such as the size of the parliament. More often, familiarity with the American and French systems allowed the Russians to borrow from each system when it suited their political needs to limit the power of the legislature.

iii. Judiciary

The nature and function of the judiciary was among the most contentious constitutional issues that divided the post-Soviet elites. Blaustein explained: "Because Communist practice made the courts largely adjuncts of the executive, training and habit of members of the Commission resulted in opposition to the judicial review concept." An independent judiciary was controversial for Russia because judicial independence did not exist under communism where courts

135. LUDWIKOWSKI, supra note 73, at 67.
136. Id.
137. See id. at 202.
139. Blaustein, supra note 79.
were simply puppets of the executive.\textsuperscript{140} As a result of the Russian experience with the judiciary as a subordinate branch of the executive, the Constitutional Commission understandably opposed giving the judiciary the power to review legislative decisions. They feared that doing so would allow the executive to overrule unfavorable legislative decisions through its judicial arm.

Yet, for the same reason that the Russians hesitated to adopt judicial review, the American advisors pushed it because "without judicial review there aren't many checks on the abuses of the executive that [the Russians] found so horrifying from Lenin onwards. The constitution has become virtually a paper tire without judicial review."\textsuperscript{141} Similarly, Berman felt that "[i]n light of Soviet historical experience, the decisive role given to the judiciary in enforcing the Constitution is perhaps its most striking feature."\textsuperscript{142} Also taking into account precisely this judicial history, Blaustein felt it was particularly important for the Russians to have not only an independent judiciary, but also judicial review, and tried very hard to convince the Russians to adopt it.\textsuperscript{143} He reflected, "It took a lot of personal persuasion before I convinced Oleg Rumyantsev, secretary of the Yeltsin Constitutional Commission, that a constitutional court was important for the future of Russia. And I am pleased to report that such a court is now in operation."\textsuperscript{144}

Although the experts advocated judicial review, they did not believe judicial review had to be done exactly as in the United States. Rather, Blaustein criticized the efforts of some American lawyers to try to educate the Russians about the Supreme Court. Blaustein understood that the American system would not work the same way in Russia, and "the disinclination grew stronger as some well-meaning American lawyers regaled the Russian lawyers on the details of U.S. Supreme Court decisions."\textsuperscript{145} Blaustein's criticism alludes to over-zealous American lawyers who pushed the Supreme Court model; however, the most influential advisors invited by the Russians did not fall into this category. Stanley Katz, a constitutional scholar and participant in an exchange between American experts and Russian draftors, confirmed that some Americans pushed their own system:

\begin{itemize}
\item \textsuperscript{140} Sharlet, supra note 2, at 65.
\item \textsuperscript{141} Supra note 72.
\item \textsuperscript{142} Berman, supra note 94, at 6.
\item \textsuperscript{143} Blaustein, supra note 79.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id.
\end{itemize}
Well-known federal judges on my panel advised our Russian guests to assume a conception of judicial review just like the American, even to the point of suggesting that the proposed court limit itself to deciding controversies that arise in an adversarial context-imposing our notion of 'standing to sue' on the Russians.\(^{146}\)

For Katz, they evoked the criticism of Western advisors as being unknowledgeable about the history of the country that they were advising: “As these judges spoke, I wondered how much Russian legal history they knew. I do know that they totally misunderstood the role of European constitutional courts, which is very different from the historic role played by the American Supreme Court.”\(^{147}\) This critique did not apply to Rapaczynski, Fein, and Blaustein, who did not blindly push the American system. Rather, their justifications for judicial review evoked the unique Russian experience with the Soviet system, and not some notion of judicial review as necessary for all countries. They may have succeeded in convincing the Russians to adopt a judicial review system, despite the Russian hesitance to do so, precisely because they did not blindly advocate their own system, but instead explained why judicial review made sense considering the Russian history of executive abuse. Their success may also be explained by the fact that some individual Russian actors, such as Rumyantsev, were enamored with an independent judiciary as a result of their knowledge of the American system. When Rumyantsev came to visit the United States, his American hosts introduced him to federal judges, who explained how an independent judiciary worked. This was particularly important because the concept was new to the Russians.\(^{148}\)

Ultimately, the combination of powerful, unambiguous advice which considered the Soviet experience, and sympathetic key Russian actors, convinced the Russians to choose an independent judiciary modeled after the West. The original draft constitution “provides for the independence of the judiciary, and implements this by an appropriate method of selection of judges and by ensuring their tenure until they reach retirement age.”\(^{149}\) Although judicial independence was threatened during the power struggle, it ultimately survived the political chaos and remains in the final constitution:


\(^{147}\) Id.

\(^{148}\) Supra note 81.

