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# BUILDING BRICS: HUMAN RIGHTS IN TODAY'S EMERGING ECONOMIC POWERS

## FREEDOM OF EXPRESSION IN POST-SOVIET RUSSIA

*Jeffrey Kahn\**

### ABSTRACT

*This Article assesses the freedom of expression in Russia and prospects for its future: what has the Russian state promised its citizens, in what legal forms have those promises been made, and how well are those paper promises being kept in practice? The Article considers recent state actions and statutes enacted to regulate speech, association, and other forms of expression, and determines that these are possible because of the very weak separation of powers in the Russian Federation. The Article concludes by looking at the European Convention on Human Rights as one hope for a power capable of exerting influence on Russian practices, although it exists outside of Russia. Judgments of the European Court of Human Rights established under the Convention present a roadmap for future reform according to standards that Russia has already agreed to accept.*

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\* Associate Professor of Law, Southern Methodist University Dedman School of Law. This contribution is based on remarks prepared in anticipation for this panel. Although their revision was aided by a transcript provided by the organizers, it is not a verbatim record of remarks delivered on February 15, 2013. References to Russian law (and to proposed bills and amendments) are accurate as of that date. I thank the outstanding UCLA Law students with whom I have worked to participate in this symposium and complete this Article: Sandeep Prasanna, Elizabeth Shirey, and Tanya Sukhija. I also thank my fellow panelists, Robert Ahdieh and Anna Sevortian, and the moderator for our panel, Richard Anderson.

*"The past is a foreign country: they do things differently there."*

—L.P. Hartley\*\*

Freedom of expression in post-Soviet Russia? The choice of title for this panel's inquiry—*post-Soviet* Russia—is itself noteworthy. No other country is described so often in terms of its past as is Russia. Certainly, the other BRICS countries are not routinely given prefixes.<sup>1</sup> Russia has been post-Soviet for more than twenty years. Our expectations seem cast rather low if more than a generation after the collapse of the Union of Soviet Socialist Republics—a generation that neither knew Soviet citizenship nor feared Soviet rule—we remain inclined to refer to Russia not in terms of what it has become but in terms of what it is still struggling to leave behind.<sup>2</sup>

Compared to Soviet Russia, post-Soviet Russia is quite free. And yet, evaluating freedom of expression in Russia today is not an uncomplicated exercise.<sup>3</sup> The organizers of this excellent symposium are right to draw attention to the shadow cast by Russia's past. For although the problems we encounter with freedom of expression in today's Russia are quite different from those of Soviet times, Russia's post-Soviet present is a consequence of vestiges of a Soviet past that linger still in Russian society, politics, and law.

Consider some post-Soviet facts about Russia with which to start our inquiry:

\*\* L.P. HARTLEY, *THE GO-BETWEEN* 9 (1953).

<sup>1</sup> References to post-apartheid South Africa are occasionally seen in print but not in the materials for this symposium, although the period associated with the dismantling of apartheid, 1990-1994, broadly overlapped the collapse of the Soviet Union in 1991.

<sup>2</sup> This assertion is not meant to criticize the student organizers of this symposium. In fact, the leading, peer-reviewed academic journal devoted to the study of contemporary Russian law, politics, and society remains entitled *POST-SOVIET AFFAIRS*.

<sup>3</sup> Whatever meaning the conveners of this symposium intended to convey by the phrase "freedom of expression," I intend to convey a very broad meaning, inclusive of freedoms of speech, the press, association, and thought. This definition is in keeping with Russian constitutional law, at least in the aspirational sense. See КОНСТИТУЦИЯ РОССИЙСКОЙ ФЕДЕРАЦИИ [KONST. RF] [CONSTITUTION] arts. 28, 29, 30, 31 (Russ.), *translated at* <http://eng.constitution.kremlin.ru>; see also JANE HENDERSON, *THE CONSTITUTION OF THE RUSSIAN FEDERATION* 234 (2011). It is also in keeping with the obligations Russia accepted as a state party to the European Convention on Human Rights. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, C.E.T.S. No. 194 [hereinafter *European Convention*] (providing that freedom of expression "shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers").

For the period December 2011 to November 2012, Reporters without Borders ranked Russia 148 out of 179 countries in terms of press freedom, far below the Democratic Republic of the Congo, Kyrgyzstan, Afghanistan, and only just beating out Singapore, Iraq, and Burma.<sup>4</sup> Since 2000, at least 19 journalists have been killed and few of their killers, let alone the plotters, have been brought to justice.<sup>5</sup>

Freedom House reported Russia as “not free” in its 2012 freedom of the press report.<sup>6</sup> According to that source, the Russian state “owns, either directly or through proxies, all six national television networks, two national radio networks, two of the 14 national newspapers, more than sixty percent of the roughly 45,000 registered local newspapers and periodicals, and two national news agencies.”<sup>7</sup>

Forty-nine percent of the population has access to the Internet, but Freedom House ranks Russia as only “partly free” in 2012 in terms of Internet freedom.<sup>8</sup> This is largely due to controls on Internet access by the Ministry of Justice and Roskomnadzor, the state’s regulatory agency for communications.<sup>9</sup> Domain names may be seized without court order,<sup>10</sup> and

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<sup>4</sup> REPORTERS WITHOUT BORDERS, WORLD PRESS FREEDOM INDEX 2013 (2013), available at [http://fr.rsf.org/IMG/pdf/classement\\_2013\\_gb-bd.pdf](http://fr.rsf.org/IMG/pdf/classement_2013_gb-bd.pdf).

<sup>5</sup> *Russia – Freedom in the World 2013*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-world/2013/russia> (last visited Sept. 24, 2013).

<sup>6</sup> *Russia – Freedom of the Press 2012*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-press/2012/russia> (last visited Sept. 24, 2013).

<sup>7</sup> *Id.*

<sup>8</sup> FREEDOM HOUSE, FREEDOM ON THE NET 2012, at 411 (2012), available at [http://www.freedomhouse.org/sites/default/files/resources/FOTN%202012%20-%20Full%20Report\\_0.pdf](http://www.freedomhouse.org/sites/default/files/resources/FOTN%202012%20-%20Full%20Report_0.pdf) [hereinafter FREEDOM ON THE NET].

<sup>9</sup> *Id.*

<sup>10</sup> COORDINATION CENTER FOR TLD RU/РФ, *The Terms and Conditions of Domain Names Registration in Domains .RU and .РФ*, § 5.5, (Sept. 10, 2011) <http://www.cctld.ru/en/docs/rules.php> (approved by decision 2011-18/81 of 05.10.2011 and effective Nov. 11, 2011) (“The Registrar may terminate the domain name delegation on the basis of a decision in writing by a head (deputy head or equal to him public official) of an agency, which exercises operational search actions.”). A further elaboration on this process is available in the form of an “Explanation” (Разъяснения) available in Russian only. КООРДИНАЦИОННЫЙ ЦЕНТР НАЦИОНАЛЬНОГО ДОМЕНА СЕТИ ИНТЕРНЕТ [COORDINATION CENTER FOR TLD RU/РФ], Разъяснения: по порядку применения п. 5.5 Правил регистрации доменных имен в домене RU и РФ [Explanations: In the Order of Application of Item 5.5 The Terms and Conditions of Domain Names Registration in Domains .RU and .РФ], (Russ.) <http://www.cctld.ru/ru/activities/faq/5.5.php> (last visited Sept. 26, 2013). The Coordination Center is a non-commercial entity that administers the top-level Internet domain suffixes .RU and .РФ. A representative of the Russian Federation Ministry of Mass

websites have been blocked regardless of their placement on lists required by laws against “extremism.”<sup>11</sup>

Until relatively recently, President Vladimir Putin has used this control of the media to his advantage and with little difficulty. Unlike his Soviet predecessors (whose censorship and media control were both more formalized and more extreme), President Putin’s approval rating is much higher than most major western leaders—62 percent in January 2013.<sup>12</sup> President Putin annually holds nationally televised press conferences that last four or five hours at a stretch.<sup>13</sup> His stage-managed appearances are now the stuff of legend.<sup>14</sup> His persona is a carefully crafted creature of the media, which, for all intents and purposes, has become *his* media.

Communication sits on its 13-member governing council. The two agreements between the Ministry and the Center, posted on the Coordination Center website, indicate in identical language that the Ministry, “as the federal organ of executive power that carries out the functions for the formulation and implementation of State policy and normative-legal regulation in the sphere of information technologies delegates a representative to the management (Council) of the Coordination Center.” Соглашение о Взаимодействии Между Министерством Связи и Массовых Коммуникаций Российской Федерации и Координационным Центром Национального Домена Сети Интернет по Вопросам Управления Национальным Доменом «.RU» [Agreement About Cooperation Between the Russian Federation Ministry of Information and Mass Communication and the Coordination Center for TLD on the Subject of the Management of the National Domain .RU], art. 2, Feb. 18, 2009, available at [http://www.cctld.ru/files/minsvyaz/aggr\\_ru.pdf](http://www.cctld.ru/files/minsvyaz/aggr_ru.pdf); Соглашение о Взаимодействии Между Министерством Связи и Массовых Коммуникаций Российской Федерации и Координационным Центром Национального Домена Сети Интернет по Вопросам Управления Национальным Доменом «.РФ» [Agreement About Cooperation Between the Russian Federation Ministry of Information and Mass Communication and the Coordination Center for TLD on the Subject of the Management of the National Domain .RF], art. 2, Apr. 7, 2010, available at [http://www.cctld.ru/files/minsvyaz/aggr\\_rf.pdf](http://www.cctld.ru/files/minsvyaz/aggr_rf.pdf).

