

NOTES

SELECTIVE PROSECUTION IN RUSSIA – MYTH OR REALITY?

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I. INTRODUCTION

The trial of Mikhail Borisovich Khodorkovsky¹ is considered by some to be the most important “legal”² case in Russian history since the break-up of the Soviet Union.³ It has garnered close attention and scrutiny by international media and scholars alike, and continues to be a topic of discussion.⁴ Such widespread interest is

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¹ Mikhail Borisovich Khodorkovsky was born on June 26, 1963 in a lower middle class Jewish family in Moscow. In 1986, he graduated from Mendeleev Institute of Chemical Technology in Moscow and in 1988 finished the Plekhanov Institute of National Economy. In 1990, he founded the Menatep Bank Group, which provided funds for Mr. Khodorkovsky to use in his bidding process for Yukos. In 1994, Mr. Khodorkovsky became the CEO and main shareholder of Yukos Oil Company. See *Mikhail Khodorkovsky*, MOSNEWS.COM, Dec. 15, 2005, <http://www.mosnews.com/mn-files/khodorkovsky.shtml>; see also *Mikhail Khodorkovsky*, BUSINESS REFERENCE: INTERNATIONAL DIRECTORY OF BUSINESS BIOGRAPHIES, <http://www.referenceforbusiness.com/biography/F-L/Khodorkovsky-Mikhail-1963.html> (last visited Dec. 27, 2005).

² Due to the popular belief that the trial was fake and the judges were not impartial, the media and Mr. Khodorkovsky’s attorneys often refer to the trial as a “show case,” rather than a legal case. See *A Soviet Show Trial*, TIMES (London), June 1, 2005, at 17, available at <http://www.timesonline.co.uk/article/0,,542-1635952,00.html> (last visited Jan. 10, 2006); see also *Interview with Robert Amsterdam, International Defense Counsel for Khodorkovsky*, NOVAYA GAZ. [NEW NEWSPAPER], July 14, 2005, available at <http://www.mbktrial.com/qanda/20050714.cfm> (last visited Jan. 10, 2006).

³ See Lawyers’ Statements, Updates for the Press from the Defense Lawyers on the Statements Presented on the Case, June 10, 2005, <http://www.mbktrial.com/qanda/gen-statements.cfm> (last visited Jan. 10, 2006); see also Deutsche Welle, *Russia’s Wealthiest Man Goes on Trial*, June 16, 2004, <http://www.dw-world.de/dw/article/0,2144,123793,00.html> (last visited Jan. 10, 2006).

⁴ In fact, the arrest of Mr. Khodorkovsky has attracted wider attention from the foreign media and scholars, rather than Russian media and scholars. This is not surprising, however, because the Russian media, which is mostly government-controlled and manipulated, has portrayed Mr. Khodorkovsky as guilty. Nevertheless, 22 percent of the Russian population in Russia considered the Khodorkovsky trial as the most important event of the year. Foreign scholars and commentators, however, find the Khodorkovsky case to be one of the strongest indicators of the suppression of democracy. See generally <http://www>.

not surprising, given that Mr. Khodorkovsky is the founder of the Yukos Oil Company, formerly one of the world's largest privately held oil companies.⁵ Prior to the trial, Mr. Khodorkovsky was the world's sixteenth wealthiest man,⁶ and was counted among Russia's richest and most powerful businessmen.⁷ Since October 2003 he has been guarded at Correctional Facility #10 in Krasnokamensk and in December 2006 was transferred to Chita.⁸ Until February

khodorkovsky.ru (last visited Jan. 28, 2006); see also Peter Clayman, *Summary and Analysis of Report on Criminal Case #18/41-03*, Dec. 10, 2003, http://www.cdi.org/russia/johnson/jrl_yukos_lega.cfm (last visited Dec. 25, 2006) (indicating that there were many comments discussing the justice of the prosecution of Khodorkovsky, particularly in the West); *Mikhail Khodorkovsky*, MOSNEWS.COM, *supra* note 1 (indicating that the arrest of Mr. Khodorkovsky has attracted attention from various public figures and human rights groups, both Russian and Western, criticizing it as politically motivated); Press Center Mikhail Khodorkovsky, <http://www.mbktrial.com/opinion/> (last visited Jan. 11, 2006) (providing the feedback about the trial from international scholars, journalists, European Organizations and U.S. Government).

⁵ Yukos Oil Company, headquartered in Moscow, Russia, under the leadership of Mr. Khodorkovsky, was one of the world's largest private oil companies based on reserves and market capitalization. It owned five principal oil refineries in Russia, ran eighteen distribution companies and more than 1,200 filling stations, and employed approximately 100,000 people. Following Mikhail Khodorkovsky's recent arrest, Simon Kukes replaced him as head of the company. Currently Yukos is the subject of severe government and judicial scrutiny. In April 2003, Mikhail Khodorkovsky announced that Yukos would merge with Sibneft Oil Company, but Sibneft cancelled the proposed merger after his arrest and the Russian government eventually froze Yukos' shares. See *Yukos Oil and Gas Company*, Dec. 27, 2005, MOSNEWS.COM, <http://www.mosnews.com/mn-files/yukos.shtml#news>. See also American Morning, *U.S. Citizen of Russian Birth Set to Become Head of Russia's Biggest Company*, CNN.COM, Nov. 4, 2003, transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0311/04/lm.18.html> (last visited Jan. 10, 2006) (indicating that Yukos was the largest oil company in Russia, and the fourth or fifth largest in the world).

⁶ *Who's Who? Khodorkovsky, Mikhail Borisovich*, RUSSIA PROFILE, <http://www.russiaprofile.org/resources/whoiswho/alphabet/K/khodorkovsky.wbp> (last updated Sept. 26, 2005) (describing the biography of Mikhail Khodorkovsky, and indicating that in 2004 Forbes Magazine listed Mikhail Khodorkovsky as the sixteenth wealthiest man in the world, with an estimated worth of over fifteen billion USD). Some question the ethics of Mr. Khodorkovsky, because he made a huge fortune following the Soviet Union's collapse by acquiring state property at low prices. See Kevin Alfred Strom, *Jewish Oligarch Mikhail Khodorkovsky Arrested by Russians*, NAT'L VANGUARD, Oct. 25, 2003, available at <http://www.nationalvanguard.org/story.php?id=907> (last visited Dec. 27, 2005). In 2005, Mr. Khodorkovsky's net worth plummeted to two billion USD. See C.J. Chivers and Erin Arvedlund, *Russia Tycoon Given 9 Years On Tax Charge*, N.Y. TIMES, June 1, 2005, at A1.

⁷ See *BBC's Damian Grammaticas in Moscow*, BBC NEWS, <http://news.bbc.co.uk/1/hi/business/3259331.stm> (last visited Mar. 18, 2006).

⁸ See *A Step at a Time, Khodorkovsky to Face New Fabricated Charges*, Dec. 23, 2006, <http://halldor2.blogspot.com/search/label/Khodorkovsky> (last visited Jan. 31, 2007) ("Mikhail Khodorkovsky was transferred from his penal colony to a detention center in Chita on December 20 in advance of the announcement of new charges against him and

2009,⁹ contrary to the typical location of imprisonment, Mr. Khodorkovsky will be even further away from Moscow than most other prisoners; there was no space available for him closer to his family.¹⁰ While a transition from being a very influential businessman to a prisoner may seem shocking in and of itself, Mr. Khodorkovsky is not shocked¹¹ but rather is concerned that his conviction was fraudulently manipulated by a group of bureaucrats aiming to steal Yukos away from him.¹²

former business associate Platon Lebedev.”). Krasnokamensk is a “vast empty region of subarctic forest and plains near the Chinese border, known mainly for its large bear population. Krasnokamensk is closer to Alaska than to Moscow, and even for nonprisoners to get there takes a six-hour flight and an eight-hour drive over bone-jarring roads.” Alan Cullison, *Off to the Gulag: A Day in the Life of a Russian Tycoon*, WALL ST. J., Nov. 30, 2005, at A1. After living his life in a mansion outside of Moscow for the past two years, the former business oligarch is getting used to a completely different lifestyle.

⁹ Originally Mr. Khodorkovsky was sentenced to nine years in jail, but the Moscow City Court in October 2005 reduced the prison time to eight years, making the anticipated release date in 2011; however, lawyers believe that with good behavior he can be released in 2009. Press Center, *Mikhail Khodorkovsky, Selected Media Coverage, Week of Oct. 24–30, 2005*, <http://www.mbktrial.com/media/20051024-10230.cfm>. See Russian News and Information Agency Novosti, *Khodorkovsky to Appeal to Presidium of Moscow City Court*, Oct. 4, 2005, <http://en.rian.ru/business/20051004/41597838.html>. Some believe that Mr. Khodorkovsky, as a political prisoner, will never be free again. See, e.g., Interview by Echo Peterburga with Valeriy Panyushkin, *JOURNALIST*, Jan. 27, 2006, <http://www.khodorkovsky.ru/society/comments/4604.html>.

¹⁰ Cullison, *supra* note 8 (discussing Mr. Khodorkovsky’s life in prison; also indicating that Russian law requires that Mr. Khodorkovsky be sent to a prison closer to his family in European Russia, but that prison officials claimed there were no free beds available. “Mr. Khodorkovsky thanked the government . . . for sending him to the ‘land of Decembrists, political convicts and uranium mines.’”). According to Ugolovnyi Kodeks RF [UK] [Criminal Code] art. 73 (Russ.), Russian prisoners must be imprisoned in the area where they live or where they are charged, except for special circumstances. See Kseniya Solyanskaya, *Senat Protiv Krasnokamenska* [*Senate against Krasnokamensk*], *GAZETA.RU*, Nov. 22, 2005, available at http://www.gazeta.ru/print/2005/11/22/oa_178711.shtml (last visited Dec. 27, 2005) (translated by the author).

¹¹ “I definitely was quite shocked. But that was the result not of the arrest per se (I was warned about my impending arrest by well-informed people), but rather by the circumstances. It was cold early Saturday morning, Novosibirsk, at the airport, [I was] captured right in the plane.” Interview by A. Prokhanov with Mikhail Khodorkovsky, Sept. 9, 2005, http://www.mbktrial.com/about/mbk_9_9_2005.cfm (last visited Feb. 26, 2006). See also *Mikhail Khodorkovsky*, *MOSNEWS.COM*, *supra* note 1 (“On October 25, 2003, Mikhail Khodorkovsky was arrested by masked FSB operatives, who stormed his private jet as it was waiting to be refueled near the city of Novosibirsk en route to a remote Yukos production centre in East Siberia.”).

¹² See Interview by A. Prokhanov with Mikhail Khodorkovsky (Sept. 12, 2005), available at <http://khodorkovsky.ru/speech/3394.html> (last visited Dec. 27, 2005) (Mr. Khodorkovsky said: “I am sure they arrested me not because of politics, but to take away Yukos.” Mr. Khodorkovsky claims that if he were not helping various groups in opposing President Putin, he would still have been arrested under a different pretext.) (translated by

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Many commentators agree that Mr. Khodorkovsky has been selectively prosecuted for his political ambitions.¹³ Selective prosecution is a significant problem in Russia today: many oligarchs have violated laws, but only select individuals are subject to prosecution.¹⁴ In comparison, not every criminal in the United States is prosecuted, but if individuals are selected based on an unjustifiable standard, it is a constitutional violation.

the author). *See also* Mikhail Khodorkovsky, Address to the Court during Khodorkovsky Trial (Sept. 22, 2005), available at <http://khodorkovsky.ru/speech/3548.html> (last visited Dec. 27, 2005) (Mr. Khodorkovsky said he was convicted not by the court, but by a group of bureaucrats.) (translated by the author); *British Court Bars Extradition of Former Yukos Executive*, THE STAR, Dec. 25, 2005, available at <http://biz.thestar.com.my/news/story.asp?file=/2002/12/25/business/20051225121901&sec=business> (last visited Jan. 10, 2006) (indicating that Mr. Teremenko, a member of the board of directors of Yukos, said that in his opinion the Russian government had attempted to steal Yukos assets and remove Mr. Khodorkovsky as a political threat to President Putin); Transcript of the International Press Conference held by Leonid Nevzlin, Israel, 4, May 31, 2005 [hereinafter Nevzlin Transcript], http://www.supportmbk.com/pdfs/Nevzlin_PressConf_053105%20_2.pdf (last visited Jan. 10, 2006) (Mr. Nevzlin indicated that in his opinion President Putin was trying to steal Yukos).

¹³ Editorial, *Putin's Trials*, JERUSALEM POST, June 2, 2005, available at http://www.ncsj.org/AuxPages/053105NYTimes_Khod.shtml#JP1 (last visited Dec. 27, 2005) (discussing that Natan Sharansky saw Mr. Khodorkovsky's prosecution as selective punishment for political reasons, and the threat of rising anti-Semitism in Russia together with this trial creates a concern for all Russian Jewry); *see also* Stephen F. Williams, Senior Circuit Judge, U.S. Court of Appeals for the D.C. Circuit, Remarks at the American Enterprise Institute for Public Policy Research Conference: The Khodorkovsky Trial (June 30, 2004), <http://www.aei.org/events/filter.,eventID.852/summary.asp> (last visited Dec. 29, 2005) (indicating that selective prosecution is one of the primary legal issues in the Khodorkovsky trial. German Gref, Russia's minister of trade and economic development, has admitted that the prosecution of Khodorkovsky was selective); Nevzlin Transcript, *supra* note 12 (Mr. Nevzlin indicated that Mr. Khodorkovsky's charges were fabricated for political reasons, to destroy political opposition and the financial support of the political opposition in Russia.).

¹⁴ Interview with Congressman Tom Lantos, U.S. Congressman, *Deep and Fundamental Differences*, available at <http://www.thepolitic.org/media/paper457/news/2005/11/14/Features/Deep-And.Fundamental.Differences-1048297.shtml> (last visited Nov. 14, 2005) (Congressman Lantos states that "[a]ll of the oligarchs probably violated many laws, particularly since laws during the early 90's were conflicting and internally inconsistent, and thus by definition an individual could not function in the business spheres without violating laws.").

[T]he decision to prosecute Khodorkovsky appeared to single him out for political reasons—the majority of Russia's businesspeople violated legislation in establishing their wealth, but Khodorkovsky was increasingly active politically. Coincidentally, Khodorkovsky was also on the verge of selling a large stake in his firm to a foreign oil company, presumably putting a valuable strategic resource somewhat beyond Kremlin control and thereby triggering high-level displeasure.

FREEDOM HOUSE, COUNTRY REPORT, RUSSIA 2004, <http://www.freedomhouse.org/template.cfm?page=47&nit=342&year=2004&display=law> (last visited Mar. 9, 2006).