\(^{149}\) Berman, supra note 94, at 6.
"Judges shall be independent and shall obey only the Constitution of the Russian Federation and the federal law."¹⁵⁰ Nor is this an issue of mere lip service without any teeth, since the constitution goes on to explain that judges may not be replaced, or have their powers terminated, and that judges possess immunity.¹⁵¹

Once they decided to have judicial review, the Russians still had to choose between various Western models. They took this responsibility seriously, as \"[v]arious approaches to this subject would be considered, in particular the American, Austrian, German, and French models, but in the end, continental models were favored over an American approach.\"¹⁵² The Russian judicial system closely resembles the German system, which splits the appellate and constitutional aspects of the judicial system into separate institutions.¹⁵³ The Russian system allows the Constitutional Court to review laws if requested to do so by the President, the Supreme Arbitration Court and local legislative and executive bodies. Individuals can also take their cases to the Constitutional Court in original jurisdiction if they feel that their constitutional rights and freedoms have been violated. \"Thus the Constitutional Court in the Russian Federation performs a role more similar to that of the Federal Constitutional Court of Germany than to the Supreme Court of the United States or the Constitutional Council of France.\"¹⁵⁴

**B. Federalism**

Aside from the legislative-executive conflict, federalism was the most prominent issue in Russia in the early 1990s. The Russians faced difficult questions: Who would control Russia's vast resources? Are the republics sovereign, and therefore able to conduct their own foreign policies or secede from the Federation? Whose laws are supreme, and in what domains? Should Russia's federalism be symmetric, or should the historically autonomous ethnic republics be treated differently?¹⁵⁵ Federalism challenged the Russians because

¹⁵⁰ Konst. RF, supra note 116, art. 120, § 1.
¹⁵¹ Konst. RF, supra note 116, arts. 121-22.
¹⁵² Sharlet, supra note 2, at 65.
¹⁵³ See LUDWIKOWSKI, supra note 73, at 64; see also SMiTH, supra note 10, at 134 (concluding the \"Russian Constitutional Court was modeled on the constitutional courts of Western Europe, especially the German Federal Constitutional Court.\")
¹⁵⁴ Monticone, supra note 132, at 12-14.
¹⁵⁵ Peter C. Ordeshook, Institutions and Incentives: Reexamining Russia, 2 J. OF DEMOCRACY (ISSUE 2) 52 (1995).
under the Soviet Union the republics each had their own constitutions, governments, and unique relationship to the central authority in Moscow. Yet Russia was so closely associated with the central Soviet government that the Russian republic had never created a separate constitution or government. Therefore, while the republics already had political institutions in place, Russia was starting from scratch.

i. Theoretical Challenges with Influencing Federalism

Political theory suggests that idea transfer in the realm of federalism should be an uphill battle. Due to the unique local circumstances that must be taken into consideration, federalism is predictably the most difficult aspect of governmental structure to transfer from country to country.\(^\text{156}\) Scholars explain that: "Given the diverse circumstances of geography, history, economic condition, and political tradition that all potential and existing federations confront, no mechanical guide can suffice any more than we can build an aircraft or span a river according to some fixed formula."\(^\text{157}\) Recently, scholars have even argued that there may be situations where federalism is altogether impossible: "we must appreciate that there may be . . . situations in which federalism, if it exists at all, will do so only in a form that bears the weakest correspondence to any definition of the concept."\(^\text{158}\)

Furthermore, scholars have distinguished between an ideal symmetric federal system, in which the interests of component units in relation to the center and each other are identical, and an ideal asymmetric system, in which each component unit has a unique set of features which separates its interests from the system as a whole.\(^\text{159}\) The interests of the component units depend upon equality of disparity in the conditions of the units which can be grouped into environmental factors (size and location of the territory, climate, population), social factors (ethnic origin, language, religion, history, tradition, law, social groupings) and political factors (the political

\(^{156}\) Cf. Montesquieu, supra note 6 (theorizing that the degree of transferability of a given institution has an inverse relationship to its closeness to the local habitat).


\(^{158}\) Id. at 331.

The United States is an example of a relatively symmetrical system in which the interests of the various states with relation to the center are mostly identical, because they have comparable environmental, social and political factors. Russia, however, inherited the regional composition of the strongly asymmetrical Soviet Union, where Russia itself was significantly larger, more powerful, and better developed than the majority of the other republics. Asymmetry was also created because in the Soviet Union the ethnic republics enjoyed more autonomy than the other republics. The existence of republics with very different ethnic and religious populations, with different traditions, laws and political systems, meant that this overwhelmingly asymmetrical system had a high likelihood of dissolution by secession. According to this categorization of federalism as either symmetric or asymmetric, the American system was an unlikely model for the new Russian constitution, since conditions in Russia were not appropriate for the American symmetric federalist system.¹⁶¹

In addition to the difference in the distribution of power among the territories, Americans and Russians believe federalism has different purposes. For Americans, federalism historically allows separation of power along the vertical axis, designed to prevent the excessive concentration of centralized power. For Russians, federalism enables various peoples to live together, despite the extreme asymmetrical conditions of society. This also suggests that the American system would be an unlikely source for the Russians.

ii. Developing a Federalism Structure

The reality of the Russian experience with drafting their federalism provisions both confirms and disputes the theory. Consistent with the theoretical prediction that the American federalism system would not be an appropriate model for the Russians, to a large extent the Russians turned to other Western models for guidance.¹⁶² At the same time, the Russians did borrow aspects of the American federalist system.

The mostly American Western advisors supported

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¹⁶⁰. Id.

¹⁶¹. See id. at 16 (explaining “To endure, the constitution of a federal state must take account of the underlying conditions in an appropriate way.”)