<sup>11</sup> FREEDOM ON THE NET, *supra* note 8.

<sup>12</sup> Alissa de Carbonnel, *Russian Pollster Says Approval For Putin at 12-Year Low*, REUTERS (Jan. 24, 2013), <http://www.reuters.com/article/2013/01/24/us-russia-putin-approval-idUSBRE90N0IX20130124>. This rating is the lowest since Putin first assumed the presidency of Russia 13 years ago.

<sup>13</sup> *Putin Sets New Q&A Session Record*, RIA NOVOSTI (Apr. 25, 2013), <http://en.ria.ru/russia/20130425/180844955.html> (reporting 2013 televised session lasting four hours, 47 minutes).

<sup>14</sup> See Alan Taylor, *Vladimir Putin, Action Man*, ATLANTIC (Sept. 13, 2011), <http://www.theatlantic.com/infocus/2011/09/vladimir-putin-action-man/100147/> (showing photographs of Putin’s most well-known exploits, including those in which the president has “piloted firefighting planes, darted whales, driven race cars, and taken a submersible 1,400 meters (4,600 ft) below the surface of Lake Baikal”); see also Andrew Osborn, *Vladimir Putin Diving Discovery Was Staged, Spokesman Admits*, TELEGRAPH (Oct. 5, 2011),

The monopolization of media outlets and outsized press conferences (which most specialists on Russian politics doubt are instances of truly spontaneous, unmediated interaction with the Russian public<sup>15</sup>) brings to mind a scene from Shakespeare's *Henry V*. Henry, having just won the battle of Agincourt, seeks the hand of Katharine of France. Katharine is shocked at the proposal. "Is it possible dat I sould love de *ennemi* of France?" she asks. No, says Henry, it is not possible that you should love an enemy, "[b]ut, in loving me, you should love the friend of France; for I love France so well that I will not part with a village of it; I will have it all mine ...",<sup>16</sup>

One can see a parallel with President Putin's approach to freedom of expression. He loves freedom of expression so well that he would not part with a single bit of it. Is that more or less what we should expect from a post-Soviet ruler, even twenty years after Soviet rule?

What you expect freedom of expression in Russia should look like today depends on the terms by which you judge Russia in general. If you consider Russia in isolation, in terms of its own history, then today's state of affairs calls for nothing short of rejoicing. At no time in Russian history has the individual enjoyed greater freedom of expression. Never before have so many Russians enjoyed access to so much uncensored information. Close to three quarters of the urban population enjoy broadband Internet access; 95 percent of Russia's youth (defined as 12- to 34-year-olds) connect in some

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<http://www.telegraph.co.uk/news/worldnews/europe/russia/8808689/Vladimir-Putin-diving-discovery-was-staged-spokesman-admits.html> (reporting admission of Kremlin Press Spokesman Dmitrii Peskov, reversing previous press coverage suggesting otherwise).

<sup>15</sup> In his latest televised call-in program, Putin answered 85 questions selected from approximately three million requests. Jonathan Earle, *In Marathon Show, Putin Pledges to Stay the Course*, MOSCOW TIMES (Apr. 26, 2013), <http://www.themoscowtimes.com/news/article/in-marathon-show-putin-pledges-to-stay-the-course/479297.html>. The manner of selection does not appear to be random. See, e.g., Ellen Barry, *For Nearly 5 Hours, a Showcase of Putin's Fully Intact Confidence*, N.Y. TIMES, Apr. 26, 2013, <http://www.nytimes.com/2013/04/26/world/europe/for-nearly-5-hours-a-confident-putin-takes-questions.html> ("He pledged help for retirees and factory workers, and he benevolently granted petitions, like one from a pigtailed girl in Russia's Far East who asked for a playground. (He was still speaking when word came that the regional authorities had already begun a construction project on his orders, and the audience applauded.)").

<sup>16</sup> WILLIAM SHAKESPEARE, *HENRY V*, 228–29 (Emma Smith ed., 2002) (1623) ("KATHARINE: Is it possible dat I sould love de *ennemi* of France? KING: No, it is not possible you should love the enemy of France, Kate. But, in loving me, you should love the friend of France, for I love France so well that I will not part with a village of it. I will have it all mine; and, Kate, when France is mine and I am yours, then yours is France and you are mine. KATHARINE: I cannot tell vat is dat.").

way to the Internet, either with computers or mobile phones.<sup>17</sup> Compare those statistics to a time, even very late in the Soviet era, when strict state censorship was the norm, foreign radio broadcasts were deliberately jammed, and most Soviet citizens lived under an information blackout most of the time (whether concerning wage and price adjustments or the Chernobyl nuclear power plant disaster).<sup>18</sup>

Such a narrow historical perspective for comparison does not yield a particularly helpful vantage point on Russia today. The statistics that opened this essay reflect a Russia in turmoil. But it is not the same turmoil that Russia has confronted in its past. Russian history, whether imperial or Soviet, is one of harsh censorship and overt police repression of dissenting voices. There is little point to a comparison of this sort; both the degree and means of that past repression are incomparably too extreme to be useful metrics to judge the present.<sup>19</sup>

What is more, the nature of dissent and the forms that free expression took in response to such measures are not comparable to the dissent and disquiet in today's Russia. The 1990s saw a free-for-all explosion of media outlets, newspapers, and other sources of information just as the Russian economy experienced an unprecedented free fall that left millions destitute and in a state of shock.<sup>20</sup> With this opening up of Russian society alongside market collapse, some decried the loss of cultural literacy (though seemingly

<sup>17</sup> FREEDOM ON THE NET, *supra* note 8, at 2–3.

<sup>18</sup> THE CAMBRIDGE ENCYCLOPEDIA OF RUSSIA AND THE FORMER SOVIET UNION 477–87 (Archie Brown et al. eds., 1994); ARCHIE BROWN, THE RISE AND FALL OF COMMUNISM 473–75 (2009).

<sup>19</sup> See P.S. SQUIRE, THE THIRD DEPARTMENT: THE POLITICAL POLICE IN THE RUSSIA OF NICHOLAS I (1968); ROY A. MEDVEDEV, LET HISTORY JUDGE: THE ORIGINS AND CONSEQUENCES OF STALINISM (Colleen Taylor trans., David Joravsky & Georges Haupt eds., Alfred A. Knopf 1971) (1969); ALEKSANDR I SOLZHENITSYN, THE GULAG ARCHIPELAGO (Thomas P. Whitney trans., Harper & Row 1974) (1973).

<sup>20</sup> See Gregory Walker, *Book Publishing*, in THE CAMBRIDGE ENCYCLOPEDIA OF RUSSIA AND THE FORMER SOVIET UNION, *supra* note 18, at 478 (“In 1991 about 1,800 non-state publishing-houses were registered in Russia, in contrast to the 235 publishers functioning in the entire USSR in 1988.”); Martin Dewhurst, *Censorship*, in THE CAMBRIDGE ENCYCLOPEDIA OF RUSSIA AND THE FORMER SOVIET UNION, *supra* note 18, at 487 (observing that in 1992, “There was, however, practically no pre-publication censorship, and the problems faced by writers, scholars, scientists, journalists, and cinema directors, were mainly economic, resulting from enormous shortages of, and the virtual monopoly control over and high prices charged for, paper supplies, printing and distribution facilities and film stock. Ironically, this meant that for the general public the availability and range of high-quality Russian literature, journalism and films were no greater than they had been during the Khrushchev and Brezhnev periods, and less than under Gorbachev.”).

forgetting how the state had tightly controlled entry into the official cultural canon in Soviet times). To some, the collapse of Soviet controls meant a race-to-the-bottom of Western-style commercialism imbedded in a mushrooming mass media.<sup>21</sup> Others noted oddities of a different sort. As one of the preeminent scholars of the Soviet Union and communism has observed, “Paradoxical though it may appear, some of the freest and broadest-ranging conversations in the world took place round the kitchen tables in the apartments of the intelligentsia in Moscow and Leningrad during the Khrushchev and Brezhnev years of oppressive Communist rule in Russia.”<sup>22</sup> The fruits of freedom of expression, like the avenues for its suppression, are thus not so easily measured.

If a comparison with Russian history is inadequate on its own, perhaps a comparison with the recent history of Russia’s Eastern and Central European neighbors is worthwhile. Do Russians have more or less freedom of expression than citizens in countries newly independent from Soviet control? One of the most important events of the twentieth century was the collapse of the Soviet Union and a new release from the “prison of nations” that was both catalyst and consequence of that collapse.<sup>23</sup> Beginning in 1989, the Warsaw Pact states of Eastern Europe broke free from four decades of Soviet control. To the immediate west, north, and south, 14 of the 15 Soviet socialist republics that made up the *Union* of Soviet Socialist Republics declared their independence, while within the Russian Soviet Federated Socialist Republic (the fifteenth component of the USSR), 26 other entities declared their sovereignty from Moscow in a bid for more autonomy.<sup>24</sup> All this occurred in a span of less than three years. Imagine if the fifty states of the United States splintered apart to form separate countries in less than the time it takes to earn a law degree.