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The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.¹⁵

International commentators suggest that the violators in Russia are deliberately selected based on an unjustifiable standard.¹⁶

Even though the Constitution of the Russian Federation guarantees equality to all people before the law,¹⁷ there is a belief that the Russian government has repeatedly targeted its perceived opponents for criminal investigation.¹⁸ Nevertheless, selective prosecution¹⁹ is not an established legal defense in Russia, and it is virtually impossible to prove in a Russian court of law.²⁰ Commen-

¹⁵ *Potter v. Murray City*, 760 F.2d 1065, 1071 (10th Cir. 1985).

¹⁶ See Letter from Lotte Leicht, Brussels Director Human Rights Watch, to General Affairs Council, *Russia: E.U. Policy Should Address Human Rights* (Mar. 19, 2004), available at <http://hrw.org/english/docs/2004/04/13/russia8427.htm> (last visited Nov. 12, 2005).

¹⁷ Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 19, translation available at <http://www.russianembassy.org/Russia/constit/> (last visited Jan. 3, 2006). See also Robert Amsterdam & Charles Krause, *A White Paper Prepared by Defense Lawyers on Behalf of Mikhail Khodorkovsky, Platon Lebedev, Alexei Pichugin, Constitutional and Due Process Violations in the Khodorkovsky/Yukos Case 4*, available at http://www.khodorkovskytrial.com/pdfs/yukos_white_paper.pdf (last visited Jan. 6, 2006).

The Constitution contains a charter of rights that rivals that of any Western democracy. In fact, the Constitution goes beyond the U.S. Bill of Rights. It makes internationally recognized norms for the protection of human rights part of Russian domestic law and gives these international norms priority over domestic law.

Id.

¹⁸ Letter from Lotte Leicht, *supra* note 16. Lotte Leicht refers to the prosecutions of Berezovsky, Gusinsky and Khodorkovsky. R

In each of these cases, the timing of the investigation appeared linked to the Kremlin's political agenda, even though the alleged crimes in most cases had been committed years ago and could have been investigated much earlier. Also, these prosecutions singled out a select group of individuals, while others who engaged in activities similar to this group, but who did not stand in the way of the Kremlin's political agenda, were not targeted.

Id.

¹⁹ "The practice or an instance of a criminal prosecution brought at the discretion of a prosecutor rather than as a matter of course in the normal functioning of the prosecuting authority's office. Selective prosecution violates the Equal Protection Clause if a defendant is singled out when others similarly situated have not been prosecuted and the prosecutor's reasons for the disparate treatment are impermissible." BLACK'S LAW DICTIONARY 631 (2d Pocket ed. 2001). "[A] defendant who advances a claim of selective prosecution must do so in pretrial proceedings." *United States v. Sun Myung Moon*, 718 F.2d 1210, 1229 (2d Cir. 1983).

²⁰ See *infra* note 153. Moreover, there is a belief that selective prosecution will appear more frequently in the Russian courts. Igor Semenov, *Noviye Izvestiya [New News]*, Nov. 15, 2006, <http://www.khodorkovsky.ru/media/5973.html> (last visited Nov. 21, 2006). R

tators indicate that the Putin regime engaged in selective prosecution of Mr. Khodorkovsky due to concern surrounding his political ambitions and activism.²¹ Prior to his arrest, Mr. Khodorkovsky was an extremely influential supporter of opposing parties, and many believed that he planned to run for the presidency in 2008.²² To that end, it is worth noting that Mr. Khodorkovsky had acquired the rights to publish the *Moskovskiy Novosti* newspaper and hired journalists that were highly critical of President Putin.²³ Additionally, Mr. Khodorkovsky contributed money to almost all political parties, including the communists and liberal-democratic groups.²⁴

²¹ See *Profile: Mikhail Khodorkovsky*, BBC NEWS, June 16, 2004, <http://news.bbc.co.uk/2/hi/business/3213505.stm> (discussing that Khodorkovsky's arrest came as a punishment for his political activism); see also Arik Elman, *Is Russia on the Brink of an Anti-Semitic Wave*, JERUSALEM POST, July 29, 2003, available at <http://www.cdi.org/russia/johnson/7271-14.cfm> (last visited Dec. 27, 2005) (discussing that Mr. Khodorkovsky declared his support for various opposition groups, and engaged in oil dealings with the United States, and that Mr. Khodorkovsky threatened the stability of current Russian government. "[The] Kremlin is determined to enforce conformism on the biggest economic and political players: the oligarchs.").

²² See *Mikhail Khodorkovsky, Russia's \$11 bln Oligarch*, GAZETA.RU, Oct. 25, 2003, http://www.gateway2russia.com/st/art_159311.php (last visited Jan. 10, 2006).

²³ Anna Dolgov, *Do Papers Take After Their Owners?*, MOSCOW TIMES, Nov. 14, 2003, available at <http://www.cdi.org/russia/johnson/7419-12.cfm> (last visited Jan. 28, 2006).

The weekly *Moskovskiy Novosti* was acquired by Khodorkovsky through his Open Russia charity foundation in September. The newspaper, which seems to have gained some depth under its new ownership and new editor Yevgeny Kiselyov, has a core readership of liberal intellectuals, many of whom may already be critical of Putin's more authoritarian tendencies.

Id.

²⁴ Some of these communist and liberal-democratic groups include the Union of Right Forces and Yabloko. See Interview with Tom Lantos, *supra* note 14; see also *Interview with Mikhail Khodorkovsky: Money, Power and Politics*, FRONTLINE WORLD, Oct. 23, 2003, <http://www.pbs.org/frontlineworld/stories/moscow/khodorkovskyinterview.html> (last visited Dec. 27, 2005) (indicating that Mr. Khodorkovsky is involved in lobbying for the interests of the company at the State Duma [Parliament], but is not personally involved in the political process. He merely provided financial support to people with similar views.). See also Interview by A. Prokhanov with Mikhail Khodorkovsky, *supra* note 12 (Mr. Khodorkovsky espouses that it is almost impossible to be simultaneously a businessman and participate in politics, because businessmen should stand for their property and not their beliefs.) (translated by the author).

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Anti-Semitism²⁵ may have also played a role in Mikhail Khodorkovsky's arrest.²⁶ With anti-Semitism becoming an increasingly more open tendency in Russia, it is not surprising that almost all those targeted by Putin's regime have been Jewish.²⁷ Similar victims of selective prosecution, such as Vladimir Gusinsky²⁸ and Boris Berezovsky,²⁹ have charges levied against them and currently

²⁵ Anti-Semitism is "hostility toward or discrimination against Jews as a religious or racial group." *Anti-Semitism*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/eb/article-9007807?query=anti-semitism&ct=> (last visited Mar. 18, 2006). Even though state sponsored anti-Semitism no longer exists in Russia, there is a large number of anti-Semitic groups, and various hate incidents such as bombs attached to anti-Semitic signs, stabbings and other acts of violence continuously occur. See RUSSIA, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004 (Feb. 28, 2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41704.htm> (last visited Jan. 3, 2006).

²⁶ S.A. Greene, *Kremlin Targets Jewish Tycoons in War on Critics*, RENSE.COM, Nov. 2, 2003, <http://www.rense.com/general44/won.htm> (last visited Dec. 27, 2005) (discussing the arrest of Mr. Khodorkovsky and other Jewish oligarchs, Mr. Berezovsky and Mr. Gusinsky, as representative of an old wave of anti-Semitism that never died). Some view anti-Semitism as a distant third in the government's hierarchy of motives. See Sam Ser, *Bad for Everyone, Not Just the Jews: Khodorkovsky Case Shows Democracy, Free Market are the True Victims of Putin's Reign*, THE JERUSALEM POST, June 2, 2005, at 5. Khodorkovsky has a Jewish father and a non-Jewish mother. Before his arrest he mentioned privately to Jewish leaders that he did not consider himself Jewish and never contributed to Jewish causes. However, Jewish communities agree that regardless of what Khodorkovsky himself felt about his Jewish faith, any anti-Semite would readily view him today as a Jew. See Lev Krichevsky, *Sentencing of Russian Jewish Tycoon Seen as a Way to Keep Putin in Power*, JTA, June 1, 2005, available at http://www.ncsj.org/AuxPages/053105NYTimes_Khod.shtml#JP1 (last visited Dec. 27, 2005).

²⁷ Ser, *supra* note 26, at 5.

²⁸ Vladimir Aleksandrovich Gusinsky was born into a Jewish family in Moscow in 1952. He was the first Russian businessman to recognize the political and financial benefits of the mass media. He controlled various TV and radio stations, newspapers and magazines known for their critical stance toward Kremlin policies. In 2001 he lost control of his media empire and left the country for exile in Spain. The Russian government demanded his extradition, but the Spanish courts refused. *Vladimir Gusinsky*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/eb/article-9384026> (last visited Dec. 28, 2005). Spain's national court viewed the charges brought against Mr. Gusinsky as pretextual. "The Russians charge that Mr. Gusinsky somehow committed fraud by misstating the value of his holdings when using them as collateral for a loan; even if that were true, the problem was resolved months ago when Mr. Gusinsky turned over additional assets to cover the loan." *Spain on Trial*, WASH. POST, Mar. 18, 2001, at B6.

²⁹ Boris Abramovich Berezovsky was born in Moscow in 1946. After receiving his Ph.D. from the Institute of Control Sciences, he started selling and importing computer software, then cars. Mr. Berezovsky started acquiring his wealth from state auto manufacturer Avtovaz. Later, he took over the management of the Russian airline Aeroflot, the oil company Sibneft, much of Russia's aluminum industry, and ORT, the state's largest and most influential television network. Former President Yeltsin appointed Mr. Berezovsky as a deputy secretary of the National Security Council, then secretary of the Organization for Coordinating the Commonwealth of Independent States. In 1999, Mr. Berezovsky won a seat in the State Duma (the lower chamber of the Russian parliament), but six months

reside in Spain and London respectfully, unable to return to Russia without facing prosecution.³⁰ Mr. Khodorkovsky believes that he too could have avoided Russian incarceration through foreign exile,³¹ but instead opted to become a political symbol, a man pleading his innocence in a Russian court, rather than a cliché millionaire avoiding the clutches of his homeland.³²

This note will not attempt to determine whether Mr. Khodorkovsky has in fact been selectively prosecuted, but will rather analyze and determine the need for establishing “selective prosecution” as a legal defense in Russia. Part II of this note will discuss the case of Mikhail Khodorkovsky as a representative example of a possible politically-motivated case involving selective prosecution. Part III of this note will discuss the development of selective prosecution as a procedural defense, including the importance of such defense as well as the standard one must meet to prove selective prosecution in the United States. Part IV of this note will discuss the foundation for creating a legal defense in Russia for selective prosecution. This will touch on various white collar crimes in Russia that are particularly suited to such a defense. Part V will discuss the importance of selective prosecution in Russia as compared to the United States and other civilized societies. The conclusion provides a recommendation for the Russian legal system to adopt a legal standard which affords victims a defense against the use of selective prosecution, not only to improve the

later, when President Putin came to power, Mr. Berezovsky resigned and soon fled Russia. The Russian Prosecutor General has numerous charges pending against him. A London Court granted Mr. Berezovsky political asylum, protecting him from extradition. *See Boris Berezovsky, Russia's Fallen Oligarch*, FRONTLINE WORLD, Oct. 2003, <http://www.pbs.org/frontlineworld/stories/moscow/berezovsky.html> (last visited Mar. 18, 2006).

³⁰ Even though all three of these oligarchs are Jewish, all of them also supported anti-Putin opposition movements. Thus, it ultimately remains unclear as to whether the attacks on them were politically motivated or induced by religious discrimination. *See Ser, supra* note 26. Mr. Gusinsky's TV station, NTV, reported critically on the war in Chechnya. *Spain on Trial, supra* note 28.

³¹ *See* Interview by A. Prokhanov with Mikhail Khodorkovsky, *supra* note 12 (Mr. Khodorkovsky indicates that he could have easily left Russia, sold Yukos in 2001, and moved to the United States as a billionaire.) (translated by the author).

³² *See id.* (Mr. Khodorkovsky indicates that instead of escaping Russia he chose a more interesting role as a Russian politician). Maybe in reality he did not believe that he would actually be prosecuted because of his wealth and status in Russia, but rather, that the Western world would support him. *See also Strana Prestupila Chertu, za Kotoroi Okazalos' Vosmozhno Vsyo [The Country has Stepped over the Line, After which Everything Becomes Possible]*, GAZETA.RU, Oct. 26, 2006, <http://www.khodorkovsky.ru/media/5898.html> (discussing that Mr. Khodorkovsky is in jail because he did not make agreements with the government the way hundreds of others did).

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Russian citizens' faith in their nation's judicial system, but also to enhance Russia's prospects for successful democratization.

II. MIKHAIL KHODORKOVSKY'S TRIAL AS A POSSIBLE EXAMPLE OF "SELECTIVE PROSECUTION"

A. Charges

Mikhail Khodorkovsky has been charged with violating Criminal Code of the Russian Federation including:³³ grand theft property by an organized criminal group,³⁴ malicious non-compliance with a court ruling by representatives of a commercial organization,³⁵ damage to assets caused by fraud committed by an organized criminal group,³⁶ multiple counts for conspiracy to evade corporate tax obligations by an organized group,³⁷ evasion of personal tax and social security obligations by an individual,³⁸ multiple counts of forgery of official documents,³⁹ and embezzlement of property.⁴⁰ Additionally, Platon Lebedev⁴¹ was arrested in July

³³ Bill of Indictment, available at <http://www.mbktrial.com/about/billofindictmnet.cfm> (last visited Dec. 27, 2005); see also List of Charges against Mikhail Khodorkovsky, PRAVDA.RU, May 17, 2005, <http://newsfromrussia.com/main/2005/05/17/59814.html> (last visited Dec. 27, 2005) (listing the charges and the corresponding sections of Criminal Code of Russian Federation). In February 2007 new charges have been filed against Khodorkovsky for embezzlement by misappropriation and legalization laundering of financial assets. Yuri Schmidt, attorney for Khodorkovsky believes that "these charges to be not just absurd, but even insane" There are references to "crazy amounts of money, amounts it would have been simply impossible to steal, launder or hide from accounts." *New Charges Brought Against Khodorkovsky and Lebedev*, Feb. 5, 2007, http://www.khodorkovsky.info/khodorkovsky_in_colony?134792.html (last visited March 6, 2007).

³⁴ Bill of Indictment, *supra* note 33; see also Court Decision of the Meschansky District Court of the City of Moscow in the Case of Mr. Khodorkovsky, May 16, 2005, [hereinafter Meschansky Court Decision], available at <http://www.khodorkovsky.ru/trial/files/3812.html> (last visited Feb. 11, 2006).