¹⁶². Sharlet, supra note 2, at 64 (“Spain and Belgium have served as partial guides for the development of the asymmetrical federalism of the Russian Federation.”).
democratically elected local governments with some genuine authority. At the same time, they wished to secure the authority and strength of the federal government. A strong centralized Russia could control the nuclear remnants of the Cold War better than decentralized republics. Similarly, a strong centralized Russia could drive a progressive economic plan, better than small individual republics.

As in many other aspects of designing the Russian constitutional system, for a while it appeared that politics would play the primary role in shaping the Russian federalist system. As the Soviet Union fell apart, the various republics negotiated their respective powers in a Federal Treaty. The Constitutional Commission opposed the inclusion of the Federal Treaty the republics were demanding. Rumyantsev justified this refusal in terms of democracy, “The presidents of the republics are not elected democratically. If these people sign a union treaty, it has no responsible meaning.” Yeltsin, however, despite his strengthened position, needed the regions’ political support, and therefore was forced to concede and write the constitution in such a way that they would be more likely to support him. The republics demanded that they be identified as “sovereign states,” with the presumption that this label, combined with the terms of the federal treaty, would protect their autonomy. Furthermore, the republics demanded that they retain authority to bilaterally renegotiate their relationship with Moscow, so separate deals could be struck between regional and national governments over the disposition of joint jurisdictions. Essentially, the republics demanded continuation of the asymmetric system of the Soviet Union, which treated the heavily ethnic republics differently from the predominantly Russian jurisdictions.

In April 1993, the resolution of the conflict with the Supreme Soviet remained unclear and Yeltsin needed the republics’ political support. Giving in to political expediency, the April 1993 presidential draft constitution acceded to the republics’ demands by adopting the entire Federal Treaty, which called the republics sovereign, gave each republic the right to negotiate its relationship with Moscow bilaterally, and required that the republics’ representation be

165. Ordeshook, supra note 155, at 52.
increased to the extent necessary to ensure their control of the Federation Council. Given the extreme nature of these provisions, it came as no surprise when they were dropped in the constitution’s final version, when Yeltsin no longer needed the republics’ support.166

Aside from political considerations, the Russians had a variety of Western models from which to choose. The drafters of the American constitution had no working models regarding federalism, and therefore paid very little attention to the theoretical aspects of the task. By contrast, post-communist nations such as Russia had extensive Western theory and practice to scrutinize as they determined what sort of federalism they wished to create.167

a. Federal Supremacy

The first federalism issue the Russians confronted was whether they wanted to implement federal supremacy. Rapaczynski recommended: “at least a part of the federal Constitution should be supreme with respect to state laws. Thus, at a minimum, in all cases in which a conflict arises between the federal bill of rights and state laws . . . the federal bill should trump everything in state laws.”168 He believed that “in the area in which the federal government is entitled to act . . . it should be able to act decisively and directly on the people themselves, rather than being hostage to local government approvals or enforcement machinery.” His focus on federal supremacy evokes the American historical experience during the Articles of Confederation, where the federal government was held hostage by the unwillingness of the states to pay taxes or pass laws. Likely because this balance of power was consistent with Yeltin’s vision of a strong centralized nation, this proved one of the easier problems to solve, and as recommended, the final Russian Constitution, like its American counterpart, makes laws that conflict with the federal constitution null and void. The final Russian Constitution also contains a supremacy clause indicating that when federal laws and local laws conflict, federal laws are supreme.169

b. Genuine Authority for Local Government

Having chosen federal supremacy, the Russians needed to

166. Ordeshook, supra note 155, at 53.
167. STEIN, supra note 159, at Part I.
168. Supra note 87, at 5-6.
confront its flip side, namely the provision of powers left to the local government. For local government to have genuine authority, there must be an area of influence left uniquely to them. This comprises the most complex question regarding federalism: How to divide power between the central government and the constituent states. Horizontally, power in a field may be exclusive, concurrent, or shared. Exclusive power means that only the local government or only the central government may legislate within a field. Concurrent power means that local governments are free to take action until the central government acts, or that local governments may act unless action by the central government serves the common purpose more efficiently. Shared power means that the local and central government may both take action within the same arena.\textsuperscript{170}

Rapaczynski advocated a mostly exclusive power model, with certain areas left to the exclusive dominion of the federal government, other areas left exclusively to the constituent states, and very little overlap of these influences. He wrote: “Federalism properly understood is a decentralized form of government in which a large number of decisions is left to local authorities independent from the central government.”\textsuperscript{171} He reinforced this idea in his response to the Constitutional Commission’s first draft by asking: “What are the exclusive competencies of the states?”\textsuperscript{172}

The Russians adopted the American approach to allocating power to the local government. The U.S. Constitution reserves to the states and to the people those powers neither delegated to the federal government nor expressly denied to the states. Scholars have noted that

The Constitution of the Russian Federation is similar to the Constitution of the United States in that it delegates powers to the federal government and enumerates the powers which can be exercised concurrently by the federal government and the member units and then states that member units may exercise powers not mentioned in the constitution.\textsuperscript{173}

c. Type of Association

In addition to the division of power between the central and local

\textsuperscript{170} STEIN, supra note 159, at 52.

\textsuperscript{171} Supra note 87, at 9-10.