This year, we celebrate the twentieth anniversary of the establishment of a new, democratic Russian Federation following the adoption by referendum of a new, democratic constitution in 1993.<sup>25</sup> Perhaps the proper starting

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<sup>21</sup> See, e.g., ELLEN MICKIEWICZ, *CHANGING CHANNELS: TELEVISION AND THE STRUGGLE FOR POWER IN RUSSIA* 235–36 (1997).

<sup>22</sup> BROWN, *supra* note 18, at 258.

<sup>23</sup> Students of Russian and Soviet history will recognize the quoted expression as the promise of Vladimir Lenin. V.I. LENIN, *On the Question of National Policy (April 6 (19), 1914)*, in *COLLECTED WORKS* 217, 219 (Julius Katzer ed., Bernard Isaacs & Joe Fineberg trans., 1964), available at <http://www.marxists.org/archive/lenin/works/1914/apr/06b.htm>.

<sup>24</sup> Jeff Kahn, *The Parade of Sovereignties: Establishing the Vocabulary of the New Russian Federalism*, 16 *POST-SOVIET AFFAIRS* 58 (2000).

<sup>25</sup> It should be noted that the validity of this referendum was contested. See STEPHEN



point for evaluation is to compare Russia's trajectory of transition to other democratic transitions.

Russia clearly lags behind most of the states of Central and Eastern Europe that escaped Soviet controls to form their own democratic societies (Belarus, the last unabashed dictatorship in Europe, being the glaring exception).<sup>26</sup> By most reputable measures, the citizens of these other countries enjoy far more freedom of expression and unhindered access to information.<sup>27</sup> But as scholars have noted, the trajectories of these countries may say less about easily discoverable patterns, rules, and norms of transitions to democracy than they do about the particular experiences of these various countries (or groups of countries) themselves.<sup>28</sup> For example, "[n]one of the former Warsaw Pact countries of East Central Europe (unlike the former USSR) experienced widespread bloodshed over 'stateness' problems. Also, unlike Russia, there is no ambivalent legacy about the loss of an empire or the disintegration of the USSR."<sup>29</sup> While the comparative project of the political science subdiscipline known during its short and optimistic life span as "transitology" did indeed produce valuable insights about roughly similarly situated countries, equally important were the distinguishing factors that transitologists uncovered:

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WHITE ET AL., HOW RUSSIA VOTES 99–101 (1997).

<sup>26</sup> For the period December 2011 to November 2012, Reporters without Borders ranked Belarus 157 out of 179 countries in terms of press freedom, with no European country ranked lower on the list. REPORTERS WITHOUT BORDERS, *supra* note 4. Freedom House identified Belarus as fifth among "the 10 most serious violators of press freedom in the world." Arch Puddington, *The 10 Worst Countries for Journalists*, FOREIGN POLICY (May 1, 2013), [http://www.foreignpolicy.com/articles/2013/05/01/the\\_10\\_worst\\_places\\_to\\_be\\_a\\_journalist](http://www.foreignpolicy.com/articles/2013/05/01/the_10_worst_places_to_be_a_journalist).

<sup>27</sup> Compare Russia's ranking (148) in the Reporters without Borders 2013 World Press Freedom Index with the rankings for Estonia (11), Czech Republic (16), Poland (22), Slovakia (23), Lithuania (33), Slovenia (35), Latvia (39), and Romania (42) just to consider the top fifty. REPORTERS WITHOUT BORDERS, *supra* note 4. The United States, by comparison, is ranked 32. *Id.* Or compare Russia's ranking (176 – "not free") in the Freedom House Freedom of the Press 2013 rankings with Estonia (13 – "free"), Czech Republic (27 – "free"), Slovakia (35 – "free"), Lithuania and Slovenia (tied at 40 – "free"), and Poland (47 – "free"). FREEDOM HOUSE, GLOBAL PRESS FREEDOM RANKINGS 2013 (2013), *available at* <http://www.freedomhouse.org/sites/default/files/Global%20and%20Regional%20Rankings.pdf>. The United States is ranked 23. *Id.*

<sup>28</sup> For an early, outstanding effort to conceptualize the post-Communist transitions in Central and Eastern Europe in comparative perspective, see JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE (1996).

<sup>29</sup> *Id.* at 445.

Other important explanatory factors for democratization differences in post-Communist Europe for future researchers to explore are, of course, those related to time, prior regime types, and the presence or absence of a usable democratic legacy. The USSR lasted for about seventy-five years, during much of which totalitarian practices predominated. East Central Europe was a part of the Soviet subsystem for only forty years. In Poland for much of this period, authoritarian, not totalitarian, political realities predominated. In Hungary, mature post-totalitarianism evolved. Finally, pre-Communist history must be analyzed comparatively. Czechoslovakia, for example, was democratic from independence in 1919 until the Nazi interventions of 1938. There is virtually no such usable pre-Communist democratic past in the non-Baltic countries of the former Soviet Union. This does not mean that democracy is impossible in these countries; it does mean, however, that there will be longer and more perilous journeys toward constitutionalism and state reconstruction before democracy becomes, if ever, the only game in town.<sup>30</sup>

The Russian case makes abundantly clear that not every transition *from* authoritarianism is inevitably a transition *to* democracy or norms of free expression associated with modern-day democratic republics.

But why should that be surprising? Was it so easy to predict twenty years after the founding of the United States that our own constitutional democracy would develop such robust protections for freedom of expression?

Fearful of the revolutionary fervor and reign of terror unleashed in France, the political life of the new American republic was awash in anxiety about enemies, foreign and domestic. Not ten years after the signing of the US Constitution, the First Congress adopted some of the most repressive legislation the country has ever known. Foreigners (whether from country friend or foe) whom the President deemed dangerous could be detained without charge or trial and summarily deported.<sup>31</sup> Immediately after the experience of repressive English laws aimed at stifling a free press, the First Congress (stuffed with drafters, signers, and ratifiers of the Constitution)

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<sup>30</sup> *Id.* at 451–52.

<sup>31</sup> Act of June 25, 1798, ch. 58, 1 Stat. 570 (expired 1800); Act of July 6, 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21–24). *See also* GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 31 (2004).

passed the Alien and Sedition Acts of 1798.<sup>32</sup> These laws reinstated the crime of seditious libel as a cudgel quite willingly used by office holders against their opponents. Fines or imprisonment awaited anyone convicted of having written, uttered, or published anything “false, scandalous and malicious” with the intent to defame or bring into contempt or disrepute the President, government, or either house of Congress.<sup>33</sup> The Sedition Act in particular, which Geoffrey Stone described as “perhaps the most grievous assault on free speech in the history of the United States,” occurred less than a dozen years after the signing of the Constitution.<sup>34</sup> Living by the First Amendment was not easy, even for those who wrote it.<sup>35</sup>

As a lawyer and a political scientist, rather than as a historian or policy analyst, I prefer a more straightforward approach to assessing the freedom of expression in Russia and prospects for its future. What has the Russian state promised its citizens, in what legal forms have those promises been made, and how well are those paper promises being kept in practice? This approach has an advantage that I think the other approaches lack: it better identifies the reasons the Russian state has become ever more repressive after its first chaotic decade of democracy and the rise of Vladimir Putin in its second decade. My argument here today is that Russian repression of free expression is symptomatic of a larger, structural problem. That problem is that Russia lacks political and judicial institutions with the autonomy, strength, and authority to defend (or at least fight over) the pie-crust promises that are made in its Constitution.<sup>36</sup> In other words, the weakness of freedom of expression in Russia is a separation of powers problem.

Like most constitutions these days, whether ratified by liberal democracies or announced by petty dictators, Russia’s Constitution has a wonderful set of promises about freedom of expression. Everyone, Article 29 states, shall be guaranteed freedom of thought and speech.<sup>37</sup> Of course,

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<sup>32</sup> Act of June 18, 1798, ch. 54, 1 Stat. 566 (repealed 1802); 1 Stat. at 570; 1 Stat. at 577; Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

<sup>33</sup> 1 Stat. at 596, § 2

<sup>34</sup> STONE, *supra* note 31, at 19.

<sup>35</sup> One might just as easily consider Revolutionary France. It did not take long for the Reign of Terror to sweep away the liberty of revolutionary France, or for the Thermidor coup that followed. In fact, fear of Jacobin-inspired rebellion was an inspiration for the Alien and Sedition Acts in the United States. *Id.* at 21, 33–36.

<sup>36</sup> See CHRISTINA ROSSETTI, *Promises Like Piecrust*, in POEMS AND PROSE 125 (Simon Humphries ed., 2008). See also MARY POPPINS (Walt Disney Pictures 1964) (Mary Poppins: “That’s a piecrust promise. Easily made, easily broken.”).

<sup>37</sup> “1. Everyone shall be guaranteed freedom of thought and speech. 2. Propaganda or

in the very next sentence, the restrictions begin: “Propaganda or agitation, which arouses social, racial, national or religious hatred and hostility shall be prohibited. Propaganda of social, racial, national, religious or linguistic supremacy shall also be prohibited.”