³⁵ Bill of Indictment, *supra* note 33; see also Meschansky Court Decision, *supra* note 34.

³⁶ Bill of Indictment, *supra* note 33; see also Meschansky Court Decision, *supra* note 34.

³⁷ Bill of Indictment, *supra* note 33; see also Meschansky Court Decision, *supra* note 34. There is a three-year limitation on back tax claims, but the court may pursue claims "indefinitely if they can prove 'obstruction' on the part of the taxpayer." See Alex Fak, *Uncertainty Lingers Despite Tax Ruling*, MOSCOW TIMES, July 18, 2005, available at <http://www.cdi.org/russia/johnson/9204-10.cfm> (last visited Dec. 29, 2005).

³⁸ Bill of Indictment, *supra* note 33; see also Meschansky Court Decision, *supra* note 34.

³⁹ Bill of Indictment, *supra* note 33; see also Meschansky Court Decision, *supra* note 34.

⁴⁰ Bill of Indictment, *supra* note 33; see also Meschansky Court Decision, *supra* note 34.

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2003 and his charges included assisting Mikhail Khodorkovsky with illegal privatization of Apatit.⁴²

B. *Possible Reasons for Arrest*

After acquiring Yukos, Mr. Khodorkovsky tried to distinguish his company from other Russian businesses, not only by forming a global empire,⁴³ but also by introducing “unprecedented transparency.”⁴⁴ However, his open criticism of President Putin may have actually diminished Yukos’ transparency and triggered his prosecution.⁴⁵ In October 2003, a few days prior to his arrest, Mr. Khodorkovsky indicated that the Russian government had

⁴¹ Platon Lebedev is a former director of Group Menatep, the controlling shareholder of YUKOS Oil Company. On July 2, 2003, Mr. Lebedev was arrested on charges of fraud and tax evasion. He was found guilty and is currently serving an eight-year sentence in a maximum security prison in the Polar Ural region of Siberia. Mr. Lebedev has two illnesses which should have precluded him from serving his sentence under harsh weather conditions. See Platon Lebedev Press Center, <http://www.lebedevtrial.com/about/index.cfm> (last visited Mar. 18, 2006). The Senate of the United States wrote a letter to President Putin asking him to acknowledge and respect democratic standards and human rights by changing the location of imprisonment for both Mr. Lebedev and Mr. Khodorkovsky pursuant to Ugolovnyi Kodeks RF [UK] [Criminal Code] art.73 (Russ.). Moreover, the Senate claimed that neither Mr. Lebedev nor Mr. Khodorkovsky were granted a fair trial and that their charges were politically motivated. See Kseniya Solyanskaya, *supra* note 10.

⁴² Apatit is a former state-owned company, 20 percent of which Mr. Khodorkovsky purchased in 1994 for 225,000 USD. The total price of the company at the time was 1.4 billion dollars. See Lucy Komisar, *Yukos Kingpin on Trial*, Mar. 10, 2005, <http://www.corpwatch.org/article.php?id=12236> (last visited Mar. 18, 2006).

⁴³ If Yukos would have merged with Sibneft Oil Company, the plans for which were announced by Mikhail Khodorkovsky in April 2003, the merged company would have become the world’s second-largest oil and gas company. However, after the Khodorkovsky’s arrest, Sibneft announced that the merger had been cancelled. See *Mikhail Khodorkovsky*, MOSNEWS.COM, *supra* note 1.

⁴⁴ *Id.*

Aiming at building a global business and in need of foreign investment, Khodorkovsky introduced unprecedented transparency in Yukos, hiring many executives from large Western oil companies and appointing internationally-respected figures to the board of directors. Yukos accounts were published following international GAAP standards, its taxes paid in accordance with the law, its dividends issued accurately, and the identity of its shareholders revealed.

Id.

⁴⁵ See *id.*

In 2001 Mikhail Khodorkovsky and a group of other Yukos shareholders established the Open Russia Foundation, which sponsored and implemented a wide range of social and educational programs largely aimed at promoting democratic reforms in Russia. In his public statements, Khodorkovsky proved to be an open critic of President Putin’s policy of “managed democracy”. . . .

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launched an attack on the staff and shareholders of Yukos, because Yukos, as a privately-owned company, was highly influential and could utilize its resources to support political powers other than President Putin.⁴⁶

On October 25, 2003, Mikhail Khodorkovsky was arrested on his private plane by masked operatives of the Russian Federal Security Service of the Russia Federation. Upon returning to Moscow, Mr. Khodorkovsky was charged with tax fraud and evasion, and placed in detention contrary to Russian law; numerous requests for bail were denied.⁴⁷ Many constitutional and human rights violations allegedly occurred during the Khodorkovsky trial,⁴⁸ including a six month pre-trial detention without a reasoned court ruling⁴⁹ and violations of judicial independence.⁵⁰

Id. See also David Shucosky, *Khodorkovsky to Appeal Conviction to European Rights Court, Lawyers Told to Leave Russia*, Sept. 23, 2005, <http://jurist.law.pitt.edu/paperchase/2005/09/khodorkovsky-to-appeal-conviction-to.php> (last visited Jan. 5, 2006) (indicating that Mr. Amsterdam, a Canadian lawyer for Mikhail Khodorkovsky, argued that “the government engineered the case to punish Khodorkovsky for his political ambitions.”).

⁴⁶ See Interview by Sabrina Tavernise with Mikhail Khodorkovsky, Moscow (Oct. 2003), <http://www.pbs.org/frontlineworld/stories/moscow/khodorkovskyinterview.html> (last visited Jan. 28, 2006).

⁴⁷ *Mikhail Khodorkovsky*, MOSNEWS.COM, *supra* note 1. “[W]hite-collar crime of the kind Mr. Khodorkovsky is accused of does not legally entail pre-trial imprisonment, that is precisely the indignity that the billionaire has had to endure since he was arrested at gunpoint on an icy Siberian runway . . .” *Id.* See also Andrew Osborn, *Two Trials, One Issue: The Face of Modern Russia*, http://www.sakharov-center.ru/exhibitionhall/religion.files/hall_exhibitions_religion_gifru5.htm (last visited Jan. 28, 2006).

⁴⁸ See Political Persecution of Mikhail B. Khodorkovsky, http://www.supportmbk.com/documents/human_rights.cfm (last visited Jan. 28, 2006); see also Appeal to Amnesty International, http://www.sovest.org/gb/appeal_to_MA_220205_gb.htm (last visited Feb. 11, 2006).

⁴⁹ Parliamentary Assembly of the Council of EU, Res. 1418, *The Circumstances Surrounding the Arrest and Prosecution of Leading Yukos Executives*, Jan. 25, 2005, available at http://assembly.coe.int/Documents/AdoptedText/ta05/ERES1418.htm#_ftn1 (last visited Feb. 11, 2006).

Mr Khodorkovsky’s conduct showed that there was no risk of absconding or of interfering with evidence. After the completion of the pre-trial investigation, Mr Khodorkovsky . . . [was] kept in custody, which raises additional issues in light of the judgments of the European Court of Human Rights in the cases of *Kalashnikov v. Russia* and *Letellier v. France*. Also, following a recent legislative reform, persons accused of non-violent “economic crimes”, such as those allegedly committed by Mr. Khodorkovsky, are generally not placed in pre-trial detention.

Id.

⁵⁰ K.A. Moskalenko, *Cassational Appeal to the Judicial Board for Criminal Cases of the Moscow City Court*, Jun. 10, 2005, http://mbktrial.com/pdfs/MBK_appeal_Moskalenko_10Jun2005_eng.pdf (last visited Jan. 28, 2006).

C. Defense in Mr. Khodorkovsky's Trial—Not Guilty

Mr. Khodorkovsky's attorneys did not argue in court that "everybody was doing it," nor did they focus on making a showing of selective prosecution.⁵¹ Instead, the defense focused on the substantive aspects of the claims, trying to prove that Mr. Khodorkovsky was not guilty. A critical point for the defense was the fact that the tax schemes in which Mr. Khodorkovsky was engaged were carried out with the knowledge of the tax authorities, and this would usually constitute a valid defense against such tax evasion charges.⁵²

The judges of this court have on numerous occasions delivered unreasoned decisions to extend Khodorkovsky detention, thereby predetermining the future conviction. . . . During the whole trial, there was a massive attack on M.B. Khodorkovsky in the mass media using TV films containing categorical statements and conclusions about Khodorkovsky's guilt and implications that he had committed even more grave offences. An image of an enemy having robbed the whole nation was created in the heads of all the Russian people (TV is the most popular mass media in Russia). Higher officials and representatives of the Procuracy general took the liberty of making categorical statements about Khodorkovsky's guilt During the whole legal proceedings in this case, starting from the preliminary investigation, the defendant's right to defense was constantly violated The defendants were not provided with the necessary conditions to prepare their defense Since Khodorkovsky was behind the bars in the court room and the hearings were carried out on daily basis, he was deprived of the possibility to have confidential contact with the defense."

Id. Also, Article 18 of the European Convention was violated "by the political motivation of the case and the intervention of the executive power and the Head of the country himself in the law enforcement." *Id.*

Senior District Judge Workman, London, indicated that Mr. Khodorkovsky's case was "so politically motivated that there is a substantial risk that the judges of the Moscow City Court would succumb to political interference in a way which would call into question their independence." *English Court Rules that President Putin Orchestrated Yukos Prosecutions*, <http://www.corkerbinning.co.uk/documents/Clickhere.pdf> (last visited Mar. 9, 2006). See also Leon Aron, *Where is Russia Headed*, USA TODAY.COM, May 8, 2005 (indicating that the "Kremlin sent a chilling message to political opponents and to free markets: It blatantly violated judicial independence and legal procedures.").

⁵¹ See Interview with Robert Amsterdam, *infra* note 153 (indicating that the defense team did not focus on arguing selective prosecution, but rather focused on arguing the substantive claims, because arguing in the alternative is not as widely accepted in Russia as it is in the Western nations). **R**

⁵² Clayman, *supra* note 4. Clayman notes that in the United States, the reliance on outside tax advice and successful review by auditors may be raised as a valid defense against charges of criminal tax evasions. Even though reliance on advice has yet to be tested in Russia as a defense against criminal tax evasion charges, the fact that the tax authorities knew of the tax schemes could be offered as a valid defense, if no corruption was involved. *Id.* **R**

Mr. Khodorkovsky's attorneys demonstrated that the prosecution had brought charges against him under the revised versions of the federal law, thus criminalizing acts not previously considered illegal.⁵³ Moreover, in arguing for Khodorkovsky's acquittal, his attorneys pointed to evidentiary materials showing that Mr. Khodorkovsky had in fact paid his taxes in "good faith,"⁵⁴ and highlighted the vagueness and inconsistencies in the charges brought.⁵⁵

D. Selective Prosecution Defense

The attorneys of Mr. Khodorkovsky had a basis for bringing the selective prosecution claim. They could have argued that other individuals were engaged in similar tax transactions and privatizations and yet were not prosecuted, suggesting that Mr. Khodorkovsky was chosen simply because of his political endeavors.⁵⁶ The attorneys could have also argued that Mr. Khodorkovsky was chosen in violation of his constitutional rights. Article 19 of the Rus-

⁵³ See Attorney Yuri Schmidt, Address in Defense of M. Khodorkovsky (Apr. 7, 2005), available at <http://www.khodorkovsky.ru/trial/advocacy/petitiones/2207.html> (last visited Jan. 6, 2006) (explaining that the 2003 version of the Article 198 of the RF Criminal Code creates criminal liability "not only if deliberately distorted information about revenues and expenditures has been reported in a statement, but also if false data has been deliberately in the statement or in other documents required to be submitted to the tax body."). Under the 1998 version of the law, reporting false data about the activities, rather than about the amount of income was not considered criminal. *Id.*

⁵⁴ See *id.* (indicating that between 1994 and 1997 the tax legislation was "imperfect," after referring to Mr. Khodorkovsky paying his income taxes in "good faith."). Cf. Alexei Trochev, *Distrusted Courts: The Impact of State (In)capacity on Judicial Power in Post-Communist Countries* 25 (2005), available at <http://www.cpsa-acsp.ca/papers-2005/Trochev.pdf> (last visited Feb. 11, 2006) (indicating that Russian Tax Code does not define "good faith" behavior).

⁵⁵ See Attorney Yuri Schmidt, Address, *supra* note 53.

⁵⁶ See Ariel Cohen, *The Khodorkovsky Verdict: A Setback for U.S.-Russian Relations*, THE HERITAGE FOUNDATION, June 2, 2005, <http://www.heritage.org/Research/RussiaandEurasia/wm753.cfm> (last visited Mar. 18, 2006) ("Many oligarchs likely committed the kind of crimes of which Khodorkovsky and Lebedev were accused, but no others were prosecuted.").

President Vladimir Putin's chief of staff, Dmitry Medvedev, has admitted that the prosecution was intended to "make an example" for Russian business, which will now be chastened to pay its taxes dutifully and stay away from politics. During the trial, Putin initiated a retroactive amnesty for privatization violations of the kind Khodorkovsky was found guilty. Further, in his annual State of the Federation address, Putin criticized tax authorities' "terrorization" of business—seemingly the same terror that brought down YUKOS with a \$30 billion tax liability.

Id.

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sian Constitution grants all citizens equality before the law, yet Mr. Khodorkovsky is being prosecuted for exercising the very rights he is guaranteed under the constitution, namely, freedom of “membership of political association.”⁵⁷ Mr. Khodorkovsky’s financial contributions to various political parties is one such example; “Khodorkovsky has been funding Yabloko and other opposition parties, which has been read as a threat to plans to form a two-thirds pro-Kremlin majority in the next Duma.”⁵⁸ Some commentators believe Mr. Khodorkovsky may have run for the presidency in 2008, although now it looks like he will be imprisoned for both the 2008 and 2012 presidential elections.⁵⁹ Moreover, “[t]he legal proceedings against Khodorkovsky were deeply flawed, with retroactive application of the tax code, harassment of Khodorkovsky’s lawyers, and violations of criminal procedure,”⁶⁰ all of which could serve as indicators that he was treated differently from the other “criminals.”

III. SELECTIVE PROSECUTION—PROCEDURAL DEFENSE

Even U.S. citizens may not be immune from the injustice inflicted through selective prosecution practices.⁶¹ When implicated for their selective prosecution practices, Russians often highlight the prosecution of Martha Stewart as an example of selective prosecution in the West.⁶² Many Americans agree⁶³ and point to the

⁵⁷ See *infra* note 139.