\textsuperscript{172} Letter from Andrzej Rapaczynski, supra note 88.

\textsuperscript{173} Monticone, supra note 132, at 8.
governments, the Russians needed to decide "whether the Russian Federation [was] to be a genuine state or a conglomerate of semi-independent constituent states."\(^\text{174}\) States can be structured as a federation from the top down, such as Belgium and Canada, where central authority power devolves to the component units, or as a confederation from the bottom up, such as the United States and Germany, where independent states accept a common constitution.\(^\text{175}\)

Rapaczynski strongly advocated for the former, writing, "the Russian Federation should be a genuine country, rather than an alliance."\(^\text{176}\) In theory, the Soviet Union was a voluntary alliance among autonomous republics. Rapaczynski advised that instead of such an alliance, the Russians should have a sufficiently strong constitutional link between the various republics that they could compel them to act as a single country. This is consistent with the position Americans advocated for in the Czech Republic, where Americans pleaded for a strong federation because they believed that only a federation could accomplish both restructuring the Belgian economy, and integrating Belgium into the European and international political and economic systems.\(^\text{177}\)

A subcategory of this question of the type of association is whether and under what circumstances States ought to be allowed to secede. This was one of the most controversial topics in the debate over the Russian Constitution. Prior to the publication of any draft constitutions, Rumyantsev alluded to the difficulty of the secession question, acknowledging: "The most difficult thing is the nationalities. They must not feel that they were forced to accept the constitution. If they do not want to be part of the Russian Federation, the best way out is not to ratify the constitution."\(^\text{178}\) Based on these comments, the assumption of the advisors working with Rumyantsev was that the constituent States would have the right to secede.\(^\text{179}\) Accordingly, Rapaczynski offered the Russians specific advice regarding secession: "If they are to be given this right, great care should be exercised to make sure that the mode in which it can be exercised is clearly stated

\(^{174}\) Supra note 87, at 9.

\(^{175}\) STEIN, supra note 159, at 51.

\(^{176}\) Supra note 87, at 6.

\(^{177}\) See STEIN, supra note 159, at 40.

\(^{178}\) Rumyantsev, Meeting Notes, supra note 163.

\(^{179}\) See, e.g., Supra note 87, at 6 (writing "[i]n accordance with what you said in Washington, I assume here that the constituent states . . . of the Russian Federation will have a right to opt out or secede.").
in the Constitution itself and that the decision to step out is definitive enough to give pause to the decider.\footnote{180} Furthermore, he wrote:

[I]t may be possible for any particular state to secede from the federation and go it alone. But this option must be one that allows for a genuine separation, rather than for opting out of the particular decisions of the federation which would open the door for an exploitation of the other members of the federal compact.\footnote{181}

In other words, Rapaczynski advocated thinking of secession as an "all-or-nothing proposition: they should either remain in the Federation and submit to its Constitution and the laws enacted in accordance with it, or get out altogether."\footnote{182} For Rapaczynski, the question of secession was at the very heart of whether the Russian Federation would be an actual nation, or a loose alliance. He encouraged the Russians to make secession a difficult proposition because otherwise "the Russian Federation will become no more than a loose alliance of its component parts, and the federal Constitution will be no more than a quasi-international agreement."\footnote{183}

Rapaczynski also addressed the conditions under which secession should be permitted. He split secession into a variety of time frames. For those nationalities who were a part of the Soviet Union, but from the beginning did not want to join the Russian Federation, secession made sense as "it is not advisable to keep by force the various nationalities now composing the Russian Federation inside the future compact to be established by the new Constitution."\footnote{184} Beyond this, however, he expressed concern about allowing for secession once States decided to join the Federation: "The question to be considered very seriously is whether the constituent states, once they make their initial decision to enter the federal compact, should indeed be free to step out when they no longer want to remain in it."\footnote{185} He reiterated his key point that even if States can secede, it should only be from the Federation entirely, and not from any particular piece of legislation:

Whether or not the constituent states of the Russian Federation have a right to secede, it would be a great mistake, in my opinion, to understand federalism as a loose association which relies on

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\begin{itemize}
  \item \footnote{180}{Supra note 87, at 9.}
  \item \footnote{181}{Id. at 10.}
  \item \footnote{182}{Id. at 6.}
  \item \footnote{183}{Id.}
  \item \footnote{184}{Id. at 9.}
  \item \footnote{185}{Id.}
\end{itemize}
voluntary state compliance with the federal law. The very idea of federalism is based on a realization that alliances are often not enough because the parties to them have too strong incentives to free ride on the other participants, so that some common decision making and enforcement mechanism is necessary for the long-term benefit of all. For this reason, the federal authority cannot rely on voluntary compliance and must have considerable powers of its own. As I said, it may be possible for any particular state to secede from the federation and go it alone. But this option must be one that allows for a genuine separation rather than for opting out of the particular decisions of the federation which would open the door for an exploitation of the other members of the federal compact.\textsuperscript{186}

Despite Rumyantsev’s early comments, the final version of the Russian Constitution lacks any mention of a secession mechanism. Although the causality is difficult to trace, this is consistent with Rapaczynski’s warnings to think very carefully about whether secession ought to be allowed once a region had agreed to join the federation. The Russians neither added a provision explaining the conditions under which secession could occur, nor a provision explicitly forbidding secession. Nevertheless, it is possible that the shift from allowing secession in the earlier drafts to ignoring it altogether is due to Rapaczynski’s influence.