None of these words are defined in the Constitution, of course, but the result has been an expansive view by state executive authorities of the restrictions on expression and a cramped view of the freedom itself (views that, not incidentally, have not been robustly challenged by a judiciary whose independence has often been subject to question, as noted below). This we can detect from recent statutes enacted to regulate speech, association, and other forms of expression. Consider in reverse chronological order a few of the most recent statutes that have been passed.

The first Russian law to consider was actually passed in retaliation for an American law. On December 14, 2012, President Obama signed into law the Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012.<sup>38</sup> This US statute brought an end to trade restrictions adopted under the so-called Jackson-Vanik Amendment to the Trade Act of 1974.<sup>39</sup> As its double-barrel name implies, the Act normalized trade relations while responding to widespread anger at the death of Russian lawyer Sergei Magnitsky. Magnitsky, a young lawyer for the private equity firm Hermitage Capital, was detained for a year after alleging corruption in the tax ministry. He died under highly suspicious circumstances while in Russian police custody in 2009.<sup>40</sup> The Magnitsky

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agitation, which arouses social, racial, national or religious hatred and hostility shall be prohibited. Propaganda of social, racial, national, religious or linguistic supremacy shall also be prohibited. 3. Nobody shall be forced to express his thoughts and convictions or to deny them. 4. Everyone shall have the right freely to seek, receive, transmit, produce and disseminate information by any legal means. The list of types of information, which constitute State secrets, shall be determined by federal law. 5. The freedom of the mass media shall be guaranteed. Censorship shall be prohibited.” KONST. RF art. 29.

<sup>38</sup> Magnitsky Act, Pub. L. 112-208, 126 Stat. 1496 (2012).

<sup>39</sup> 19 U.S.C. §§ 2431–34 (2012). These restrictions, long a source of irritation in U.S.-Russian relations, were originally passed in response to harsh Soviet restrictions on (primarily Jewish) emigration.

<sup>40</sup> Congress cited as authoritative the findings of Russian President Dimitry Medvedev’s Human Rights Council, issued on July 6, 2011:

“The Human Rights Council concluded that Sergei Magnitsky’s arrest and detention was illegal; he was denied access to justice by the courts and prosecutors of the Russian Federation; he was investigated by the same law enforcement officers whom he had accused of stealing Hermitage Fund companies and illegally obtaining a fraudulent \$230,000,000 tax refund; he was

Act obliges the President to submit to Congress a list of individuals involved with that case or involved with similar cases who are to be deemed inadmissible to the United States and whose assets in the United States are to be frozen.<sup>41</sup>

Two weeks later, President Putin signed the Dima Yakovlev Act, known informally as the Anti-Magnitsky Act.<sup>42</sup> The portion of this law that garnered the most attention in the United States prohibits Americans from adopting Russian children.<sup>43</sup> Another provision mandates creation of a Russian list of US citizens who are prohibited from entering, owning property, or conducting business in Russia because they are “guilty of violating the fundamental human rights and freedoms of Russian citizens.”<sup>44</sup> A pro-Kremlin Russian news outlet described the list as one intended to respond to “cases in which US officials either failed to react or reacted inadequately to incidences of adopted Russian children experiencing abuse—and even death—by their new US families.”<sup>45</sup> An American reader may find this provision a peculiarly misdirected form of retaliation against

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denied necessary medical care in custody; he was beaten by 8 guards with rubber batons on the last day of his life; and the ambulance crew that was called to treat him as he was dying was deliberately kept outside of his cell for one hour and 18 minutes until he was dead. The report of the Human Rights Council also states the officials falsified their accounts of what happened to Sergei Magnitsky and, 18 months after his death, no officials had been brought to trial for his false arrest or the crime he uncovered. The impunity continued in April 2012, when Russian authorities dropped criminal charges against Larisa Litvinova, the head doctor at the prison where Magnitsky died.”

Magnitsky Act § 402(8).

<sup>41</sup> *Id.* §§ 404–06.

<sup>42</sup> Федеральный закон от 28 декабря 2012 г. N 272-ФЗ, «О мерах воздействия на лиц, причастных к нарушениям основополагающих прав и свобод человека, прав и свобод граждан Российской Федерации» [Federal Law of the Russian Federation on Measures Against Persons, Involved in Violations of Fundamental Rights and Freedoms, Rights and Freedoms of Citizens of the Russian Federation], ROS. GAZ., Dec. 29, 2012, p. 1 [hereinafter Federal Law No. 272-FZ], available at <http://www.rg.ru/2012/12/29/zakon-dok.html>. President Putin signed the bill into law on December 28, 2012; it entered into force on January 1, 2013.

<sup>43</sup> *Id.* art. 4.

<sup>44</sup> *Id.* arts. 1–2; *A Law on Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of Russian Citizens has Been Signed*, WEBSITE OF THE PRESIDENT OF RUSSIA (Dec. 28, 2012, 1:30 PM), <http://eng.kremlin.ru/acts/4810>.

<sup>45</sup> Robert Bridge, *Moscow Responds to US Magnitsky Act with Dima Yakovlev Law*, RT.com (RUSSIA TODAY) (Dec. 12, 2012, 4:35 PM), <http://rt.com/politics/russia-us-yakovlev-magnitsky-human-rights-898/>.

the United States for a list of those complicit in Magnitsky's death or similar human rights abuses by the state. But the American reader is also likely to be unfamiliar with the expansive coverage in the largely state-controlled Russian media of American cases of child abuse and neglect concerning Russian orphans.<sup>46</sup> According to a survey conducted shortly after the Russian provision entered into force, over half of Russians polled supported the measure.<sup>47</sup> The focus on such stories, tragedies to be sure, is a telling example of state controls on the Russian mass media and their resulting ability to shape the public debate. Sergei Magnitsky's story was not pursued nearly as aggressively by the state-controlled media.

The dueling nature of these statutes is only the beginning, and the adoption restrictions and list of individuals deemed *personae non gratae* in Russia are really the lesser story. Even if some might dismiss the lists created by the Magnitsky and Anti-Magnitsky acts as tit-for-tat politics (wrongly implying what many would consider to be a false equivalence of principle between the two statutes), Article 3 of the Russian statute goes much further, applying a guilt-by-association sanction to Russian citizens, too. Non-governmental organizations (NGOs) that engage in undefined "political activity" in Russia and that receive funds from American citizens or organizations (regardless of their listing under the prior articles) may have their activity suspended if the state determines that their activities "present a threat to the interests of the Russian Federation."<sup>48</sup> In addition to suspension (which appears to be accomplished solely by a decree of the executive), the property of the NGO may then be seized pursuant to a court order.<sup>49</sup> By late January 2013, the Russian Foreign Ministry had also compiled a list of at least 71 Americans who would be denied entry into Russia.<sup>50</sup> A law professing to protect fundamental rights does so by restricting freedom of expression and association.

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<sup>46</sup> Dima Yakovlev, for whom the Russian law was named, died of heat stroke in 2008; his American adoptive father was acquitted at trial for involuntary manslaughter. Will Englund, *Russians Say They'll Name Their Magnitsky-Retaliation Law After Baby Who Died in a Hot Car in Va.*, WASH. POST (Dec. 11, 2012, 9:10 AM), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/11/magnitsky-retaliation-man-baby/>.

<sup>47</sup> Press Release, Russian Public Opinion Research Center, Dima Yakovlev Bill: Public Assessment (Jan. 18, 2013), <http://www.wciom.com/index.php?id=61&uid=756>.

<sup>48</sup> Federal Law No. 272-FZ, *supra* note 42, art. 3, § 1.

<sup>49</sup> *Id.* art. 3, § 3.

<sup>50</sup> *The Lavrov List Expanded From 11 to 71 Names of Americans*, ITAR-TASS (Jan. 21, 2013, 11:40 AM), <http://www.itar-tass.com/en/c142/626443.html>.

The Anti-Magnitsky Act was not the first statute to restrict the activities of non-governmental organizations. In July 2012, just months after returning to the presidency, Vladimir Putin signed a law requiring politically active groups that accept foreign money to declare themselves to be “foreign agents.”<sup>51</sup> There is a host of restrictions on what those NGOs can do once they are so labeled, but the very label “foreign agent” has a connotation in Russian history and Russian society which makes it that much harder for these NGOs even to function. The law appears to be working its intended effect. Lyudmila Alexeyeva, the octogenarian doyenne of the Russian human rights community and leader of the Moscow Helsinki Group, announced that her long-established human rights NGO would forego foreign grants, saying, “I don’t want to be a foreign agent.”<sup>52</sup>

There are many more statutes besides these two. A week before this symposium, in early February 2013, the Kremlin announced stricter reporting requirements for NGOs receiving state funding, including the possible creation of a blacklist for NGOs that submit unsatisfactory reports of their work.<sup>53</sup> This announcement is all the more ominous because Russia ordered the United States Agency for International Development (USAID) to stop funding Russian organizations in September 2012.<sup>54</sup> There is an anti-rally law (signed June 8, 2012). On January 7, 2013, this so-called “Hyde Park” law entered into force, under which “special assigned venues” are preselected for public protest (an effort to avoid the colossal protests that marched too close to the Kremlin in December 2011).<sup>55</sup> Amendments to the law on freedom of conscience proposed by the Ministry of Justice would

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<sup>51</sup> Федеральный закон от 20 июля 2012 г. N 121-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации в части регулирования деятельности некоммерческих организаций, выполняющих функции иностранного агента» [Federal Law Amending Certain Legislative Acts of the Russian Federation with Regard to the Regulation of Non-Profit Organizations Acting as a Foreign Agent], ROS. GAZ., July 23, 2013, p. 6, available at <http://www.rg.ru/2012/07/23/nko-dok.html>.