⁵⁸ Francesca Mereu, *Yabloko Still Counts on Khodorkovsky*, MOSCOW TIMES, July 16, 2003, <http://www.cdi.org/russia/johnson/7250-11.cfm> (last visited Mar. 18, 2006).

⁵⁹ Jeremy Page, *Nine Years in Prison for the Oil Billionaire Who Took on Putin*, TIMES (London), June 1, 2005, <http://www.timesonline.co.uk/article/0,,3-1636090,00.html> (last visited Mar. 18, 2006).

⁶⁰ See Cohen, *supra* note 56.

⁶¹ See Kristin E. Kruse, *Proving Discriminatory Intent in Selective Prosecution Challenges: An Alternative Approach to United States v. Armstrong*, 58 SMU L. REV. 1523, 1546–1547 (2005) (referring to the possible problems of selective prosecution post-September 11, 2001).

⁶² See *Double Standards, Moral Dilemmas and Ukraine*, Letters, MOSCOW TIMES, Apr. 29, 2004.

⁶³ See Alan Reynolds, *A Fair Trial for Martha?*, CATO INSTITUTE, Jan. 18, 2004, available at <http://www.cato.org/research/articles/reynolds-040118.html> (last visited Jan. 3, 2006) (suggesting that Martha Stewart was a victim of selective prosecution, and a fair trial for her would be no trial at all); see also Mark H. Allenbaugh, *If Martha Stewart Pleads Guilty, What Sentence Might She Receive*, CNN.COM, June 9, 2003, <http://www.cnn.com/2003/LAW/06/09/findlaw.analysis.allenbaugh.stewart/> (last visited Jan. 3, 2006). See also Transcript of CNBC News, Attorney Nancy Grace of CNN Headline News and Court TV discusses her new book “Objection!” June 25, 2005. Attorney Nancy Grace discusses that in her opinion Martha Stewart was the victim of selective prosecution.

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possibility that selective prosecution will plague cases that arise in connection with the aftermath of September 11, 2001.⁶⁴ The significant distinction, however, between the United States and Russia is the defendant's ability to use a selective prosecution defense in a U.S. court, whereas the Russian legal system bars this right.⁶⁵

A. *History and Development of the Selective Prosecution Defense in the United States*

Currently, American principles of equality before the law protect criminal defendants against selective prosecution.⁶⁶ The Fourteenth Amendment of the Constitution prohibits the states from enforcing even valid laws "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances."⁶⁷ The procedural defense of selective prosecution may also be introduced in the federal courts under the Fifth Amendment,⁶⁸ whereby the defendant is afforded the opportunity to argue against his criminal liability based on the judicial system's discriminatory stance towards him.⁶⁹ The issue

[S]he was a celebrity trophy defendant for a couple of federal prosecutors. And when you are the prosecutor, you have to be the good guy. You cannot have selective prosecution. There are many, many examples of jurors having the wrong motives about why they want to sit in the jury box.

Id.

See also B.J. Roche, *Peaks & Valleys; River to Field, It's all Under the Weather*, BOSTON GLOBE, June 15, 2003, at B4 (discussing that Author Richard Grayson views Stewart's prosecution as selective, and part of anti-elegance conspiracy led by John Ashcroft).

⁶⁴ See Kruse, *supra* note 61 (referring to the possible problems of selective prosecution post-September 11, 2001).

⁶⁵ See *infra* note 153.

⁶⁶ *U.S. Demands Immunity from International Court*, 2(26) BIGOTRY MONITOR (UCSJ, Washington, D.C.), July 3, 2002, available at <http://www.fsmonitor.com/stories/070302Russia.shtml> (last visited Dec. 29, 2005).

⁶⁷ *People v. Carter*, 86 A.D.2d 451, 453 (2d Dep't 1982) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886)).

⁶⁸ See *United States v. Bass*, 536 U.S. 862 (2002). See also *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999); Marc Michael, Note, *United States v. Armstrong: Selective Prosecution—A Futile Defense and its Arduous Standard of Discovery*, 47 CATH. U. L. REV. 675, 675 (1998).

⁶⁹ LAURA DIETZ ET AL., 21A AM. JUR. 2D *Criminal Law* § 983 (2d ed. 2005).

Improper selective prosecution arises when a defendant has been singled out for prosecution when others similarly situated have not been prosecuted and the prosecutor's reasons for doing so were impermissible A selective prosecution claim requires proof of intentional or purposeful discrimination based on some impermissible standard such as race, religion, or some other arbitrary classification, including the exercise of protected statutory or constitutional rights.

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should be addressed to a court before trial as a motion to dismiss on grounds of a constitutional violation.⁷⁰ However, the Supreme Court has never determined whether dismissal of the charges is a proper remedy upon a finding that the defendant has in fact been the victim of selective prosecution.⁷¹

Nevertheless, selective prosecution was regularly implemented in the United States during the first 150 years of American jurisprudence.⁷² The development of the selective prosecution doctrine began in 1886, when the Supreme Court in *Yick Wo v. Hopkins*⁷³ recognized that the discriminatory enforcement of law violates constitutional rights.⁷⁴ In 1905, the Supreme Court began formulating the defense for the selective prosecution in *Ah Sin v. Wittman*.⁷⁵ In 1944, in *Snowden v. Hughes*,⁷⁶ the Court held that

Id.

⁷⁰ *People v. Carter*, 86 A.D.2d 451, 453 (2d Dep't 1982).

⁷¹ *United States v. Armstrong*, 517 U.S. 456, 461 n.2 (1996); see also Mark H. Allenbaugh, *How Much Time will Martha Stewart Do?*, FINDLAW'S LEGAL COMMENTARY, Mar. 10, 2004, <http://writ.news.findlaw.com/allenbaugh/20040310.html> (last visited Jan. 3, 2006). Mark Allenbaugh is a nationally-recognized expert on federal sentencing. In his article, Allenbaugh opines that even if Martha Stewart prevailed on the selective prosecution defense she would not avoid prison time altogether. Rather, she would probably receive a shorter prison sentence. Cf. Michael, *supra* note 68, at 676 (indicating that the dicta in *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 588–89 (1961), suggests a selective prosecution claim might be a complete defense to a criminal prosecution). Although courts indicate that a selective prosecution defense should be addressed through a motion to dismiss, a review of the relevant case law shows that none of the courts have actually concluded that dismissal of the charges is the appropriate remedy.

⁷² Williams, *supra* note 13 (suggesting that the two primary legal issues in the Khodorkovsky trial are selective prosecution and the lack of an independent judiciary).

⁷³ 118 U.S. 356 (1886). In *Yick Wo v. Hopkins*, a Chinese citizen was convicted of violating a San Francisco ordinance prohibiting maintenance of laundries in wooden buildings without a license. The facts suggested that 200 laundry operators of Chinese heritage were denied the licenses, while eighty non-Chinese individuals were granted such licenses. The court struck down the ordinance as unconstitutional, because it was discriminating against the Chinese. The Court commented on such discriminatory application of the law.

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justices is still within the prohibition of the Constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373–374 (1886).

⁷⁴ The court recognized that “discriminatory enforcement of the law can violate the Equal Protection Clause of the Fourteenth Amendment.” BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 4.10 (2d ed. 2005).

⁷⁵ *Ah Sin v. Wittman*, 198 U.S. 500 (1905). See Michael, *supra* note 68 at 685 (In *Ah Sin v. Wittman*, “Supreme Court further developed the similarly situated requirement for the discriminatory effect prong of the selective prosecution defense in *Ah Sin v. Wittman*.”).

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[t]he unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.⁷⁷

In 1985, in *Wayte v. United States*,⁷⁸ the Supreme Court established the framework for the selective prosecution de-

In [*Ah Sin*], the defendant filed a habeas petition while imprisoned for violating a San Francisco ordinance prohibiting gambling tables in rooms with barricades in place to prevent police from entering. *Ah Sin* simply alleged in his habeas petition that the ordinance itself was enforced only against Chinese and not against any other races.

Kruse, *supra* note 61, at 1529–30.

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The court in *Ah Sin* held that

discriminatory effect had to be established by a showing that people of other races who were similarly situated were treated differently. Since the defendant did not allege that the ordinance's prohibited practices were not exclusively committed by Chinese and did not show that there were other non-Chinese violators of the ordinance who were not prosecuted, *Ah Sin* could not show discriminatory effect.

Id.

⁷⁶ *Snowden v. Hughes*, 321 U.S. 1 (1944).

⁷⁷ *Id.* at 8.

⁷⁸ *Wayte v. United States*, 470 U.S. 598, 605 (1985) (“[I]n order to establish a prima facie case petitioner had to prove that (i) others similarly situated generally had not been prosecuted for conduct similar to petitioner’s and (ii) the Government’s discriminatory selection was based on impermissible grounds such as race, religion, or exercise of First Amendment rights.”).

The Court explained that the claim is based on equal protection standards and specified that the “standards require [the] petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose.” In [*Wayte*], . . . the petitioner refused to comply with a 1980 Presidential Proclamation requiring males born during 1960 to register with the Selective Service System. The petitioner was in the group of men required to register; however, he refused to do so and sent letters to government officials informing them that he did not register and did not intend to register. The Selective Service saved the letter in its files, and as a part of its “passive enforcement” policy of only prosecuting unregistered persons in their file, notified the petitioner that if he did not register, he would be prosecuted. After several letters and a visit by an FBI agent, he was indicted for knowingly and willfully failing to register in violation of the Military Selective Service Act. *Wayte* moved to dismiss the indictment on the ground of selective prosecution. The Supreme Court held that *Wayte* was not selectively prosecuted because he did not show that the reason the Selective Service chose to prosecute the nonregistrants that it did was because they sent in letters voicing their refusal to register. It also noted that *Wayte* did not prove that the policy had a discriminatory effect.

Kruse, *supra* note 61.

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fense under the Equal Protection Clause used by the courts today.⁷⁹

Racial segregation mandated by state law continued until the mid-1950s in the United States,⁸⁰ despite the Fourteenth Amendment's intended purpose of eliminating state sponsored racial discrimination.⁸¹ Because many of the selective prosecution defenses were initially brought in the racial discrimination context,⁸² it is not surprising that such a defense was only recognized following the official termination of racial discrimination, even though the Fourteenth Amendment was enacted far earlier.⁸³

⁷⁹ Miriam Kim, Notes and Comments, *Discrimination in the Wen Ho Lee Case: Reinterpreting the Intent Requirement in Constitutional and Statutory Race Discrimination Cases*, 9 *ASIAN L.J.* 117, 135 (2002). Perhaps it is not surprising that there is such a long gap between the acknowledgement of selective prosecution and the time to create an actual standard; after all the Fourteenth Amendment, including the Equal Protection Clause, was ratified in 1868, but "government-sanctioned segregation" officially ended in 1954. See *Jump Back in Time, Reconstruction (1866–1877)*, http://www.americaslibrary.gov/cgi-bin/page.cgi/jb/recon/revise_2 (last visited Jan. 16, 2006). Prior to *Wayte v. United States*, in *Snowden v. Hughes*, the court held that

[t]he unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.

Snowden v. Hughes, 321 U.S. 1 at 8 (1944). The Court in *Wayte* created a two-prong test currently referred to by the courts.

⁸⁰ See *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁸¹ *Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").

⁸² See e.g., *Ah Sin v. Wittman*, 198 U.S. 500 (1905) (involving a claim by an individual of a Chinese ethnicity trying to prove that he was selectively prosecuted solely for his race); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (involving a claim by an individual of a Chinese ethnicity). Even today most of the selective prosecution claims arising in the United States deal with racial issues. See Michael McGuinness, *State and Federal Standards Require Proof of Discriminatory Intent in Ethnic Profiling Claims*, N.Y. St. B.J. 29 (2003), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Bar_Journal/Bar_Journal_Archive/2003_Archive/journaloctober03mcguinness.pdf. (last visited Jan. 28, 2006).

⁸³ "The problem of selective prosecution based on race is an issue that is not abating. Indeed, closely associated with the issue of selective prosecution is the use of racial profiling, which has gained new relevance in the post September 11 world." Kruse, *supra* note 61, at 1546–47.

In *United States v. Alameh*, 341 F.3d 167 (2d Cir. 2003) a Muslim defendant was arguing that he has been selectively prosecuted because of his ethnicity and not simply because he was involved in a "green card" marriage.

In support of this selective prosecution claim, [Alameh] offered affidavits from immigration attorneys stating that the type of prosecution against him was "unprecedented" and that prosecutions of Muslims in the United States had "dramatically increased" since September 11, 2001. In particular, he offered

B. Requirements for Proving Selective Prosecution

Despite a long-founded existence, selective prosecution claims are very difficult to prove in the United States.⁸⁴ In order for a defendant to prove a claim of selective prosecution, he must show (1) that others in similar situations were not prosecuted, and (2) that the prosecution was based on impermissible motive, for reasons forbidden by the Constitution.⁸⁵ The defendant bears the burden of proving that he has been intentionally or purposefully targeted for discriminatory reasons, such as race, religion, national origin, sex, political activity, membership in a political party or labor union, or exercise of protected statutory and constitutional rights, including First Amendment rights.⁸⁶ If the motion alleges sufficient facts to show that an individual has been selectively prosecuted, the court must conduct an evidentiary hearing.⁸⁷ A defen-

statistics of all persons charged in the Southern and Eastern Districts of New York for marriage fraud under either federal or state laws. The list of over 400 names, which were grouped according to whether the name had a Muslim or Arab sounding surname, revealed that before September 11, 2001, 15 percent of this type of charge were against persons with Muslim or Arab sounding names, as compared to after September 11, 2001, where 85 percent were against persons with a Muslim or Arab sounding surname. . . . Ultimately, the court decided to not recognize the selective prosecution claim on the ground that the government had already investigated the defendant's case for eighteen months before September 11, 2001. The court reasoned that because so much investigation on Alameh's case had already occurred prior to September 11, 2001, the defendant would have been prosecuted in any event—not as part of the post-September 11 increase in Muslim/Arab prosecutions illustrated by the statistics. Although it did not recognize the defendant's selective prosecution claim, the fact that the court's decision turned on the defendant's case being investigated prior to September 11, 2001 implies that the court may be willing to affirm another post September 11 selective prosecution claim by a defendant with a Muslim or Arabic sounding surname who presents similar statistics.

Id.

⁸⁴ See Siskind Susser Bland, *Reno v. American-Arab Anti-Discrimination Committee: Supreme Court Deals Blows to Immigrant Rights*, SISKIND'S IMMIGRATION BULLETIN, Feb. 1999, available at <http://www.visalaw.com/99feb/3feb99.html> (last visited Jan. 2, 2005) (indicating that prosecutors are granted great discretion concerning the conduct of criminal indictments and trials).