d. General Influences

In addition, to the direct influences on federalism issues discussed above, the Russian federalism provisions were also indirectly influenced. As already explained, Yakovlev, the head of the working group on the Federal Organs of Power within the Constitutional Assembly, was heavily influenced by the West. Yakovlev was asked to present the results of his group’s attempt to subdivide the federal and regional competence, but they were unable to draw a clear line.\textsuperscript{187} They did, however, draw on many Western models to try to figure out some of the thornier issues. For example, Yakovlev explained that the group drew upon both German and early American experiences in writing the constitutional provision that “provides that the federation council consists of two representatives from each component of the Russian Federation, with each one

\textsuperscript{186} Supra note 87, at 9-10.
\textsuperscript{187} Supra note 37.
appointed by the representative and executive local bodies of state power."188

Similarly, Leonid Smirnyagin, who also worked on the federalism provisions, was an expert on American regional systems. He indicated that the Russians looked at many foreign constitutions for ideas of how to deal with the federalism problem. According to Smirnyagin, the Russians consulted sixteen different world constitutions, including those of Mexico, India, Germany, the United States, and France, as they worked.189

Ultimately, the political theory suggested that the Russian Constitution would not be influenced by the United States in the area of federalism due to deep structural differences between the two countries. Contrary to the predictions of political theory, the Russians did borrow from the United States as well as other Western countries in creating their federalism system. The various Western influences were both direct and indirect, as the Russians searched for a federalism model that would suit their particular needs.

C. Bill of Rights

Chapter two of the Russian Constitution is entitled "Rights and Liberties of Man and Citizen." Placing the bill of rights as the second chapter was no coincidence. The Russians deliberately chose this placement to emphasize the importance of individual rights within the Russian system: "We have deliberately placed this section on individual freedoms ahead of the section that deals with the structure of the state, thereby breaking with the longstanding tradition of subservience of the individual to the mighty dragon of the state."190 Placing the bill of rights at the front of the constitution was Russia's unique twist to a traditional Western concept, and reflected the role of individual rights within the Soviet system.

i. Enforceable Rights

The Western advisers and experts across the board worried that the Russians would list too many unenforceable rights in their constitution, thus rendering the remaining enforceable rights equally useless. They therefore tried to convince the Russians to address this danger. Fein noted: "The difficulty that I could conceive in the

188. LUDWIKOWSKI, supra note 73, at 63.
189. Interview with Leonid Smirnyagin, in Moscow, Russ. (July 16, 2003).
190. Rumyantsev, supra note 42, at 40.
Russian Constitutional Draft . . . was that they write too many of their rights in absolutes.\textsuperscript{191} Rapaczynski advised: "I have already indicated that the Constitution should, in my view, contain only those provisions which can, by and large, be enforced by the courts. This is particularly important in the case of individual rights."\textsuperscript{192} Schwartz reiterated this concept of enforceability, telling the Russians they have "got to be able to implement it."\textsuperscript{193} Fein also stressed the importance of judicial enforcement:

You should not make the constitution in my judgment a series of campaign promises that are incapable of judicial honoring and enforcement, because then it abuses the real important rights that the judiciary can enforce . . . [I]f you can't guarantee everyone a nice home or whatever, then don't put it in the constitution.\textsuperscript{194}

Similarly, Berman wrote, "It is a defect of the Draft that it contains too many declarations of broad goals without indication of the means for achieving them."\textsuperscript{195}

Ultimately, even consensus amongst the Western advisors failed to persuade the Russians to remove all such sections. Although many extraneous provisions were removed, for example, the section protecting the rights of children born outside of wedlock, the Russian Constitution still enumerates many rights that cannot be enforced by the court system.

There are many possible explanations for the Russians' decision to retain certain unenforceable rights. Rumyantsev did not have enough confidence in a Constitution that would require others to fill in the blanks. This fear may be attributed to the history of Russian imperialism.\textsuperscript{196} The Russians' decision can also be explained by the difference between a legal and non-legal tradition. Fein argues that in a country where certain rights have always been taken for granted, they can be spoken of in generalities and do not have to be narrowly defined. He suggests that "[C]onstitutions are best when they . . . don't speak so much in prime colors, but put things as matters of degree and giving weights and shape, one way or the other." Fein explains that although the American Constitution speaks in absolutes, "we

\begin{itemize}
\item \textsuperscript{191} Supra note 72.
\item \textsuperscript{192} Supra note 87.
\item \textsuperscript{193} Supra note 97.
\item \textsuperscript{194} Supra note 72.
\item \textsuperscript{195} Berman, supra note 94, at 3.
\item \textsuperscript{196} Supra note 81.
\end{itemize}
really never have understood them in that way.” For example, although the United States has always had freedom of speech and freedom of press “that doesn’t mean that you can post where our military is going to land in Baghdad or something.”197 By contrast, in a society such as Russia’s where rights were never taken for granted, it was considered important to carefully delineate all such rights.198

Therefore, the Russians may have felt they were facing a very different historical situation than their American counterparts, and rejected the advice as inapplicable to their situation.