<sup>52</sup> Alexander Bratersky, *Q & A: Alexeyeva Lives Golden Years and the Golden Rule*, MOSCOW TIMES (July 20, 2012), <http://www.themoscowtimes.com/business/article/qa-alexeyeva-lives-golden-years-and-the-golden-rule/462346.html>.

<sup>53</sup> Петр Козлов, *Кремль создает черные списки НКО* [Kremlin Creates an NGO Blacklist], IZVESTIA (Feb. 8, 2013, 12:01 AM), <http://izvestia.ru/news/544570> (Russ.).

<sup>54</sup> See Press Release, U.S. Dept. of State, On Russian Decision to End USAID Activities in Russia (Sept. 18, 2012), <http://www.state.gov/r/pa/prs/ps/2012/09/197846.htm>.

<sup>55</sup> *Moscow will Form its Hyde Parks*, ITAR-TASS (Jan. 9, 2013, 10:53 AM), <http://www.itar-tass.com/c142/616764.html>. In Moscow, these venues will be located in Gorky Park and Sokolniki Park, farther from the Kremlin than Bolotnaya Square, where the December 2012 rallies centered. *Id.*

limit “unauthorized outdoor religious activity.”<sup>56</sup> Slander has been recriminalized.<sup>57</sup> The definition of treason has been expanded to include more acts more vaguely stated than before, and narrowed to require less proof of harm to the security of the Russian state.<sup>58</sup>

Many if not most of these laws and state actions are possible because of the very weak separation of powers in the Russian Federation. The formal

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<sup>56</sup> *Religious Actions to be Given the Same Status as Rallies*, ITAR-TASS (Jan. 18, 2013, 1:00 PM), <http://www.itar-tass.com/en/c142/624722.html>.

<sup>57</sup> Slander (art. 129) and Insult (art. 130) were decriminalized in December 2011 under President Medvedev. *See* Article 1(45) in Федеральный закон Российской Федерации от 7 декабря 2011 г. N 420-ФЗ «О внесении изменений в Уголовный кодекс Российской Федерации и отдельные законодательные акты Российской Федерации» [Federal Law Amending the Criminal Code of the Russian Federation and Certain Legislative Acts of the Russian Federation], ROS. GAZ., Dec. 09, 2011, p. 13, *available at* <http://www.rg.ru/2011/12/08/p-raboty-site-dok.html>. Slander was returned to the Criminal Code under a new Article 128.1 by President Putin roughly eight months later. Федеральный закон от 28 июля 2012 г. N 141-ФЗ «О внесении изменений в Уголовный кодекс Российской Федерации и отдельные законодательные акты Российской Федерации» [Federal Law Amending the Criminal Code of the Russian Federation and Certain Legislative Acts of the Russian Federation], ROS. GAZ., Aug. 1, 2012, p. 18, *available at* <http://www.rg.ru/2012/08/01/kleveta-dok.html>.

<sup>58</sup> Федеральный закон Российской Федерации от 12 ноября 2012 г. N 190-ФЗ «О внесении изменений в Уголовный кодекс Российской Федерации и в статью 151 Уголовно-процессуального кодекса Российской Федерации» [Federal Law Amending the Criminal Code of the Russian Federation and Article 151 of the Criminal Procedure Code of the Russian Federation], ROS. GAZ., Nov. 14, 2012, p. 18 [hereinafter Federal Law No. 190-FZ], *available at* <http://www.rg.ru/2012/11/14/izmenenia-dok.html>. In its previous version, Article 275 of the Criminal Code defined the crime of state treason as “espionage, the delivery of a state secret or other assistance to a foreign state, foreign organization, or their representatives in carrying out hostile acts to damage the foreign security of the Russian Federation.” Федеральный закон Российской Федерации от 27 декабря 2009 г. N 377-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации в связи с введением в действие положений Уголовного кодекса Российской Федерации и Уголовно-исполнительного кодекса Российской Федерации о наказании в виде ограничения свободы» [Federal Law Amending Certain Legislative Acts of the Russian Federation in Connection with the Enactment of the Criminal Code of the Russian Federation and the Penal Code of the Russian Federation for the Punishment of Restriction of Freedom], ROS. GAZ., Dec. 30, 2009, p. 11, *available at* <http://www.rg.ru/2009/12/30/arrest-dok.html>. In addition to the revelation of state secrets, the new law expands treason to include the rendering of “financial, material-technical, consultative, or other assistance to a foreign state, international or foreign organization or their representatives in activity directed against the security of the Russian Federation.” The limiting element in the previous version of the law that required damage to “the foreign security” (“ущерб внешней безопасности”) of Russia has been narrowed by the deletion of the qualifier to acts “that are directed against the security” of the state.



structures of separate institutions exist—a bicameral federal legislature, independently constituted courts, an elected executive, a structure of federal-regional divisions—but these structures disguise an extraordinary practical dominance by the presidential administration. This is my theoretical point.

Consider first the absence of horizontal separation of powers, the principle by which power is controlled through checks and balances between different branches of the federal government. The legislature has been captured by the President's party, United Russia, and has been so for some time. The government is led by Prime Minister Dmitry Medvedev, at least for now, but his hands are in fact tightly held by President Putin. This is the so-called "tandem" around which Russian politics has revolved for the last five years. Vladimir Putin served as president from 2000 to 2008. Dmitri Medvedev then became president from 2008 to 2012 while Putin switched to service as Prime Minister. This arrangement was understood as a clear decision to formally comply with a constitutional prohibition on consecutive third terms while allowing Putin to retain considerable power.<sup>59</sup> Now, Putin has returned as president and he is constitutionally permitted to remain in office for two more consecutive terms. Barring the emergence of a strong opposition candidate or some other unforeseen political development, he may therefore rule until 2024. All of the laws diminishing the freedom of expression that I identified above were passed by President Putin in the first year of his return to the presidency in May 2012. In fact, slander was recriminalized just months after then-President Medvedev signed its decriminalization into law.<sup>60</sup> The power of the president seems unconstrained by the constitutional separation of powers because the political reality is that legislative and executive powers are very weakly separated, if at all.

Now consider the vertical separation of powers: federalism.<sup>61</sup> There are

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<sup>59</sup> See KONST. RF art. 81, § 3. In December 2007, months before the March 2008 presidential elections, then First Deputy Prime Minister Dmitri Medvedev announced the planned tandem: "In order to stay on this path, it is not enough to elect a new president who shares this ideology. It is not less important to maintain the efficiency of the team formed by the incumbent president. That is why I find it extremely important for our country to keep Vladimir Vladimirovich Putin at the most important position in the executive power, at the post of the chairman of the government." *Speech by Dmitri A. Medvedev*, N.Y. TIMES (Dec. 11, 2007), <http://www.nytimes.com/2007/12/11/world/europe/medvedev-speech.html>.

<sup>60</sup> Federal Law No. 190-FZ, *supra* note 58.

<sup>61</sup> See generally Jeffrey Kahn, Alexei Trochev, and Nikolay Balayan, *The Unification of Law in the Russian Federation*, 25 POST-SOVIET AFF. 310 (2009) (examining Russian federalism from its decentralized beginnings under Yeltsin to the current centralized system

83 constituent units of the Russian Federation. Seventy-seven of their governors or presidents (the functional equivalent in regions demarcated as ethnic republics within the Russian Federation) are members of the United Russia ruling party.<sup>62</sup> The vast majority of these governors are not elected, direct elections having been cancelled by Putin in 2004 following the terrorist attacks on Beslan.<sup>63</sup> And although gubernatorial elections have been suggested and a few have even been held, a new wave of restrictive bills threatens whatever weak federalism may be permitted.<sup>64</sup> The vertical separation of powers, like the horizontal variety, has been virtually dismantled.

Let me turn then to the third branch of government—the courts. Kim Lane Scheppele at Princeton described Russia at one point as being in the grips of what Ernst Fraenkel called the “dual state.”<sup>65</sup> She was referring to the division in Nazi Germany that Fraenkel described between ordinary cases and political cases.<sup>66</sup> Something similar exists in Russia. For ordinary cases—ordinary commercial disputes or ordinary property disputes—the

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under Medvedev and Putin).

<sup>62</sup> Jonathan Earle, *Bill to Limit Gubernatorial Elections Approved*, MOSCOW TIMES (Jan. 23, 2013) <http://www.themoscowtimes.com/print/article/bill-to-limit-gubernatorial-elections-approved/474464.html>.

<sup>63</sup> Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GA. J. INT’L & COMP. L. 511, 530-31 (2008).