⁸⁵ *United States v. Armstrong*, 517 U.S. 456, 463 (1996); *United States v. Graham*, 146 F.3d 6, 9 (1st Cir. 1998); see also *United States v. Nelson*, 137 F.3d 1094 (9th Cir. 1998).

⁸⁶ See DIETZ ET AL., *supra* 69, § 98; see also Seth T. Goldsamt, Note, "Crucified by the FCC"? *Howard Stern, the FCC, and Selective Prosecution*, 28 COLUM. J.L. & SOC. PROBS. 203, 221 (1995) (quoting WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 13.4 635 (2d ed. 1992)).

⁸⁷ *United States v. Saade*, 652 F.2d 1126, 1135 (1st Cir. 1981).

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dant waives the defense of selective prosecution unless it is raised before trial.⁸⁸

In *United States v. Armstrong*,⁸⁹ the Supreme Court defined the standard a defendant must meet to be entitled to discovery for a selective prosecution claim. The defendant must present clear evidence that the prosecutor's decision to prosecute had a discriminatory effect and was motivated by a discriminatory purpose.⁹⁰ Such a rigorous standard "adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution."⁹¹ Once the individual establishes a *prima facie* case, the burden of proof shifts to the government. "Compelling evidence" must be presented to establish valid grounds for the prosecution.⁹²

C. *Broad Prosecutorial Discretion*

Even though a prosecutor's discretion to bring criminal charges against an individual is not unlimited, there is broad discretion to choose certain individuals instead of others,⁹³ which explains the rare number of the cases granting the selective prosecution defense.⁹⁴ Judges generally assume that prosecutors are appropriately carrying out their duties by bringing cases before a court, that is, unless clear evidence exists to the contrary.⁹⁵ Such wide prosecutorial discretion renders the selective prosecution de-

⁸⁸ *United States v. Stuttley*, 103 F.3d 684, 686 (8th Cir. 1996).

⁸⁹ *United States v. Armstrong*, 517 U.S. at 456.

⁹⁰ *Id.* at 465.

⁹¹ *Id.* at 470.

⁹² GERSHMAN, *supra* note 74, at § 4.32 ("Appropriate rebuttals by the prosecution have included (1) lack of knowledge reading the claimed basis for selection, (2) efficient use of scarce resources, (3) randomness of selection, (4) laxity, and (5) other reasonable and legitimate law enforcement considerations.")

⁹³ See GERSHMAN, *supra* note 74, at § 4.9; see also *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

Id.

⁹⁴ See GERSHMAN, *supra* note 74, at § 4.9.

⁹⁵ Michael, *supra* note 68.

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fense hard to prove and explains the courts' general reluctance to overturn convictions based on this defense.⁹⁶

Broad prosecutorial discretion is not only ingrained in the jurisprudence of U.S. law, but is also consistent with American adversarial system of justice.⁹⁷ The American legal community and judicial system touts the importance of advocacy and impartiality in resolving legal disputes.⁹⁸ In recent years, however, there has been discussion regarding the need to restrict discretion in certain areas where a tendency to improperly discriminate against suspect classes' individuals is prevalent.⁹⁹ Some have also argued that the

⁹⁶ NATIONAL VICTIM ASSISTANCE ACADEMY, Ch. 4: History of Law: The Evolution of Victims' Rights (1998), *available at* <http://www.ojp.usdoj.gov/ovc/assist/nvaal/ch04hslaw.htm> (last visited Jan. 17, 2006); *see also* *Wayte v. United States*, 470 U.S. 598, 607 (1985) (indicating the problems with judicial supervision over prosecutorial decision-making and discretion).

⁹⁷ Prosecution: Prosecutorial Discretion, <http://www.law.families.com/prosecution-prosecutorial-discretion-ecj> (last visited Jan. 16, 2006).

The term "prosecutorial discretion" refers to the fact that under American law, government prosecuting attorneys have nearly absolute and unreviewable power to choose whether or not to bring criminal charges, and what charges to bring, in cases where the evidence would justify charges. . . .

The grant of broad discretion to prosecutors is so deeply ingrained in American law that U.S. lawyers often assume that prosecutorial discretion is inevitable. In fact, some countries in Europe and Latin America adhere to the opposite principle of "mandatory prosecution," maintaining, at least in principle, that prosecutors have a duty to bring any charge that is supported by evidence developed by the police or presented by citizens.

Id.

⁹⁸ *Id.*

The general acceptance of prosecutorial discretion in the United States is closely linked to our adversarial system of justice. The adversarial principle is generally taken to mean that judges in American courts are not commissioned to investigate cases, determine the truth, and provide justice. Instead, the courts are understood as dispute-settling institutions, in which judges take a more passive role, considering only such facts as are presented to them by the parties, and deciding only such issues as are necessary to resolve the disputes thus presented. Primary responsibility for defining the nature of the dispute, and presenting the relevant facts, lies with the parties and their lawyers. More specifically, criminal cases are seen as disputes between the government and individuals accused of crime. Just as a plaintiff in a civil suit has the option of withdrawing his claim, or settling it privately with the defendant—in which case the court has no further role—so in a criminal case, the prosecutor, as representative of the government, can decide that the interests of his client are best served by not taking any legal action at all, or by settling for relief short of what could in theory be available if litigation were pursued to its final conclusion.

Id.

⁹⁹ *See* WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 1.4(j) (2005). *See also* Kruse, *supra* note 61, at 1528.

Court's test for discovery is too demanding and may undermine the effectiveness of the selective prosecution claim.¹⁰⁰

The general perception of judicial legitimacy in the United States challenges the purpose of the selective prosecution defense as a deterrent against overly zealous prosecutors and government officials.¹⁰¹ But because the majority of the American judiciary is in fact legitimate, the purported effect is not crucial to ensuring the administration of justice.¹⁰² However, in Russia, where many foreign governments and commentators have repeatedly spoken out against cases of selective prosecution,¹⁰³ it is important to deter such impermissible conduct on the part of the Russian government with respect to its selective prosecution tendencies.¹⁰⁴

D. *Selective Prosecution based on First Amendment Claims*

"Selecting persons for prosecution based upon the exercise of their First Amendment right to free speech is unconstitutional."¹⁰⁵ Tax protestors are one group of individuals who often raise selective prosecution as a defense. In *United States v. Catlett*,¹⁰⁶ the defendant publicly protested the United States' involvement in the

Justice Jackson, a former prosecutor, recognized the problem [of the prosecutors' broad power] when he referred to the prosecutor's decision to prosecute as "the most dangerous power of the prosecutor," because it enables the prosecutor to "pick people he thinks he should get, rather than pick cases that need to be prosecuted." Jackson also noted that prosecutors are capable of finding a violation in almost anyone, which means that prosecution "becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor." When this "most dangerous power" is exercised by prosecutors who discriminate either intentionally or even unintentionally, defendants can become victims of selective prosecution.

Id.

¹⁰⁰ See Michael, *supra* note 68, at 719.

¹⁰¹ See *Id.* at 717 (indicating that "[t]he selective prosecution defense, therefore, will remain, for most defendants, only an illusory opportunity to defeat criminal charges open to those with good fortune to discover the necessary 'similarly situated' evidence.").

¹⁰² See Prosecution: Prosecutorial Discretion, *supra* note 97.

¹⁰³ S. Con. Res. 85, 108th Cong. (2003) ("Whereas the arrest and prosecution of prominent Russian business leaders who had supported the political opposition to President Putin are examples of selective application of the rule of law for political purposes.").

¹⁰⁴ Letter from Lotte Leicht, *supra* note 16 (proposing that the European Union ask the Russian Government to "[c]ease the selective prosecution of perceived opponents for political reasons. Instead, the Russian government should direct its efforts at establishing genuine rule of law.").

¹⁰⁵ GERSHMAN, *supra* note 74, at § 4.16.

¹⁰⁶ *United States v. Catlett*, 584 F.2d 864 (8th Cir. 1978).

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Vietnam War and payments of taxes that supported it.¹⁰⁷ He was charged with having willfully and knowingly failing to file his income tax for three years, violating 26 U.S.C. § 7203.¹⁰⁸ The defendant filed a motion to dismiss on grounds that he was selectively prosecuted in violation of his First and Fourteenth Amendment rights. He argued that the government has an option to bring either civil or criminal charges against “non-filers”; while civil charges were brought against protestors who did not file because of their religious or moral beliefs, criminal charges were brought against those protestors who failed to file taxes because of their political objection to the government’s allocating such funds to support the highly criticized war effort.¹⁰⁹ Thus, Catlett argued he was the victim of selective prosecution in connection with his political views.

Similar charges were brought against the defendant in *United States v. Ojala*,¹¹⁰ who argued that he was selectively prosecuted for his outspoken opposition against the Vietnam War and for exercising his First Amendment rights.¹¹¹ Applying the two prong test, the defendant was able to make a strong showing that others similarly situated were not prosecuted,¹¹² and that he was purposefully discriminated against.¹¹³ Nevertheless, in both *Ojala* and *Catlett*, the court focused on the deterrent effect of the judicial proceedings.

[S]election for prosecution based in part upon the potential deterrent effect on others serves a legitimate interest in promoting more general compliance with the tax laws. Since the government lacks the means to investigate and prosecute every suspected violation of the tax laws, it makes good sense to prosecute those who will receive, or are likely to receive, the attention of the media.¹¹⁴

E. *Khodorkovsky in the United States*

In considering the American approach to selective prosecution, it is interesting to evaluate the possibility that Mr.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 866.

¹¹⁰ *United States v. Ojala*, 544 F.2d 940 (8th Cir. 1976).

¹¹¹ *Id.* at 941.

¹¹² *Id.* at 943.

¹¹³ *Id.*

¹¹⁴ *Catlett*, 584 F.2d at 868.

Khodorkovsky would have also been convicted in a U.S. court, even though international commentators and scholars widely agree that he was selectively prosecuted. Similarly to the defendants in *Ojala* and *Carlett*, if Mr. Khodorkovsky was a widely known figure in the United States, who actually opposed governmental views and openly violated laws, the courts could have focused on the deterrent effects of the judicial proceedings. Even if Mr. Khodorkovsky would have been able to meet the two prong test, the court could have still convicted him to deter such behavior among other individuals. But, if his attorneys are correct in arguing that he did not actually violate the current laws, the fairness of the American judicial system would have probably resulted in a verdict of not guilty, not because of the selective prosecution, but because he did not commit a criminal offense in the first place.

However, Mr. Khodorkovsky does not live in the United States, and he cannot receive the benefits of the American judicial system. The strictness of the American standard and the balancing of it against the deterrent effect is rooted in the institutional legitimacy of the American judicial system,¹¹⁵ something which is lacking in Russia.¹¹⁶

Russia should impose a legal standard allowing for selective prosecution as a defense which is already consistent with its current judicial system and will be a step to improving citizens' faith in the courts. In fact, the legitimacy the courts had gained following the Soviet Union breakup has declined significantly. While in 1995 about half of the Russian people trusted the court, by 2002 the percentage of the Russian population who affirmed trust in the judiciary had dropped drastically to between 3 and 4 percent,¹¹⁷ and two out of three Russians supported judicial reform between 1997 and 2001 as a way to eliminate corruption and change the Soviet-era legal system.¹¹⁸

¹¹⁵ Prosecution: Prosecutorial Discretion, *supra* note 97.

¹¹⁶ See also *Putin Defends His "Democracy,"* CBS NEWS, May 8, 2005, http://www.cb-snews.com/stories/2005/05/06/60minutes/main693422_page3.shtml ("They took advantage of the weakness of the state by using their money to buy influence in the legislature, and the judicial system, and the mass media," says Putin (referring to oligarchs).)

¹¹⁷ Trochev, *supra* note 54, at 12 (indicating that in Spring 2001, "a VTsIOM nationwide survey revealed that nearly 2 out of 3 Russians [67%] did not trust the courts, and another poll found that only 18% of Russians . . . trusted the courts.").

¹¹⁸ *Id.* at 10 (indicating that "2 out of 3 Russians consistently supported judicial reform between 1997 and 2001 as a way to get rid of corruption and of the Soviet-era legal system.").

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IV. THE IMPORTANCE OF SELECTIVE PROSECUTION
AS A DEFENSE

A. *Selective Prosecution in Russia Poses a Significant
International Concern*

Selective prosecution is not new to Russia.¹¹⁹ On numerous occasions scholars and commentators have discussed examples of selective prosecution rooted in political or anti-Semitic grounds.¹²⁰ However, selective prosecution in modern Russia not only threatens the Russian citizenry, but also presents a significant obstacle to international investors and post-Soviet Union democratic reforms.¹²¹ Selective prosecution of white collar criminals¹²² such as Khodorkovsky poses an international and economic point of con-

¹¹⁹ See Letter from Lotte Leicht, *supra* note 16.

The practice of selective justice is not new. For years, the Federal Security Service (FSB) has pressed espionage charges against specific journalists, environmental activists, and scientists who worked with foreign contacts in sensitive areas, apparently to deter others from engaging in similar activities. For example, Russia has held scientist Igor Sutiagin in pretrial detention on such charges for more than four years, even though a court severely criticized the FSB's conduct of the investigation in 2001. Sutiagin's continued detention violates Russia's obligations under the European Convention of Human Rights.

Id.

See also H.R. Con. Res. 85, 108th Cong. (2003) ("Whereas the arrest and prosecution of prominent Russian business leaders who had supported the political opposition to President Putin are examples of selective application of the rule of law for political purposes.").

¹²⁰ The cases against Boris Berezovsky and Vladimir Gusinsky are two such examples. See *supra* Part I. See Michael Moran, *What Can the U.S. do About Putin*, MSNBC.COM, Nov. 6, 2006, <http://msnbc.msn.com/id/3403762/> (last visited Feb. 26, 2006) (indicating that Mr. Khodorkovsky, Mr. Berezovsky, and Mr. Boris Gusinsky were all Jewish oligarchs "targeted and largely destroyed by Putin."). See also Anna Badkhen, *Russia Freezes Shares of Biggest Oil Firm; Kremlin's Move Rattles Businesses*, SAN FRANCISCO CHRONICLE, Oct. 31, 2003.

Critics say Khodorkovsky's arrest was a politically motivated punishment for the tycoon's attempt to finance political parties competing against pro-Kremlin blocs in December's parliamentary elections and a signal to others not to follow suit. Russia's two other outspoken oligarchs, Boris Berezovsky and Vladimir Gusinsky, who ran media empires critical of the Kremlin, have gone into exile to avoid criminal prosecution.

Id.

¹²¹ Editorial, *Putin's Trials*, *supra* note 13.