Alternatively, the result can be explained by the role of politics. The authors of the draft constitution did not yet have a strong grip on the political situation of the country. It was still feasible that the communists could retake control, and that democracy could fail. Fein explained that when the Russians were approached regarding cutting extraneous provisions from the Constitution, “their basic response was that this is a political document too.”199 In other words, they did not have the luxury of writing a purely legal document, because they did not have tight enough control over the power structure, and therefore had to make extreme political compromises. In particular, in the shadow of the Communist Party, they had to put in overreaching economic provisions in order to gain the support of a population that had lived for generations with the communist system of economic entitlements.

ii. General Influence on Individual Rights

Despite the failure to limit the bill of rights section in the Russian Constitution to enforceable rights, the bill of rights section was otherwise modeled after the Anglo-American system.200 Often the language used in the Russian Constitution closely paralleled language in the American Constitution. As Fein explained,

We wouldn’t say that you have to use these exact words, but you see that it is also useful to contemplate how once you have a document it will be interpreted ... If the language is the same as ours in the United States then [the Russian courts] can give some weight value to how our Supreme Court interpreted cruel and

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197. Supra note 72.
198. Id.
199. Id.
200. Supra note 37.
unusual punishment. That can be a useful thing.  

For the most part, the direct influence took the form of Western advisers reading and commenting on the bill of rights section in the early drafts, which survived largely intact in the final version. In addition, the bill of rights section was assigned to the Institute of State of Law as their project because the Institute had previously written a declaration of the rights of man. This assignment resulted in indirect Western influences on the bill of rights section because the Institute was heavily influenced by Western ideas.

The Western advisors gave specific advice on a variety of subjects. Blaustein, one of the direct advisors to Rumyantsev, felt that first amendment rights were critical. Rapaczynski recommended that the bill of rights “should be guaranteed to ‘every person,’ rather than to citizens alone.” Only those rights should be limited to citizens which, in some sense, pertain to the privilege of citizenship, such as the right to vote. As advised, the bill of rights generally are not limited to only citizens, but rather apply to the general population by means of such phrases as “human being,” “all people,” “the person,” and “everyone.” The few times that the Russians used the term citizen, they combined it with the general population, such as in Article 18 which states: “The rights and liberties of man and citizen shall have direct effect,” or Article 17 which states: “The exercise of rights and liberties of a human being and citizen may not violate the rights and liberties of other persons.” Finally, the Russians reserved a few rights specifically to citizens. In one such instance, Article 24, the use of the term citizen makes sense because it deals with state provided documents, a service not usually provided to non-citizens: “The bodies of state authority and the bodies of local self-government and the officials thereof shall provide to each citizen access to any documents and materials directly affecting his/her rights and liberties unless otherwise stipulated under the law.” In addition to the few scattered references to the word citizen, a few sections of the chapter deal with rights that pertain exclusively to citizens and fall into the category of “the privilege of citizenship.” The privileges exclusive to citizens include the right to

201. Supra note 72.
202. Supra note 31 (claiming that well over half of the section was taken directly from the Rumjantcev draft).
203. Supra note 31.
204. Supra note 91.
be recognized of legal age upon reaching the age of 18, protections against deportation or extradition, and the right to defense outside of Russia. Other provisions limited to citizens fall into the category of duties of the citizen, such as defense of the homeland, military or civil service, which logically do not apply to non-citizens. Overall, the fact that the Russians changed the bill of rights section from being entirely limited to citizens, as was the case in the Constitutional Commission draft, to mostly applying to the entire population shows the extent to which they adhered to Rapaczynski's advice.

Rapaczynski also advised on the death penalty provision, which in the early draft read: "Every individual has the right to life. No one may be deprived of his life. The death penalty can only be imposed by a decision of the court, with the participation of jurors, as an exceptional measure of punishment for the most severe crimes against an individual." First, Rapaczynski expressed a concern that the first and second sentence seemed repetitive of each other. The final constitution removed this repetitiveness, reading instead:

1. Everyone shall have the right to life.

2. Capital punishment may, until its abolition, be instituted by the federal law as exceptional punishment for especially grave crimes against life, with the accused having the right to have his case considered in a law court by jury.

Rapaczynski also noted that the third sentence of the early draft was "at least superficially, in contradiction with the first two." His concern was that the same section states that no one may be deprived of his life, and then immediately afterwards explains precisely how someone can be deprived of their life, without wording this deprivation as an exception to the general rule. The final draft did not completely resolve this issue, although the removal of the second sentence caused a slightly less harsh juxtaposition. It is still less clear than the American Constitution, which as Rapaczynski points out "simply states that 'No person shall be deprived of life . . . without due process of law.'"

Rapaczynski also commented on a provision of the early draft

205. Draft Constitution, supra note 74, at art. 2.3.1.
206. Supra note 91.
207. Konst. RF, supra note 116.
208. Supra note 91.
209. Id.
constitution which stated, “All citizens have the right to receive the opportunity to earn an income through the kind of labor which they freely choose and to which they freely agree...” Rapaczynski expressed his concern that “the language of the beginning phrase may come to be interpreted as obliging the state to provide work to every person (which, by the way, seems contradicted by the provision for unemployment compensation at the end of the same point).” To solve this problem, he proposed “different language the subject of which is not ‘every person’ (or even ‘every citizen’), but rather the state. E.g. The state protects labor.”