<sup>64</sup> On July 1, 2012, gubernatorial elections were restored after an eight-year hiatus. Виктор Хамраев et al., *Губернаторам готовят смешанную систему легитимности: Региональных парламентариев заинтересовали явкой избирателей* [Combined Legitimacy: Federation Subjects are to be Granted the Power to Abolish Gubernatorial Elections], KOMMERSANT (Jan. 21, 2013), <http://www.kommersant.ru/doc/2109399>. On October 5, 2012, five subjects of RF elected governors under the new law. *Id.* On January 16, 2013, the Duma held its first reading of a draft law delegating choice to subjects. *Id.* The draft law would permit a regional legislature to elect a governor after candidates are proposed by political parties in the RF Duma or regional legislature, from whom a slate of three nominees would be selected by RF President for the election. *Direct Gubernatorial Elections Should be Everywhere or Nowhere – Experts*, ITAR-TASS (Jan. 25, 2013), <http://en.itar-tass.com/russia/688834..> But on January 23, 2013, a United Russia bill in the Duma was put forward to exclude “multi-ethnic” regions from direct gubernatorial elections. Richard Arnold, *Russian Duma Backtracks on Direct Regional Elections*, EURASIA DAILY MONITOR (Feb. 11, 2013), [http://www.jamestown.org/single/?tx\\_ttnews%5Btt\\_news%5D=40442](http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=40442).

<sup>65</sup> I first heard Professor Scheppele make this comparison at an AALS National Conference “Hot Topics” Panel that I organized. Kim Lane Scheppele, *The Dictatorship of Law: The Khodorkovsky Case, Human Rights, and the Rule of Law in Russia*, Panel Presentation at the Association of American Law Schools National Conference (Jan. 6, 2012).

<sup>66</sup> See ERNST FRAENKEL, *THE DUAL STATE* (E.A. Shils et al trans., 1941).

courts are not only functional, but at some levels functioning quite well and professionally. But if a political case should arise, a different world emerges. This is the world of the former oligarch Mikhail Khodorkovsky, or the opposition blogger Alexey Navalny, or the members of the punk rock group Pussy Riot.

I was asked to speak specifically about Pussy Riot today, although for reasons that should become clear, I would prefer to concentrate on the Khodorkovsky case. For those who are unfamiliar, Pussy Riot is a sensationalist punk rock group that, on February 21, 2012, performed what they called a punk prayer—a loud, crass, and disrespectful anti-Putin demonstration—on the altar of the Cathedral of Christ the Savior, a newly-rebuilt church not far from the Kremlin.<sup>67</sup> They were charged with hooliganism motivated by religious hatred.<sup>68</sup> The charge of hooliganism, at least, probably is not all that dissimilar to a disorderly conduct charge in the United States. Had they performed something similar in the National Cathedral in Washington, I would not be surprised if they were charged in that way. The Pussy Riot women were sentenced to a two-year term of incarceration; disorderly conduct in the United States would probably result, at most, in ninety days in jail and a small fine.<sup>69</sup> But aside from the disproportionate sentence, the case actually has surprisingly little to teach about Russia's approach to freedom of expression.

At first glance, the Khodorkovsky case does not seem to have anything

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<sup>67</sup> The performance occurred on February 21, 2012. Дело #1-170/12, Приговор [Case No. 1-170/2012, Verdict] (Aug. 17, 2012) [hereinafter Case No. 1-170/12], [http://hamovnichesky.msk.sudrf.ru/modules.php?name=sud\\_delo&srv\\_num=1&name\\_op=doc&number=117671859&delo\\_id=1540006&new=&text\\_number=1](http://hamovnichesky.msk.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=117671859&delo_id=1540006&new=&text_number=1). Three members of the group—Nadezhda Tolokonnikova, Maria Alyokhina, and Yekaterina Samutsevich—were arrested in early March 2012 for “hooliganism motivated by religious hatred.” *Id.* On August 17, 2012, all three were convicted and sentenced to two years in labor camps. *Id.* Samutsevich was freed on appeal in October, sentence suspended and on probation. *One Pussy Riot Member Freed on Appeal, Two Stay Jailed*, RIA NOVOSTI (Oct. 10, 2012), <http://en.ria.ru/crime/20121010/176530904.html>. Two other members of the band fled Russia out of fear of prosecution. *Police Yet to Learn the Identities of Pussy Riot Accomplices*, RAPSI (Sept. 5, 2012), <http://rapsinews.com/news/20120905/264584697.html>.

<sup>68</sup> Case No. 1-170/12, *supra* note 67.

<sup>69</sup> See D.C. CODE § 22-1321 (2011), under which a person who engages in “loud, threatening, or abusive language, or disruptive conduct, with the intent and effect of impeding or disrupting the orderly conduct of a lawful public gathering, or of a congregation of people engaged in any religious service or in worship, a funeral, or similar proceeding” may be found guilty of a misdemeanor and fined up to \$500, imprisoned for up to ninety days, or both.

to do with freedom of expression.<sup>70</sup> Russia's richest oil baron found himself in a political conflict with Vladimir Putin. In October 2003, he was arrested and has remained in confinement ever since. In April 2004, the Russian Tax Ministry ordered his Yukos Oil Company to pay €2.8 billion in tax arrears, interest, and penalties, giving him one day to execute payment. However, by a decision of a Moscow commercial court rendered on the same day that the demand was served, Yukos was enjoined from disposing of certain assets in anticipation of a judgment by the court, a judgment that ultimately led to the bankruptcy and forced sale of Yukos to state-owned Rosneft. In May 2005, Khodorkovsky was sentenced to nine years in prison after being convicted, *inter alia*, of fraud and tax evasion. Just as he became eligible for parole, he was tried again and, in December 2010, convicted of embezzlement and money laundering and sentenced to 14 years in prison.<sup>71</sup> Khodorkovsky's fate has long served as a warning to others.<sup>72</sup>

The Khodorkovsky case was investigated by the Kremlin's Human Rights Council. One might be surprised to discover that the Kremlin even has a Human Rights Council.<sup>73</sup> But what happened in the aftermath of its state-sanctioned investigation further illustrates the separation of powers problem that I raised earlier. This Council has no power other than to investigate and report. It spent a year studying the case to determine what, if anything, went wrong as a matter of law. The Council obtained the

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<sup>70</sup> The following general description draws from, and a more detailed description may be obtained in, Jeffrey Kahn, *Report on the Verdict Against M.B. Khodorkovsky and P.L. Lebedev*, 4 J. EURASIAN L. 321 (2011).

<sup>71</sup> Alexey Navalny, an opposition blogger in Russia, has recently come under threat from similar charges of embezzlement. The same articles of the criminal code that were used to charge Khodorkovsky and put him under threat of imprisonment are now used against Navalny. Jonathan Earle, *Opposition Figures' Legal Woes Mount*, MOSCOW TIMES (Jan. 21, 2013), <http://www.themoscowtimes.com/news/article/opposition-figures-legal-woes-mount/474224.html>.

<sup>72</sup> Paul Goble, *Window on Eurasia: Leading NGOs, Running out of Funds, May be Forced to Close*, WINDOW ON EURASIA – NEW SERIES (Jan. 19, 2013, 8:30 AM), <http://windowoneurasia2.blogspot.com/2013/01/window-on-eurasia-russias-leading-ngos.html>, republished by JOHNSON'S RUSSIA LIST (Jan. 21, 2013), <http://russialist.org/russias-leading-ngos-running-out-of-funds-may-be-forced-to-close/> (“[Memorial Council Chairman Oleg] Orlov suggested that some wealthy Russians may want to support these programs that do so much good for ordinary Russians, ‘but they have been shown with the Khodorkovsky case what can happen to them if they begin to give money for projects that do not have the approval of the authorities.’”).

<sup>73</sup> See СОВЕТ ПРИ ПРЕЗИДЕНТЕ РОССИЙСКОЙ ФЕДЕРАЦИИ ПО РАЗВИТИЮ ГРАЖДАНСКОГО ОБЩЕСТВА И ПРАВАМ ЧЕЛОВЕКА [PRESIDENTIAL COUNCIL FOR THE DEVELOPMENT OF CIVIL SOCIETY AND HUMAN RIGHTS], <http://president-sovet.ru/> (last visited Oct. 24, 2013).

assistance of nine experts: six Russian scholars, two Europeans, and one American. I was the American. We worked independently. I did not know who were the other experts selected by the Council, and I was not paid for my work. All of these measures, I now realize in retrospect, were designed to protect the autonomy and integrity of the investigative process.<sup>74</sup>

As it turns out, there were good reasons for the Council to exercise such caution. The Council submitted our work to President Medvedev in December 2011, coincidentally at the height of mass protests catalyzed by allegations of fraud in recent parliamentary election returns and the announcement that the tandem of President Dmitri Medvedev and Prime Minister Vladimir Putin was again going to exchange positions.<sup>75</sup> The report was subjected to criticism by state officials and in state-controlled media outlets.<sup>76</sup> But worse was yet to come. The week before this symposium, it was revealed that as many as four of the six Russian experts—professors of law, economists, experts at still-surviving NGOs—found themselves in the sights of Russian investigators.<sup>77</sup> These individuals had been subjected to search warrants, their property seized, their homes searched. They were brought before investigators and subjected to lengthy questioning.