As worrying as the threat of rising anti-Semitism in Russia may be, it pales in comparison to the real danger highlighted by this trial: the increasing, even accelerating efforts by the Putin government to turn back the democratic gains made in Russian since the fall of the Soviet Union, and the rest of the world's inability so far to effectively pressure the Kremlin to halt this slide into authoritarianism.

Id.

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cern for investors,¹²³ as well as for foreign governments.¹²⁴ Foreign investors fear losing the value of their investments to the Russian government,¹²⁵ and thus, if selective prosecution continues, will become more cautious with their investments.¹²⁶ “Currently, foreign investment in the Russian energy sector is falling, efficiency in the sector is declining, and production, which until 2003 grew by leaps and bounds, has plateaued.”¹²⁷ The white collar criminal¹²⁸ victims of selective prosecution under Putin have all controlled a significant part of the Russian economy.¹²⁹ Moreover, these individuals may have been targeted for their political endeavors, and have not

¹²² White-collar crime is “[a] nonviolent crime usually involving cheating or dishonesty in commercial matters. Examples include fraud, embezzlement, bribery, and insider trading.” *BLACK’S LAW DICTIONARY* 766 (2d pocket ed. 2001).

¹²³ See Arkady Ostrovsky, *A Russian Phoenix Struggles to Stay Free*, *FIN. TIMES*, Feb. 20, 2006, at 8 (indicating that following the arrest of Mr. Khodorkovsky there seems to be a great deal of insecurity surrounding investment in Russia).

Estimation of investment risks by foreign investor represents the complex analysis including not only economic calculation and analysis of state legal system in the sphere of investment, but also political system analysis. It is obvious that only countries having a stable political system guarantee economic benefit from investment and their duly full return to the investor.

Denis Biryukov, *Foreign Investments in the Russian Federation*, *THE LAW JOURNAL UK*, <http://www.thelawjournal.co.uk/ForeignInvestment-RussianFederation.htm> (last visited Feb. 26, 2006).

¹²⁴ See *Democracy on the Retreat in Russia: Hearings Before the Senate Foreign Relations Comm.*, 109th Cong. (2005) (testimony of Tim Osborne), available at <http://foreign.senate.gov/testimony/2005/osbornetestimony050217.pdf> (last visited Dec. 23, 2005).

The detrimental impact of the “Yukos affair” has been widely reported in the media, as have its repercussions for Russia’s relations with the West. Not only have U.S. shareholders – including public pension funds – been directly and negatively impacted, but the actions of the Russian authorities show a flagrant disregard for rule of law, as the circumstances around the auction of Yuganskneftegas clearly demonstrate.

Id.

¹²⁵ Elif Kaban, *Foreign Investors May Sue Russia*, *PROSPERITY CAPITAL MANAGEMENT*, Nov. 10, 2004, <http://www.prosperitycapital.com/articles/2069/message> (last visited Feb. 26, 2006) (indicating that foreign investors were ready to sue Russia for billions of dollars if they were to lose the value of their investments to the Russian government).

¹²⁶ See Neil Buckley, *Aftershocks Will Keep Foreign Investors on Edge*, *FINANCIAL TIMES*, May 17, 2005, at 10.

¹²⁷ See Cohen, *supra* note 56.

¹²⁸ “Many observers say the [Khodorkovsky] trial is less about white collar crimes than about settling scores with a Kremlin foe who supported opposition parties and hinted at political ambitions.” *Russia’s Courts Go on Trial—YUKOS Case Bears Witness to Series of Defects in Legal System*, *WALL ST. J.*, May 23, 2005, available at <http://www.mbktrial.com/media/20050523-0529.cfm> (last visited Jan. 28, 2006).

¹²⁹ For example, Gussinsky, Berezovsky and Khodorkovsky. See *supra* note 120 and accompanying text.

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received appropriate treatment pursuant to the laws of the Russian Federation.¹³⁰

Perhaps the United States was trying to prevent American investors from becoming involved in a situation similar to the Yukos scandal¹³¹ through its attempts at establishing a Treaty with the Russian Federation, an agreement which has not yet been ratified.¹³² Yet, if the Russian government pursues selective prosecution and thus disrupts internationally held investments, the economic relationship between Russia and the United States may eventually sour and foreign investment in Russia could decline significantly.¹³³

B. *Adoption of the New Constitution*

Russia's adoption of its 1993 Constitution¹³⁴ significantly altered the direction of all prior Soviet constitutions during the pe-

¹³⁰ For example, even though white collar crime does not legally allow for pre-trial imprisonment, Mr. Khodorkovsky was imprisoned before trial. *See* Osborn, *supra* note 47. One may be surprised that after the adoption of the new constitution in Russia, selective prosecution is still not a legal defense. However, in the United States, even though the defense of selective prosecution is based on the violation of the constitutional provisions, the defense was not officially formulated and established until the 1950s, so perhaps, similarly to the United States, it will take some time in Russia following adoption of its constitution to implement such a legal defense.

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¹³¹ *See* Testimony of Tim Osborne, *supra* note 124 (indicating that approximately 15 percent of Yukos' shares were owned by U.S. nationals).

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¹³² *Id.* (indicating that Russia signed the treaty in Washington on June 17, 1992, but did not go before the Russian Duma until 2003 for consideration of its ratification). The relevant part of the aforementioned "Treaty with the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment" is also quoted.

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of [nondiscriminatory] treatment

Id.

¹³³ *See generally id.* *See also* Elman, *supra* note 21 (indicating that foreign investors should be alarmed since the Russian legal system could be easily manipulated).

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¹³⁴ The Constitution of the Russian Federation was adopted on December 12, 1993 after 58.4 percent of the voting population (a total of 58,187,755 voters) cast their approval. The new Constitution officially came into effect upon publication, as of December 25, 1993. President of Russia, Official Web Portal, The Constitution of Russia, the basic law, <http://president.kremlin.ru/eng/articles/ConstMain.shtml> (last visited Jan. 4, 2006). The constitution is broken into nine distinct chapters: The Fundamentals of the Constitutional System, The Rights and Liberties of Man and Citizen, The Russian Federation, The President of the Russian Federation, The Federal Assembly, The Government of the Russian Federation, The Judiciary, Local Self-Government, and Constitutional Amendments and Revi-

riod from 1917 leading up to 1993,¹³⁵ and for the first time afforded constitutional provisions “direct application.”¹³⁶ Theoretically, any person can offer a defense rooted in some violation of his constitutionally protected rights.¹³⁷ According to the Constitution, the President of the Russian Federation is the head of state responsible for defending the Constitution and its provisions;¹³⁸ yet, the Russian Constitution is not always followed in practice.¹³⁹

The Constitution of the Russian Federation creates equality for all people before the law and in a court of law,¹⁴⁰ and grants all individuals the right to freedom of thought and speech.¹⁴¹ However, local Russian authorities have been able to restrict these protected rights by selectively prosecuting individuals under false pretences and exploiting the procedural weaknesses of the Russian judicial system.¹⁴²

sions, comprising a total of 137 articles. *See* Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution].

¹³⁵ The Constitution of the Russian Soviet Federative Socialist Republic (RSFSR) was adopted at the fifth All-Russian Congress of the Soviets on July 10, 1918 and granted all the power to Soviets, abolished private land ownership, and restricted people’s political rights. The division of powers was not addressed. However, in 1924, after the USSR was formed, the Soviet constitution was adopted, which was not significantly different from the prior constitution, and dealt with the delimitation of powers between Soviet authorities and the RSFSR. A new constitution to support the principles of Communism was adopted on December 5, 1936. It lifted the political rights restrictions provided for in the earlier constitutions and granted equality for all citizens. The constitution adopted on October 7, 1977 still had provisions consistent with building communism. *See* The Constitution of Russia, The Constitutional Process, Historical Background, <http://president.kremlin.ru/eng/articles/ConstHistory.shtml> (last visited Jan. 4, 2006).

¹³⁶ *Id.* (“Unlike in the past, the 1993 constitution does not proclaim a predetermined unified economic system based on state ownership, but gives equal protection to all forms of ownership and guarantees the freedom and development of civil society.”).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See* Members of the Overseeing Advisory of “Moscow News,” MHG in SMI: President against Constitution, The Report of the Overseeing Advisory of the “Moscow News,” available at <http://www.mhg.ru/smi/293F857> (last visited Jan. 4, 2006) (translated by the author) (indicating that events of the Yukos case and the arrest of Khodorkovsky show that President Putin makes choices in favor of the anarchy).

¹⁴⁰ Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 19.

¹⁴¹ Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 29.

¹⁴² RUSSIA, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004, *supra* note 25 (“The authorities continued to exert pressure in a number of ways on journalists, particularly those who reported on corruption or those who criticized officials.” Some journalists are detained, others, such as Paul Klebnikov, the editor of Forbes Russia magazine, have been mysteriously murdered or kidnapped.).

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The Constitution also guarantees the freedom of religion,¹⁴³ and anti-Semitism is no longer state-sponsored.¹⁴⁴ Yet even though distributing propaganda or campaigning to incite religious hatred is impermissible,¹⁴⁵ anti-Semitic ideology remains part of the political platforms of Rodina bloc, the Liberal Democratic Party of Russia, and the Communist Party of the Russian Federation, as evidenced by their public statements and election campaigns.¹⁴⁶ When Jewish organizations tried to bring legal action against publishers who allowed anti-Semitic themes in their publications, the courts were unwilling to find anti-Semitic content.¹⁴⁷ The Russian Constitution also guarantees the freedom of the mass media. Yet, despite the fact that censorship is prohibited,¹⁴⁸ the government has seized control of television stations.¹⁴⁹

¹⁴³ Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 26.

¹⁴⁴ See RUSSIA, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2004, *supra* note 25.

¹⁴⁵ Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 29

¹⁴⁶ RUSSIA, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2004, *supra* note 25.

¹⁴⁷ *Id.* Many of the publications containing anti-Semitic themes may be owned or managed by the same local authorities who refused to prosecute the publishers. It seems that even though the Constitution of the Russian Federation grants democratic powers and “direct application” to its citizens, in practice this is not well-enforced.

¹⁴⁸ Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 29; see also Anya Paretskaya, *Russia's Media Morass*, http://www.cpj.org/Briefings/2000/Russia_sept00/Russia_sept00.html (last visited Jan. 20, 2006). In September 2000, President Putin adopted the Information Security Doctrine presenting the government's new media policy. It prohibited censorship and monopolization of media by the state. However, at the same time, the document emphasizes the need to strengthen the state-run media by giving a pool of selected journalists access to privileged information. While some argue that the doctrine is created to protect freedom, others indicate the vagueness of the document is actually a threat to civil liberties, and could be interpreted as not protecting the freedom of press. *Id.*

¹⁴⁹ See Members of the Overseeing Advisory of “Moscow News,” *supra* note 139. The state controls printing presses and exercises tremendous power over printed information. The state has the power “to issue and revoke broadcast and publish[ing] licenses. It can also exert pressure by ordering tax inspections, a weapon frequently used by regional authorities to encourage friendly coverage.” See Emma Gray, *Putin's Media War*, http://www.cpj.org/Briefings/2000/Russia_analysis_march00/Russia_analysis_march00.html (last visited Jan. 20, 2006). Commentators also suggest that the Kremlin significantly restricted all coverage on the war with Chechnya, and punished correspondents who tried to ignore the restrictions.

Andrei Babitsky, a Russian national who works as a correspondent for the U.S. government-funded Radio Liberty, was one of the few Russian journalists who chose to flaunt Kremlin restrictions on Chechen war coverage. He traveled independently through the war zone and sent eyewitness accounts of the impact of the conflict on ordinary people. In January, Babitsky was arrested by Russian authorities, beaten, and eventually released, following an international outcry, after spending more than a month in captivity. [B]abitsky challenged the government monopoly of information by reporting from his Chechen rebel

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C. Current State of Selective Prosecution as a Defense in Russia

Russian law evidences no explicit indication that selective prosecution is prohibited or allowed.¹⁵⁰ Russian law is very formalistic—in order for an action to be illegal it must be explicitly prohibited by law.¹⁵¹ Thus, because selective prosecution is not explicitly prohibited by law, it becomes very difficult to use as a defense, even though the Constitution of the Russian Federation indicates that all people shall be treated equally before the law. However, selective prosecution is also not directly prescribed, thus one may also argue that it is not allowed.

Moreover, it is very difficult for an individual to prove he was selectively prosecuted so long as a valid violation of the law has occurred.¹⁵² If the basis for arrest is a violation of a Russian statute (codex), attorneys believe that a judge is not required to discuss the selective prosecution claim further, and may focus solely on the substantive claims.¹⁵³ Since there will always be some violation of the law for which an individual has been arrested, it makes selec-

side, which infuriated Russian authorities and led to his detention. His treatment suggests that journalists who disobey the authorities can expect to be branded “enemies of the state.”

Id.

¹⁵⁰ E-mail from Oksana Sokolova, Licensed Attorney in the Russian Federation, to Yelina Kvurt, author (Dec. 10, 2005) (on file with author). Sokolova opines that what is not directly prescribed is prohibited. If there is nothing on the law about selective prosecution, it is at least not allowed. Nevertheless, since judges do not question whether the individual before them has been treated the same as other accused criminals or civil defendants, it is not acceptable in Russia to argue that someone has been treated differently. Even though politics is involved in most well known cases, legal scholars and practitioners agree that there is no legal basis for selective prosecution, even though selection is not purely random. Ms. Sokolova’s argument is consistent with the American system, where selective prosecution is not explicitly prohibited by any law, but it is rather a violation of the constitutional rights.

¹⁵¹ See Peter Clateman, Summary and Analysis of Report on Criminal Case #18/41-03, Dec. 10, 2003, available at <http://www.cdi.org/russia/johnson/indictment.pdf> (last visited Dec. 27, 2005) (referring to Russia’s explicit legal prohibition as extreme and attributing it to decades of an overly burdensome system, which allowed for incompetence and corruption).

¹⁵² See *infra* note 153; see also E-mail from Oksana Sokolova, *supra* note 150.