The final draft of the Constitution changes the language of the original, but does not make the subject the State. Instead, the new language states, “Work shall be free. Everyone shall have the right to make free use of his or her abilities for work and to choose a type of activity and occupation.” The first phrase of the new language addresses Rapaczynski’s concern by having the subject be the work itself. This phrase translates awkwardly into English, because of the double meaning for the word free, but the presumed meaning here is that work is free, as in accessible or unlimited, not that it does not cost anything. Therefore, by beginning the section with this generic subject-less statement, the Russians tried to achieve the effect that Rapaczynski had suggested.

Article 2.4.9 in the original draft constitution was a topic of concern for both Rapaczynski and Judge Williams. The article read: “A working person has the right to remuneration which is consistent with the quantity and quality of his labor and adequate to ensure a dignified existence. The remuneration paid to a working person for his labor may not be less than the subsistence wage in his area.” Williams underlined large sections of the article, circled the word “and,” and, in the margin jotted down, “Who decides? State? Private negotiation?” Thus, Judge Williams inquired as to who determines the wages, an important point given the socialist tradition of the former Soviet Union. He also noted in the margin that perhaps the wage should depend on “the willingness of another to pay that remuneration.” This original provision is clearly heavily influenced by the Soviet socialist tradition, whereas the American advisors came

210. Draft Constitution, supra note 74, at art. 2.4.8.
211. Supra note 91.
212. Konst. RF, supra note 116, art. 37.
213. Draft Constitution, supra note 74.
214. Williams, Text Comments, supra note 115.
from a strong capitalistic tradition. Rapaczynski alludes to this difference in his memorandum:

Given the possibility of employment with private employers, with the wages determined by the market, I do not think that the state should be obliged to assure equal pay for equal work by every employer . . . It seems that all that can be expected is that the state pass laws protecting employees against discrimination on the basis of some specified categories. 215

The final version of the Russian Constitution takes into account these concerns by moderating the language. "Everyone shall have the right to work under conditions meeting the requirements of safety and hygiene, to remuneration for work without any discrimination whatsoever and not below the statutory minimum wage . . . " 216 This incorporates Rapaczynski’s suggestion to include the language that individuals should be protected against “discrimination.” However, the revised version does not enumerate specific types of discrimination, as Rapaczynski suggested. Also, unlike the original article, which talked about wages in highly abstract terms, the final draft uses more practical language. This answers Judge Williams’s question by implying that the State decides the amount of money considered adequate to ensure a dignified existence.

Article 2.4.15 of the draft constitution included a statement that restricts the rights and freedoms of the citizens of the Russian Federation under certain scenarios including when the exercise of these rights are “encouraging religious, social, or national intolerance, or war propaganda.” 217 Rapaczynski took exception to this clause, writing, “I do not believe that the state should be given any right to forbid the enjoyment of rights which ‘incites’ to class or ‘social’ hatred.” 218 He also opposed banning war propaganda. 219 This section was moved from its original location in the document, to the section immediately following the statement regarding the right to freedom of speech and thought. The new line reads, “Propaganda or campaigning inciting social, racial, national or religious hatred and strife is impermissible. The propaganda of social, racial, national,

215. Supra note 91.
217. Draft Constitution, supra note 74.
218. Supra note 91.
219. Id.
religious or language superiority is forbidden."220 Therefore, the use of the term "war propaganda" was removed as suggested, although the restriction on religious, social or nationally intolerant speech remained.

Finally, some of the influences on the section on individual rights were indirect, and resulted from the Russians' familiarity with corresponding provisions in the American or other Western systems. This occurred most obviously in the section on criminal rights where the Russians borrowed such familiar concepts as double jeopardy, and the protection against self-incrimination. Yakovlev confirms that the American experience was important to Russian developments in freedom of speech, freedom from unlawful detention, jury trials, and the right to counsel.221 In the case of the jury trial, "the constitutional right to a jury trial, and its enabling legislation, draws directly on the Russian pre-Revolutionary jury, which in turn was the result of the reception of Western norms in the mid-nineteenth century."222 Whether as the result of direct advice by Western experts, or Russian scholars borrowing from familiar norms, it is clear for the bill of rights section of the Russian Constitution "a lot of the phrasing are just things that are straight out of [the American] constitution."223

IV. Conclusion

The Russians undeniably were influenced by the West in writing the 1993 Russian Constitution. Domestic politics often explains which Western model the Russians selected, or why they occasionally rejected Western models altogether. Yeltsin's control over the political situation meant that Russia would choose a strong presidential republic. Politics may also explain why the Russians were more likely to adopt a particular Western suggestion when it coincided with what was politically preferred, and less likely to do so when it directly contradicted a political decision.