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<sup>74</sup> These ground rules were articulated in my first correspondence with the Council. See *infra* Appendix 1, pp. 24–27, letter from Mikhail Fedotov and Tamara Morshchakova to author (Apr. 2, 2011) (“The range of issues on which you may present your views would be determined in accordance with your preferences. The expert analysis is to be conducted on a voluntary basis and on the condition of confidentiality. The list of experts involved and the content of their opinions shall be made public only after they have been submitted to the Council. Your expert opinion will be treated as an independent part of the overall analysis. As the expert, you will be free to determine the format of your opinion.”).

<sup>75</sup> See Explanatory Memorandum, Report on the Honouring of Obligations and Commitments by the Russian Federation, EUR. PARL. DOC. 13018, ¶¶ 56–66 (Sept. 14, 2012), available at <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=18998&lang=EN>.

<sup>76</sup> See, e.g., Федотов о заявлении СК РФ по экспертизе дела ЮКОСа: “учите матчасть,” Interfax.ru (Apr. 1, 2012), <http://www.interfax.ru/news/238756> (in which a representative of the RF Investigative Committee alleged that some of the participants in the Human Rights Council’s examination may have received Yukos funding in the past); see also *Kremlin Experts Deny Taking Yukos Money*, RIA NOVOSTI (Apr. 1, 2012, 10:44 PM), <http://en.ria.ru/russia/20120401/172538752.html>.

<sup>77</sup> These events were subsequently summarized. See Jeffrey Kahn, *In Putin’s Russia, Shooting the Messenger*, N.Y. TIMES (Feb. 25, 2013), <http://www.nytimes.com/2013/02/26/opinion/in-putins-russia-shooting-the-messenger.html>; see also Tom Balmforth, *Critics of Khodorkovsky Verdict in Kremlin Crosshairs*, RADIO FREE EUR./RADIO LIBERTY (Mar. 28, 2013), <http://www.rferl.org/content/khodorkovsky-crime-trial/24940316.html>.

Why? An answer came just a few days before this symposium, when I received a letter from the Chairman of the Human Rights Council, Mikhail Fedotov, apprising me, and warning me, of these events.<sup>78</sup> A copy of the letter and its translation appear in Appendix Two. The letter notes, as confirmed by numerous news reports, that the warrants were issued under the pretext of investigating whether Khodorkovsky had financed the “deliberately false conclusions of specialists under the guise of independent public expertise by paying those who organized their production as well as the experts.”<sup>79</sup> When I read it, I felt a chill run down the back of my spine, a metaphor well known to lawyers and scholars who specialize in laws protecting freedom of expression. I can only imagine how cold that chill must feel for the courageous Russian experts who undertook this task of examining a case. Although they did so with the approval of then-President Medvedev, they now face investigation by an administration that has been returned to President Putin.

Is there any hope that can be injected into this bleak depiction? Yes, if just a little. There is another power capable of exerting influence on Russian practices, although it exists outside of Russia. At the very moment of the collapse of the Soviet Union, Russia sought membership in the Council of Europe. Membership, however, required Russian accession to the European Convention on Human Rights, the human rights treaty that is the hallmark of that international organization. After some false starts, substantial reforms, and promises for further reform, Russia signed and ratified the Convention in 1998.<sup>80</sup> Among the obligations Russia undertook was judicial review of its actions by the European Court of Human Rights that sits in Strasbourg, a court that would hear the admissible petitions of individual applicants (not merely the protests of other state parties to the treaty), award damages, and insist on compliance with treaty norms.

Among the many rights and freedoms it protects, the European

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<sup>78</sup> Letter from Mikhail Fedotov to author (Feb. 13, 2013) (*infra* Appendix II, pp. 27–30).

<sup>79</sup> *Id.*; see also Леонид Никитинский, *Третье дело ЮКОСа, о «печеньках»*, [Third Yukos Case, About “Cookies”], NOVAYA GAZ. (Feb., 8, 2013), <http://www.novayagazeta.ru/politics/56623.html>; Экспертов СПЧ преследуют за доклад по второму делу “ЮКОСа” [HRC Experts Harrassed for Report on Second “YUKOS” Case], GRANI.ru, (Feb. 6, 2013), <http://grani.ru/Politics/Russia/yukos/m.211325.html>.

<sup>80</sup> I have explored this process elsewhere. Jeffrey Kahn, *Russia’s “Dictatorship of Law” and the European Court of Human Rights*, 29 REV. OF CENTRAL & E. EUR. LAW 1 (2004); Jeffrey Kahn, *Russian Compliance with Articles Five & Six of the European Convention of Human Rights as a Barometer of Legal Reform & Human Rights in Russia*, 35 MICH. J. L. REFORM 641 (2002).

Convention on Human Rights protects freedom of expression, freedom of thought, and freedom of assembly.<sup>81</sup> Member states that would restrict any of these rights may do so only in a manner prescribed by law and necessity in a democratic society.<sup>82</sup> The Strasbourg Court has repeatedly reviewed claims by Russians alleging violation of these and other provisions of the Convention. In the vast majority of these cases, judgment is issued for the applicant.<sup>83</sup>

The Court is far from perfect. Judgments take a tremendously long time, in part because of a clogged docket that is the result of a steady influx of Russian cases.<sup>84</sup> Not only do judgments come late, the remedies for rights violations are often pitifully small.<sup>85</sup> When they do come, however, these judgments are carefully reasoned, and always reference Russian domestic legal sources.<sup>86</sup> Thus, these cases present a roadmap for future

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<sup>81</sup> See European Convention, *supra* note 3, arts. 9–11.

<sup>82</sup> See European Convention, *supra* note 3, art. 9, § 2, art. 10, § 2 & art. 11, § 2 (each providing that restrictions on the exercise of these rights are limited by the requirement, *inter alia*, that such restrictions “are prescribed by law and are necessary in a democratic society”).

<sup>83</sup> Between 1959 and 2011, the Court has found Russia in violation of Article 10 in 23 judgments, the fourth highest number of such violations of all states-parties to the Convention. See EUROPEAN COURT OF HUMAN RIGHTS, VIOLATION BY ARTICLE AND BY STATE, 1959-2011, at 2 (2011), [http://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2011\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_violation_1959_2011_ENG.pdf). To put this number into perspective, as of January 1, 2011, the European Court had rendered 1,079 judgments in which Russia was a party. Of that number, 1,019 were judgments that Russia had violated the Convention and 39 judgments found no violation of the Convention (21 other judgments were also issued). See EUROPEAN COURT OF HUMAN RIGHTS, COUNTRY FACT SHEETS, 1959-2010, at 46 (2011), [http://www.echr.coe.int/Documents/Country\\_Factsheets\\_1959\\_2010\\_ENG.pdf](http://www.echr.coe.int/Documents/Country_Factsheets_1959_2010_ENG.pdf).

<sup>84</sup> At the end of 2012, the European Court recorded 128,100 applications pending before a judicial formation, 22.3 percent of which were submitted concerning the Russian Federation. That is the highest percentage of any of the 47 member states (Turkey occupied a distant second place, with 13.2 percent). See EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2012, at 6-8 (2013), [http://www.echr.coe.int/Documents/Stats\\_analysis\\_2012\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf).

<sup>85</sup> Kahn, *supra* note 63, at 539-40.

<sup>86</sup> Consider *OOO Ivpress v. Russia*, App. Nos. 33501/04, 38608/04, 35258/05, and 35618/05, Eur. Ct. H.R. (2013), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116024>, the most recent judgment against Russia concerning freedom of expression, released on January 22, 2013. A regional newspaper published articles critical of state officials, who sued the authors and the newspaper for defamation. The Strasbourg Court carefully reviewed both the Russian domestic law and the case law of the Convention before finding a violation of Article 10 of the Convention in all of the defamation proceedings and awarding pecuniary damages and

reform according to standards that Russia has already agreed to accept. Surprisingly, the Russians always have paid the compensation and costs ordered in these judgments, even if they have not always reformed their law in response to the court's findings that they have violated the Convention obligations. Still, the cases keep coming. Khodorkovsky has filed numerous cases in his decade of confinement and won several of them. In February 2013, in the week just prior to this symposium, the lawyer for the imprisoned members of the Pussy Riot group, Pavel Chikov, filed an application with the Court that alleges violations of their rights to freedom of speech and a fair trial, and alleges inhumane treatment in custody.<sup>87</sup>

Let me close with another quote from Shakespeare's *Henry V*. As the play draws to a close, the victorious English king asks Katharine for a kiss. Is it not the fashion, he asks her, for the maids of France to kiss before they are married? He is disappointed to discover that Katharine does not really want to kiss him. Henry replies, "O, Kate, nice customs curtsy to great kings."<sup>88</sup> Freedom of expression, like the separation of powers in a democratic republic, needs a stronger foundation than the nice, but occasional, custom found in post-Soviet Russia.

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costs and expenses to the applicants.

<sup>87</sup> Gabriela Baczyńska, *Russia's Pussy Riot appeal to European rights court*, REUTERS (Feb. 7, 2013, 5:07 PM), <http://uk.reuters.com/article/2013/02/07/uk-russia-pussyriot-idUKBRE9160WP20130207>.

<sup>88</sup> SHAKESPEARE, *supra* note 16 at 231.