¹⁵³ See Interview with Steven Lang, Translator for the Attorneys for Mikhail Khodorkovsky (Jan. 7, 2005) (summary of interview on file with the author); see also Interview with Robert Amsterdam, International Defense Counsel for Mikhail Khodorkovsky (Jan. 7, 2005). Mr. Amsterdam discusses the fact that Khodorkovsky’s counsel tried to show that he was selectively prosecuted; however the assertion could only be implied in the pleadings, and not directly argued in court. Mr. Amsterdam believes that courts in Russia would not admit that someone has been selectively prosecuted. Even if the person is actually selectively prosecuted, it is never a valid defense. *Id.*

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tive prosecution impossible to use a defense in the Russian courts of law.¹⁵⁴

D. *Selective Prosecution Defense is Consistent with Russian Laws*

Similar to the U.S. Constitution, the Constitution of the Russian Federation grants many democratic rights and freedoms to Russian citizens and equality for all people before the law.¹⁵⁵ Prosecuting simply for the exercise of rights guaranteed by the Constitution is “selective prosecution” and is therefore implicitly disallowed according to the Russian Constitution.¹⁵⁶ Therefore,

This leads one to believe that the only choice for the victims of selective prosecution is to argue that it is a violation of constitutional rights. Russian courts do not address the defense of selective prosecution. If an individual will mention in the court of law that he was selectively prosecuted, the judge may turn to the prosecutor and ask if there is a violation of law for which an individual has been arrested, and if there has been, the issue of selective prosecution is not addressed any further. Mr. Khodorkovsky’s attorneys chose to focus on proving that Mr. Khodorkovsky was innocent. Mr. Amsterdam said that arguing that Mr. Khodorkovsky was selectively prosecuted would not have changed the course of the trial, since it was a “show trial.” *Id.* See also *Moscovskaya Helsinskaya Grupa* [Moscow Helsinki Group], English Language Page: Article 26, <http://www.mhg.ru/english/1F275D3> (last visited Jan. 4, 2006).

Mr. Amsterdam is convinced that Mr. Khodorkovsky is innocent.

They arrested an innocent man. They put on a show trial reminiscent of Stalinist tactics for dealing with political opponents. Defense lawyers were threatened with disbarment or deported. They sent Mr. Khodorkovsky to the gulag in a remote location in Siberia. They destroyed his company with absurd tax charges, amounting to eight dollars of tax per dollar of revenue in 2004. They forced the closure of his charitable Open Russia Foundation, the first example of modern Russian philanthropy. They sent masked officers armed with machine guns into the orphanage for war victims run by his parents, turning over every last stone in their search for his remaining funds. They announced the seizure of his house, threatening to throw out his wife and school-aged children. Should anyone be surprised by new charges designed to bury Mikhail Khodorkovsky?

A Step at a Time, *Khodorkovsky to Face New Fabricated Charges*, *supra* note 8.

In response to the new charges arising in 2007, Mr. Amsterdam responded, “Khodorkovsky will be guilty before he is even accused.” Press Center, Mikhail Khodorkovsky, Selected Media Coverage, Week of Jan. 22-28, 2007, <http://www.khodorkovskytrial.com/media/20070122-0128.cfm> (last visited Jan. 31, 2007).

¹⁵⁴ See Interview with Steven Lang, *supra* note 153; see also Interview with Robert Amsterdam, *supra* note 153; E-mail from Oksana Sokolova, *supra* note 150.

¹⁵⁵ *Konstitutsiia Rossiiskoi Federatsii* [Konst. RF] [Constitution] art. 19.

¹⁵⁶ The U.S. Constitution does not expressly prohibit selective prosecution, but rather selective prosecution is prohibited by the language of the Fourteenth Amendment.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privi-

the selective prosecution defense in effect is consistent with Russia's constitutional framework and should be explicitly prohibited through its establishment as a legal defense.

In order to prove that a defendant should not be criminally liable on grounds of selective prosecution in the United States, the defendant must show that he is the victim of discrimination.¹⁵⁷ However, the Russian Constitution does not ban discrimination, and the word "discrimination"¹⁵⁸ is neither defined nor explained by the Russian legislature.¹⁵⁹ Nevertheless, it is feasible that the Russian system, similar to the provisions of the U.S. Constitution, could have a similar form of defense and the dismissal of prosecution charges on constitutional grounds.¹⁶⁰

leges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. The Constitution of the Russian Federation provides similar language:

1. All people shall be equal before the law and in the court of law.
2. The state shall guarantee the equality of rights and liberties regardless of sex, race, nationality, language, origin, property or employment status, residence, attitude to religion, convictions, membership of public associations or any other circumstance. Any restrictions of the rights of citizens on social, racial, national, linguistic or religious grounds shall be forbidden.
3. Man and woman shall have equal rights and liberties and equal opportunities for their pursuit.

Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 19. Thus, in both the Russian Federation and the United States, the prohibition of selective prosecution is consistent with the rights guaranteed under the respective Constitutions.

¹⁵⁷ See DIETZ ET AL., *supra* note 69, at § 983.

¹⁵⁸ In the United States, the word discrimination has taken on different meanings depending on the context; for example, "the term 'discrimination,' which is defined by Title III to include: 'a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, *unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.*'" *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682 (2001) (quoting 42 U.S.C. § 1218(2)(b)(2)(A)(ii)).

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁵⁹ *Moscovskaya Helsinskaya Grupa* [Moscow Helsinki Group], *supra* note 153.

¹⁶⁰ *People v. Carter*, 86 A.D.2d 451, 453 (2d Dep't 1982).

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Although Russia has a very liberal Constitution,¹⁶¹ it is not a free country where one may express one's opposing views through the press, nor may its people safely exercise their constitutional rights unless they are supportive of Russia's current political activities.¹⁶² When an individual is brought into a court of law and addresses the issue of selective prosecution,¹⁶³ the judge is not obligated to recognize such a defense, but rather, evaluates the facts underlying the arrest and makes a decision regarding the case.¹⁶⁴ So long as the arrest was legal and founded on codex, the individual may be arrested.¹⁶⁵ Russian courts are unwilling to acknowledge that a person has been selectively prosecuted.¹⁶⁶ Therefore, those who have been prosecuted selectively for political, anti-Semitic, or other constitutionally impermissible reasons have no way of seeking remedy in a Russian court of law, and are thus limited to resting their defenses on the factual allegations.¹⁶⁷ For these victims, their constitutional rights come secondary, or may not even come into the play at all.¹⁶⁸

E. *Constitutional Court*

The selective prosecution defense is also consistent with Russia's Court System. In December 1991, the Constitutional Court of

¹⁶¹ See Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 19.

¹⁶² See Interview by Stephen Sestanovich, Senior Fellow for Russian and Eurasian Studies, Council of Foreign Relations, with Gary Kasparov, World Chess Champion and Chairman of Committee 2008: Free Choice, http://www.cfr.org/publication/6776/does_russian_democracy_have_a_future.html (Feb. 11, 2004).

¹⁶³ In Mr. Khodorkovsky's case, the pleadings and arguments indicated that he was selectively prosecuted; however the attorneys did not focus much on this defense, choosing to narrow in on the actual factual circumstances of the case and its substantive arguments. They were unable to concentrate on both, because, as Mr. Amsterdam believes, Russian courts are just developing and do not understand the basis of arguments made in the alternative. See Interview with Robert Amsterdam, *supra* note 153.

¹⁶⁴ See Interview with Steven Lang, *supra* note 153. In Russia, there is no specific timeframe for bringing a selective prosecution defense, unlike in the United States. Selective prosecution may be argued in a court of law at any time; however, the court will never admit that a person has been selectively prosecuted. *Id.*

¹⁶⁵ *Id.* The Russian codex indicates on what grounds a person may be arrested. If a person argues in a court of law that he has been selectively prosecuted, the judge will ask the prosecution whether he has in fact been selectively prosecuted, to which the prosecutor would respond with the codex section number pertaining to the grounds for the individual's arrest, following which the judge ceases to address the selective prosecution defense.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (stating no court will speak of selective prosecution).

¹⁶⁸ *Id.* (stating the Constitution exists on paper, but no one really enforces its provisions).

the Russian Federation was created to protect the Russian citizens' fundamental rights.¹⁶⁹ Some of the common rights the court addressed were the rights to a fair trial, to be protected against judicial mistakes and to vote.¹⁷⁰ However, as the Constitutional Court may be hesitant to consider political cases;¹⁷¹ the victims of politically-motivated selective prosecution¹⁷² have no opportunity to seek remedy against such prosecutions in the Constitutional Court of the Russian Federation.¹⁷³ Thus, the selective prosecution defense should be separately established to help its victims in a court of law.

V. CONCERN FOR THE UNITED STATES AND OTHER CIVILIZED NATIONS

A. *Benefits to the United States*

Russia's development into a democratic state and its economic success pose significant concerns for the United States.¹⁷⁴ Selective prosecution restricts citizens' freedoms of expression and speech, which are the bases of democracy.¹⁷⁵ An economically successful

¹⁶⁹ The Constitutional Court was created by the Fifth Congress of Peoples' Deputies of the RSFSR in October 1991. It was the first judicial body of constitutional review in Russian history. The Constitutional Court is the third branch of government; it is independent and not subordinate to the legislative and executive branches. The Court decides cases exclusively on the basis of the Constitution of the Russian Federation. Article 125 of the Russian Constitution addresses the powers of the Constitutional Court. See Constitutional Court of the Russian Federation: Development & Activity, <http://ks.rfnet.ru/english/booklet.htm> (last visited Jan. 7, 2006). However, "in June 2003, 2 out of 3 [surveyed] residents of St. Petersburg, the second largest city in Russia, reported that they knew nothing about the work of the Constitutional Court." Trochev, *supra* note 54.

¹⁷⁰ Constitutional Court of the Russian Federation: Development & Activity, *supra* note 169.

¹⁷¹ *Id.* See also Tom Lynch, *Constitutional Refolution in the Ex-Communist World*, 6(2) HUM. RTS. BRIEF 24 (1999) (indicating that Dr. Mark Brzezinski, attorney at Hogan & Hartson in Washington, questioned whether the Russian Constitutional Court would be willing to tackle political cases or challenge the legislature at the time of a crisis).

¹⁷² The Russian Constitution does not explicitly allow for the freedom of political association; however, Article 19 of the Russian Constitution guarantees equality for all people: "All people shall be equal before the law and in the court of law." Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 19.

¹⁷³ See Editorial, *The Risk of Eliminating All Opponents*, MOSCOW TIMES, July 13, 2005, available at <http://www.cdi.org/russia/johnson/9199-5.cfm> (discussing the numerous investigations to silence officials for political reasons to suppress all potential opposition).

¹⁷⁴ Tom Bjorkman, *Russian Democracy and American Foreign Policy*, July 2001, available at <http://www.brook.edu/comm/policybriefs/pb85.htm> (last visited Jan. 3, 2006).

¹⁷⁵ International Federation of Library Associations and Institutions and International Publishers Association, *A Joint Statement on Freedom of Expression*, Oct. 9, 2002, available

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Russia will create a more reliable international partner in meeting global challenges, including the war on terrorism, and an even better investment partner.¹⁷⁶ A stronger Russian business community will benefit the Russian “democratic transition and the political system as a whole.”¹⁷⁷ Selective prosecution for political reasons may be damaging the Russian economy,¹⁷⁸ as well as Russian democracy.¹⁷⁹

Presently, the Russian economy is booming with great potential,¹⁸⁰ as evidenced by the many foreigners who are already investing in Russian business.¹⁸¹ Though over the past five years Russian

at <http://www.ipa-uie.org/librarians/relationship/IFLA%20IPA%20press%20release%20FofEx.html> (last visited Jan. 3, 2006).

¹⁷⁶ Alexander Vershbow, U.S. Ambassador to Russia, Keynote Speech at the World Pension Forum/U.S.- Russia Business Council Conference “Overcoming Obstacles: Is Potential Becoming Reality?” (May 29, 2005), available at http://moscow.usembassy.gov/links/statement.php?record_id=139 (last visited Jan. 5, 2006).

¹⁷⁷ *Id.*

¹⁷⁸ See Damian Grammaticas, *Yukos Workers Face Uncertain Future*, July 27, 2004, BBC NEWS, <http://news.bbc.com.uk/1/hi/business/3930907.stm>; Charles Grant, *Russia's Future in Balance: Putin versus Khodorkovsky*, Aug. 7, 2003, <http://www.openDemocracy.net>. See also Interview with Robert Amsterdam, *supra* note 2 (indicating that the economist Milton Friedman said that “free market was paramount.” Free market “can not function when there is no rule of law.”); Ian Hague, *The Khodorkovsky Trial*, June 2004, <http://www.aei.org/events/filter..eventID.852/summary.asp> (last visited Dec. 29, 2005) (indicating that the arrest of Platon Lebedev led the market to drop 15 percent, the arrest of Khodorkovsky led to another drop of the marketplace, and the freezing of Yukos’ assets led the market to take another 25 percent hit).

¹⁷⁹ See McCain, *Lieberman Urge Suspension of Russia G-8 Membership*, Feb. 19, 2005, http://mccain.senate.gov/press_office/view_article.cfm?id=201.

Russian Government’s selective prosecution of its political opponents, suppression of free media, continued abuses by military forces against civilians in Chechnya, and failure to pursue a genuine political process that could end the military campaign do not reflect the minimum standards of democratic governance and rule of law that characterize every other member of the G-8.

Id.

¹⁸⁰ Vershbow, *supra* note 176.

¹⁸¹ See Oganis Sarkisov, *Franchising in Russia* (2005), available at http://www.buyusainfo.net/docs/X_2632939.pdf (last updated Sept. 30, 2005) (discussing the growth of American food franchises in Russia, and indicating that the U.S. Commercial Service is helping U.S. franchisors establish a presence in Russia). See also Tracy Theisen, *Growing Market and Partnership Opportunities in Russia*, EXPORT AMERICA (Dec. 2003), available at <http://www.stat-usa.gov/miscities.nsf> (last visited Jan. 5, 2006) (noting that the foreign direct investments in Russia in 2003 were 35 percent higher than in 2002). Another benefit to investing in Russia is the very low tax rates—Russia has one of the lowest personal tax rates in the world. However, the tax is “somewhat offset by continuing difficulties faced by taxpayers in dealing with the tax administration system: even paying tax can be logistically challenging in Russia.” ERNST & YOUNG, *DOING BUSINESS IN THE RUSSIAN FEDERATION* 45 (May 2005), [http://www.ey.com/global/download.nsf/Russian_E/Doing+Bus_May_2005/\\$file/Doing_Business_Russia-05.pdf](http://www.ey.com/global/download.nsf/Russian_E/Doing+Bus_May_2005/$file/Doing_Business_Russia-05.pdf) (last visited Dec 9, 2005).