The Russian case study demonstrates that constitutional influence need not come from the donor country's government. Although George H. W. Bush and his administration did not actively promote constitutional reform in Russia, other Western leaders still worked successfully to influence constitutional change. Most of the

220. Konst. RF, supra note 116, art. 29, § 2.
221. YAKOVLEV, supra note 51, at xv.
222. Sharlet, supra note 2, at 64.
223. Supra note 72.
influence came not from government officials, or specific organizations, but rather from individual advisors.\textsuperscript{224}

The Russian example also suggests that Western influences are particularly effective when a provision is disputed. When there is already disagreement over how something is to be done, then the Western norm can be a powerful authority to sway the balance. Both aspects of the impeachment example demonstrate the increased power of Western influences when a particular provision is disputed.

This case study also illustrates that a country's history can affect the extent of Western influence. For example, although Western advisors cautioned the Russians against too long a constitution, due to a history of overbearing governments, Rumyantsev lacked the confidence that others would fill in the blanks. Similarly, due to their history as a society where rights could never be taken for granted, the Russians prioritized careful delineation of all such rights.

Certain aspects of the Russian experience also support the prediction of some political theorists that argue that changes in legal systems result from borrowing.\textsuperscript{225} For example, in choosing a presidential model, Western influence occurred because key Russian actors were familiar with the French system, admired it, felt it was applicable to the Russian situation, and borrowed from it. Indirect influences were important in Russia in all areas of the constitution, and in many cases worked in cooperation with direct influences, laying the seeds of thought on which an advisor could then build.

This observation may present a challenge for Western attempts to influence constitution writing in countries such as Afghanistan or Iraq where fewer key actors may have been educated in Western constitutional models. In these situations, more human capital development may be necessary to educate the key players on the Western models, to enable them to wisely choose the model that makes sense for their situation.

From the perspective of the donor nation, the Russian example is also consistent with theories regarding the conditions under which a

\textsuperscript{224} Cf. Billington, \textit{supra} note 2, at 100 (arguing that the transfer of ideas in Russia does not occur at the state level, but rather occurs in day to day interactions between individuals).

\textsuperscript{225} See generally Alan Watson, \textit{Legal Transplants: An Approach to Comparative Law} (1974) (arguing that most changes in most legal systems are the result of borrowing); Gianmaria Ajani, \textit{By Chance and Prestige: Legal Transplants in Russia and Eastern Europe}, 43 \textit{Am. J. Comp. L.} 93 (1995) (arguing that legal transplants historically result from initiatives taken by the recipient legal system).
donor state attempts to influence the domestic institutions of another country. For example, John Owen theorizes that target states are generally countries with internal instability, and of strategic importance to the influencing country. This is the case with the United States and Russia, as undoubtedly Russia in the early 1990s could be categorized as a country with internal instability. Furthermore, Russia was strategically important to the United States, economically, politically, and in terms of security. Although consistent with Owen's theory, this conclusion makes less sense in a context such as this one where the influence on the part of the U.S. was less the product of a coordinated effort, than the random albeit influential advice of various individuals.

Rett Ludwikowski theorizes that Western influence on foreign constitutions is less likely where countries are trying to distinguish their social orientation from the West. This is consistent with the Russian experience, as the Russians were not trying to distinguish their social orientation from the West. Ludwikowski's theory also raises the issue of the international relations conditions necessary for the successful transfer of political institutions. The influences on the Russian Constitution occurred in a unique time in history when the Russians were eager to assimilate the West. Furthermore, the Russians faced a unique moment, in which there were no ideas to challenge democracy. A decade later, given the relationship between the United States and the world, a similar transfer of ideas would be significantly less likely.

Constitutional assistance, like democracy assistance more generally, is often criticized on the grounds that constitutional advisers are overly infatuated with their home country's system. The Russian example questions this criticism. Not only did the Western advisors claim to be considering Russia's unique interests, but their attempts to do so are apparent in the content of the advice given. For example, Blaustein did not emphasize the U.S. Constitution, realizing that the Russians would be sensitive to such an approach. Instead, he felt that his role was to educate on Western notions of constitutionalism, not the American constitution itself.

226. Owen, supra note 4, at 375.
227. LUDWIKOWSKI, supra note 73, at 67.
228. See CAROTHERS, supra note 5, at 97-98 (criticizing both U.S. and foreign democracy promoters for basing their democracy programs on their own national model, and being "strikingly unaware of the variety of political structures in other established democracies.")
This is also seen in the Western efforts to influence the Russian presidency. If this critique were correct, then American advisors should have pushed the American presidential model. The evidence shows that the advisors did not promote the American presidential model at all, but rather considered the conditions in place, presented the various models available, and left it to the Russians to decide.

Similarly, although the American experts felt it was important for the Russians to have judicial review, none of the key experts claimed that judicial review had to be done exactly like the United States. In fact, the efforts of some American lawyers to try to push the Supreme Court model was met with scorn on the part of the more influential advisors, who understood the fallacy of this attempt. The main Western advisors did not push the American system, but rather their justifications for pushing a judicial review system clearly evoked the unique Russian experience with the Soviet system, and not some higher notion of judicial review as necessary for all countries.

Overall, the experience of the West in influencing the 1993 Russian Constitution confirms many of the theories regarding the conditions necessary to transfer institutions from one country to another, and contradicts others. While a single case study is insufficient to develop an entire theory, the conclusions that can be drawn from a study of the writing of the Russian Constitution should be carefully noted by Western advisors who continue to work to influence the constitutions of other countries.
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