## APPENDIX I

LETTER FROM MIKHAIL FEDOTOV AND TAMARA MORSHCHAKOVA TO AUTHOR  
APRIL 2, 2011



**СОВЕТ  
ПРИ ПРЕЗИДЕНТЕ  
РОССИЙСКОЙ ФЕДЕРАЦИИ  
ПО РАЗВИТИЮ  
ГРАЖДАНСКОГО ОБЩЕСТВА  
И ПРАВАМ ЧЕЛОВЕКА**

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Тел. (495) 604-41-846 факс (495) 604-48-55  
e-mail: fedotov\_MA@yandex.ru

«02» апреля 2011 г.

Уважаемый г-н Кан,

Совет при Президенте Российской Федерации по развитию гражданского общества и правам человека приглашает Вас принять участие в независимом общественном экспертно-правовом анализе документов по уголовному делу Ходорковского М.Б. и Лебедева П.Л., извершившемуся вынесением обязательного приговора, который был оглашен 27.12. 2010. Предметом экспертизы являются официальный текст приговора, опубликованные стенографические отчеты судебных заседаний в Хамовническом суде г. Москвы, а также другие относящиеся к делу открытые материалы. Проведение подобных общественных экспертиз имеет целью информирование гражданского общества о судебной практике разрешения конкретных дел.

Исходя из Вашей научной квалификации Совет заинтересован получить Ваше письменное заключение, прежде всего, по аспектам дела, лежащим в сфере Вашей научной специальности, что не ограничивает Вас в возможности высказать свое мнение и по любому другому правовому вопросу в связи с анализируемыми документами судебной практики и конкретного дела. Совет предполагает изучить и оценить данные материалы в контексте конституционного права, уголовного права и процесса, предпринимательского и корпоративного права, налогового права, международного публичного права, включая практику Европейского суда по правам человека, и международного частного права, микроэкономики и менеджмента. Круг конкретных вопросов, по которым Вы были бы готовы представлять свою научную позицию, может быть определен в соответствии с Вашими предпочтениями.

Данным экспертиза проводится на общественных началах и на условиях конфиденциальности. Список привлеченных экспертов и содержание их выводов могут быть оглашены только после представления заключений Совету. Ваше экспертное заключение будет рассматриваться как самостоятельная часть выводов данной экспертизы. Формат заключения определяется экспертом. Предварительные примерные сроки представления заключения – июнь-июль 2011 года.

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О своем согласии на участие в данной экспертизе (с подтверждением возможной области Вашего анализа) Вы можете сообщить Совету в письменной форме по адресу: Старая площадь, д. 4, 103132, Москва, Россия или по электронной почте профессору Т. Г. Моршаковой ([tmor@kpf.ru](mailto:tmor@kpf.ru)) до 30 апреля 2011 года. При получении Вашего согласия на участие в данной экспертизе Совет направит Вам уведомление о дальнейших деталях работы.

С глубоким уважением,

Председатель Совета



М.А. Федотов

Руководитель рабочей группы  
по организации экспертизы



Т.Г. Моршакова



**COUNCIL  
OF THE PRESIDENT  
OF THE RUSSIAN FEDERATION  
ON DEVELOPMENT OF CIVIL SOCIETY  
AND HUMAN RIGHTS**

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«02» \_\_\_\_\_ 2011

Dear Mr. J.Kahn,

The Presidential Council of the Russian Federation for Civil Society and Human Rights invites you to participate in an independent public expert analysis of official documents and proceedings in the recent criminal case concerning M.B. Khodorkovsky and P.L. Lebedev, who were convicted by a judgment announced on December 27, 2010. The expert analysis will examine the text of the verdict and the record of the proceedings which took place in the Khamovnichesky Court of Moscow, as well as other court materials which have been made accessible. The aim of such public expert analyses is to inform civil society about judicial practice in particular cases.

The Council hopes to obtain from you a written opinion with a focus on issues within your area(s) of expertise, although you would also be free to express your opinion on any other legal question which you believe to be pertinent within judicial practice in connection with the case at hand. The Council seeks to examine the case in the context of constitutional law, criminal law and procedure, corporate law, tax law, public international law, including the case-law of the European Court of Human Rights, private international law, as well as the fields of economics and management. The range of issues on which you may present your views would be determined in accordance with your preferences.

The expert analysis is to be conducted on a voluntary basis and on the condition of confidentiality. The list of experts involved and the content of their opinions shall be made public only after they have been submitted to the Council. Your expert opinion will be treated as an independent part of the overall analysis. As the expert, you will be free to determine the format of your opinion. The preliminary timeframe for the submitting of opinions is June – July 2011.

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Should you consent to participate in the expert analysis, we would ask you to inform the Council of this, along with a confirmation of the possible focus of your analysis, by mail at the following address: 4 Staraya Ploshad, 103132, Moscow, Russia or by email to Professor Morschakova ([mar@kurf.ru](mailto:mar@kurf.ru)) before 30 April 2011. Upon obtaining your written consent the Council will send you further details.

Yours sincerely,

Chair of the Board

 M.A. Fedotov

Head of the Working Group

Responsible for the Organization of Expert Analysis

 T.G. Morschakova

## APPENDIX II

LETTER FROM MIKHAIL FEDOTOV TO AUTHOR

FEBRUARY 13, 2013



**СОВЕТ  
ПРИ ПРЕЗИДЕНТЕ  
РОССИЙСКОЙ ФЕДЕРАЦИИ  
ПО РАЗВИТИЮ  
ГРАЖДАНСКОГО ОБЩЕСТВА  
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Профессору

ДЖЕФФРИ КАННУ

«13» февраля 2013 г.

№ 160-9-230@

Уважаемый профессор Канн!

В своем качестве председателя Совета при Президенте РФ по развитию гражданского общества и правам человека вынужден повторно беспокоить Вас в связи с т.н. «вторым» уголовным делом в отношении М.Б. Ходорковского и П.Л. Лебедева. Как Вы, надеюсь, помните, в апреле 2011 года я обратился к Вам с письмом, в котором приглашал принять участие в организованном Советом общественном научном исследовании приговора по данному делу на тех условиях, которые были утверждены Советом и опубликованы на его сайте (<http://www.president-sovet.ru>). Ваше заключение, полностью в авторской редакции вошедшее в доклад Совета о результатах общественного научного анализа материалов данного судебного дела, с благодарностью воспринято членами Совета, а сам доклад обсужден на заседании Совета и передан Президенту России 21.12.2011 г.

В настоящее время Следственный комитет РФ проводит следственные действия в отношении российских ученых, принимавших участие в данном общественном научном исследовании. Согласно судебным постановлениям о проведении обысков и выемок, расследование осуществляется в рамках возбужденного в 2003 г. уголовного дела № 18/41-03 (осужденные по данному делу отбывают наказание), но теперь оно ведется по фактам



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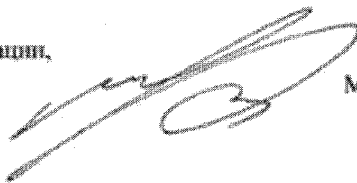
финансирования осужденными «заведомо ложных заключений специалистов под видом независимых общественных экспертиз путем оплаты лицам, организовавшим их проведение, и экспертам». Этот факт стал предметом дискуссии в СМИ после пресс-конференции в Интерфаксе 06.02.2013 г. (<http://president-sovet.ru/news/3553/>).

Считаю своим долгом проинформировать Вас об этом, как и о том, что Совет будет пристально следить за развитием ситуации, оперативно доводя своё мнение до сведения руководства страны.

С глубоким уважением,



Советник  
Президента Российской Федерации,  
Председатель Совета



М.Федотов

[Translation of letter from M. Fedotov to Jeffrey Kahn dated February 13, 2013]

Dear Professor Kahn!

In my capacity as Chairman of the Council under the President of the Russian Federation on the Development of Civil Society and Human Rights, I am forced to disturb you again in connection with the so-called "second" criminal case concerning M.B. Khodorkovsky and P.L. Lebedev. As I hope you will remember, in April 2011 I turned to you with a letter in which I invited your participation in the public scholarly research organized by the Council on the sentence in this case on those conditions which were confirmed by the Council and published on its website (<http://www.president-sovet.ru>). Your report, which was entered in full in the author's wording in the Council's report about the results of the public scholarly analysis of the materials in the given judicial case, was received with gratitude by the members of the Council, and the report itself was discussed at a meeting of the Council and conveyed to the President of Russia on December 21, 2011.

At present, the RF Investigative Committee is conducting investigatory activities with regard to the Russian scholars who participated in this public scholarly research. According to judicial decisions about the conduct of searches and seizures, the investigation is being implemented as a part of the criminal case No. 18/41-03 that was initiated in 2003 (those convicted in the given case are serving their sentences), but now it is being conducted on the facts of the financing by the convicts "of deliberately false conclusions of specialists under the guise of independent public expertise by paying those who organized their production, as well as the experts." This fact became the subject of discussion in the mass media after a press conference at Interfax on February 6, 2013 (<http://www.president-sovet.ru/news/3553/>).

I consider it my duty to inform you about this and about the fact that the Council will be intently following the development of the situation, promptly bringing its opinion to the attention of the leadership of the country.

With deep respect,

Sincerely yours,

M. Fedotov

Advisor of the RF President

Chairman of the Council