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growth averaged 6.3 percent annually and the Russian government has delivered a healthy budget, government corruption and inefficiency still exist in the country.¹⁸² Now, more than ever, the United States is interested in seeing Russia overcome the challenges that stand in its way to succeeding economically.¹⁸³ “An economically strong, stable and democratic Russia is in everyone’s best interest, and will be a more capable partner in addressing the many common challenges of the 21st Century.”¹⁸⁴

After Putin became Russia’s president, he repeatedly expressed his commitment to democracy. “Russia wants to be, and will become, a democratic, society-oriented state with a market economy.”¹⁸⁵ Development into a democracy has an important component: it must have an independent and competent court of law.¹⁸⁶ However, observers indicate that Russia had made a significant progress towards democracy in the last year of the USSR, but that process stalled by the mid-1990s.¹⁸⁷ Commentators believe that contrary to his statements, Putin backed policies that restricted civil liberties and sanctioned organizations deemed too critical of his policies.¹⁸⁸

B. *American Assistance to Russia*

The United States has attempted to help Russia overcome its judiciary’s problems, including that of selective prosecution.¹⁸⁹ The U.S. Agency for International Development (USAID)¹⁹⁰ has cre-

¹⁸² Vershbow, *supra* note 176.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Vladimir Putin, Putin Democracy Pledge (Sept. 24, 2004), available at <http://news.bbc.co.uk/2/hi/europe/3687606.stm> (last visited Jan. 3, 2006).

¹⁸⁶ Judicial System of the Russian Federation and the Supreme Court of the Russian Federation, <http://www.supcourt.ru/EN/supreme.htm> (last visited Jan. 4, 2006).

¹⁸⁷ Bjorkman, *supra* note 174, at 1; see also Jeffrey Donovan, *Russia: New Book Says Putin’s Russia Falls “Between Democracy and Dictatorship,”* May 13, 2004, available at http://www.rferl.org/features/features_Article.aspx?m=05&y=2004&id=7097966A-3079-410F-9823-BE529DE696E5 (last visited Jan. 3, 2006) (indicating that Russia transformed from communism to some form of democracy in the 1990s).

¹⁸⁸ Bjorkman, *supra* note 174.

¹⁸⁹ See USAID, Data Sheet, <http://www.usaid.gov/policy/budget/cbj2005/ee/pdf/118-0221.pdf> (last visited Jan. 2, 2006).

¹⁹⁰ USAID is the U.S. government organization responsible for promoting U.S. national security, foreign policy, and the War on Terrorism. It receives guidance from the U.S. Secretary of State and seeks to improve worldwide living conditions. USAID works in 100 developing countries, and provides assistance ranging from technical training and scholarships to budget support and food assistance. See USAID Primer: What We Do and How

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ated programs to improve Russia’s legal system and increase public awareness of legal rights.¹⁹¹ USAID recognizes that even though some improvements have been made to Russia’s legal system,¹⁹² selective prosecution, lack of an independent judiciary system, and the unequal application of laws and enforcement of judicial decisions still remain significant drawbacks to the Russian legal system.¹⁹³

At the Sixth All-Russian Congress of Judges in Moscow, Putin indicated that judges are not independent, but influenced by the oligarchs.¹⁹⁴ However, USAID is investing millions of dollars¹⁹⁵ to improve Russia’s legal system, with significant progress made.¹⁹⁶

C. Human Rights Violations

The selective prosecution of political opponents falls below the minimum standards of civilized nations,¹⁹⁷ and if Russia wants

We Do It, available at http://www.usaid.gov/about_usaid/primer.html (last visited Mar. 18, 2006).

¹⁹¹ *Id.*

¹⁹² USAID contributed significantly in assisting with the development of a modern legal framework for the Russian system. Approximately ten years ago, the judiciary was totally dependent on the executive government branch. Currently, USAID’s human rights leaders, with the help of the Moscow Helsinki Group, carry out multi-functional human rights support. See USAID, *supra* note 190. Judicial reformers try to strengthen judicial self government with the assistance of USAID, borrowing ideas from the United States. In November 2004, an All-Russia Congress of Judges voted to adopt a new Ethics Code, incorporating advice sought from the U.S. judges. *Id.* The Constitution of the Russian Federation of 1993 became the main legal basis for the judicial reform. The Constitution has a separate Chapter for Judicial Powers, which supports independence of legislative, executive and judicial powers. See Judicial System of the Russian Federation and the Supreme Court of the Russian Federation, *supra* note 186.

¹⁹³ See USAID, *supra* note 190.

¹⁹⁴ Nabi Abdullaev, *Putin Tells Judiciary to Clean up its Act*, MOSCOW TIMES, Dec. 1, 2004; see also *Putin Defends His “Democracy,” supra* note 116.

¹⁹⁵ The estimated total amount USAID has spent and proposed to spend in 2006 is \$21,497,000. See USAID, *supra* note 190.

¹⁹⁶ President Vladimir Putin indicated that citizens are increasingly placing their trust in the courts to settle their problems, evidencing a greater faith in the judiciary. See President Putin, Introductory Remarks at the VI National Congress of Judges (Nov. 30, 2004), available at <http://www.cdi.org/russia/johnson/8476-15.cfm> (last visited Jan. 3, 2006). Since 1998 Russia has been subject to the jurisdiction of the European Court of Human Rights, decisions of which are binding on the Russian courts, and since May 2002 at least seventeen cases have been decided, most of them finding violations. These cases have been addressing such issues as the length of the pretrial detention, length of civil proceedings, and the right to appeal. See USAID, *supra* note 190.

¹⁹⁷ H.R. Con. Res. 336, 108th Cong. (2003) (indicating that selective prosecution does not reflect the minimum standard of civilized nations).

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to continue its participation in the Group 8 nations¹⁹⁸ it must adhere to the standards of democracy.¹⁹⁹ As the judicial system in Russia improves,²⁰⁰ selective prosecution will only serve to impede and even reverse the progress of the Russian judiciary and the corresponding trust which its citizens have gained.²⁰¹ Russia faces many human rights problems and violations,²⁰² however, the selec-

¹⁹⁸ The members of the Group are Canada, France, Germany, Italy, Japan, the United Kingdom, the United States, and Russia. Russia officially became one of its eight members in 1997; however, it does not participate in financial discussions conducted by the Finance Ministers of the Seven Countries. See U.S. Department of State, Group of 8 (G8), What is the Group of Eight, http://usinfo.state.gov/ei/economic_issues/group_of_8.html (last updated Oct. 13, 2005).

¹⁹⁹ H.R. Con. Res. 336 (expressing the congressional belief that continued participation of the Russian Federation in the Group of Eight nations should be conditioned on the Russian Government's voluntary acceptance and adherence to democratic norms and standards). Garry Kasparov, world chess champion and chairman, Committee: 2008 Free Choice, indicated that it is still a G-7 with President Putin attending the meetings. The idea of G-7 was to form a committee of the industrialized democratic nations, and former President Boris Yeltsin was invited when Russia seemed to be moving towards a democracy. However, because President Putin did not meet these expectations, his membership to the G-7 should be reconsidered. See Interview with Gary Kasparov, *supra* note 162.

²⁰⁰ See President Putin, Introductory Remarks, *supra* note 196.

²⁰¹ See Interview by Nadezhda Popova with Tom Lantos, U.S. Congressman, (June 3, 2005), <http://www.mbktrial.com/documents/usgovt.cfm> (last visited Feb. 11, 2006) (where Mr. Lantos indicates that after Khodorkovsky's trial, Russia is no longer a democracy).

²⁰² *Russia*, JURIST, <http://jurist.law.pitt.edu/worldlaw/russia.php> (last visited Feb. 11, 2006).

Russia's human rights record remains uneven and has worsened in some areas in recent years. Despite significant improvements in conditions following the end of the Soviet Union, problem areas remain. In particular, the Russian Government's military policy in Chechnya is a cause for international concern. . . . Although the government has made progress in recognizing the legitimacy of international human rights standards, the institutionalization of procedures to safeguard these rights has lagged. There are, however, indications that the law is becoming an increasingly important tool for those seeking to protect human rights. The judiciary is often subject to manipulation by political authorities and is plagued by large case backlogs and trial delays. Lengthy pretrial detention remains a serious problem. Russia has one of the highest prison population rates in the world, at 685 per 100,000. There are credible reports of beating and torturing of inmates and detainees by law enforcement and correctional officials. Prison conditions fall well below international standards. In 2000, human rights Ombudsman Oleg Mironov estimated that 50% of prisoners with whom he spoke claimed to have been tortured. Human rights groups estimate that about 11,000 inmates and prison detainees die annually, most because of overcrowding, disease, and lack of medical care. In 2001, President Putin pronounced a moratorium on the death penalty. However, there are reports that the Russian Government might still be violating promises they made upon entering the European Council, especially in terms of prison control and conditions.

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tive use of laws by authorities against selected individuals for political purposes is among the most serious.²⁰³ “[S]ince the beginning of the 1990s, three-quarters of Russians believed that a ‘judicial system that treats everyone equally’ was important for democracy, and this value of the judiciary topped all other values attributed to democracy as did the right to judicial protection.”²⁰⁴

VI. CONCLUSION

Russia is striving to become a democracy,²⁰⁵ yet it continues to utilize the practice of selective prosecution, which is inconsistent with democratic principles and stands as an obstacle to achieving democracy.²⁰⁶ Foreign governments worry that selective prosecution coupled with the lack of independent judiciary poses significant human rights violations to perceived opponents to the government.²⁰⁷ Even though Article 19 of the Russian Constitution guarantees “the equality of rights and liberties regardless of sex, race, nationality, language, origin, property or employment status, residence, attitude to religion, convictions, membership of public associations or any other circumstance,”²⁰⁸ allowing selective prosecution undermines all of these purported rights. Article 19 also forbids “[a]ny restrictions of the rights of citizens on social, racial, national, linguistic or religious grounds,”²⁰⁹ yet commentators indicate that some selective prosecutions take place as a result of the anti-Semitic ideology still present in Russia.²¹⁰

During the trial of Mr. Khodorkovsky, the Russian court did not address the issue of selective prosecution, and left Russian citizens to determine for themselves whether his constitutional rights were violated by the court. If the Russian legal system had adopted the selective prosecution defense, the court would have addressed the selective prosecution claim and Mr. Khodorkovsky would have been availed an opportunity to prove in court that his

²⁰³ See Project for Human Rights, *The Case Against Mikhail Khodorkovsky and YUKOS Oil*, <http://www.russiaontrial.org/cases/yukos.html> (last visited Jan. 5, 2006).

²⁰⁴ Trochev, *supra* note 54.

²⁰⁵ Vladimir Putin, *Putin Democracy Pledge*, *supra* note 185.

²⁰⁶ See McCain, *supra* note 179.

²⁰⁷ See Project for Human Rights, *supra* note 203.

²⁰⁸ *Konstitutsiia Rossiiskoi Federatsii* [Konst. RF] [Constitution] art. 19.

²⁰⁹ *Id.*

²¹⁰ Ser, *supra* note 26, at 5.

prosecution was founded on constitutionally impermissible grounds if that was in fact so.²¹¹

American society emphasizes the impartiality of judges and fair resolution of issues.²¹² In Russia, there is a lack of faith in the judicial system,²¹³ with many Russian citizens perceiving the court as being either bribed by the oligarchs²¹⁴ or in corroboration with the prosecutor.²¹⁵ Selective prosecution is a significant problem in Russia today; while many oligarchs have violated laws, only select individuals are subject to prosecution.²¹⁶ Enforcing a defense of selective prosecution will alleviate one of Russia's most serious human rights violations.²¹⁷ However, change may not come quickly. It took the American courts approximately 100 years, ever since the recognition of a constitutional rights violation via selective enforcement in law in *Yick Wo v. Hopkins*,²¹⁸ to establish the framework used by U.S. courts today.²¹⁹

Russian courts may also have to spend some time in creating a framework for determining whether an individual has been selectively prosecuted, but Russia already has a strong foundation in the Constitution of the Russian Federation, which grants equality to all people before the law.²²⁰ Thus, selective prosecution is implicitly forbidden in the Russian Constitution. To deter selective prosecution, rather than "enforcing" the constitutional rights only on paper, Russian courts should implement a legal defense to enjoin selective prosecution.

²¹¹ Russia currently does not have any standard for an individual to prove he has been the victim of selective prosecution. He may discuss it throughout the trial, but the court does not address it in its decision-making. See Interview with Steven Lang, *supra* note 153.

²¹² Prosecution: Prosecutorial Discretion, *supra* note 97.

²¹³ See Susan B. Glasser & Peter Baker, *Prosecution Puts Russian "Rule of Law" on Trial; Billionaire's Case Invites Scrutiny of Justice System*, WASH. POST, Oct. 30, 2003, at A11.

²¹⁴ Abdullaev, *supra* note 194; see also *Putin Defends His "Democracy," supra* note 116.

²¹⁵ See also *Putin Defends His "Democracy," supra* note 116.

²¹⁶ Interview with Tom Lantos, *supra* note 14.

²¹⁷ See Project for Human Rights, *The Case Against Mikhail Khodorkovsky and YUKOS Oil, supra* note 203.

²¹⁸ 118 U.S. 356 (1886).

²¹⁹ *Wayte v. United States*, 470 U.S. 598 (1985), was the first case to establish the framework used by the courts today in addressing the selective prosecution defense. "[I]n order to establish a prima facie case petitioner had to prove that (i) others similarly situated generally had not been prosecuted for conduct similar to petitioner's and (ii) the Government's discriminatory selection was based on impermissible grounds such as race, religion, or exercise of First Amendment rights." *Id.* at 605.

²²⁰ Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 19.

Russia may look to the American standard in determining its own, but adopting the American standard would ignore the fundamental difference of the faith Americans and Russians place in their respective judicial systems. Defendants' motions alleging selective prosecution in the United States rarely succeed.²²¹ Broad prosecutorial discretion and its societal acceptance are ingrained in American law and are consistent with its adversarial system of justice.²²² Yet in Russia, citizens want assurance that the standard provides a remedy and is evaluated impartially. Russia should adopt a standard consistent with its judiciary.

In the United States, in order to show that a defendant has been selectively prosecuted, one must first show that others similarly situated have not been prosecuted, and second, that the prosecution was based on impermissible motive, for reasons forbidden by the Constitution.²²³ The defendant bears the burden of proof that he has been intentionally or purposefully discriminated against based on some impermissible standard, including race, religion, national origin, sex, political activity, membership in a political party or labor union, or exercise of the protected statutory and constitutional rights, including the First Amendment rights.²²⁴

In Russia, such standard would be too harsh for the individuals to meet. Since the incidents of selective prosecution are posing a significant concern for foreign investors²²⁵ and governments²²⁶ as well as Russian investors, in addition to a lack of faith among Russians in the judiciary system, a totality of the circumstances standard may be a more appropriate standard for the Russian judicial system. The courts may have to address possible acts of anti-Semitism, political behavior of individuals, or other possible reasons for which the prosecutor chose this particular individual. Simply because an individual committed a crime and was arrested pursuant to a codex may not be enough. Upon the motion by the defendant, the court should impose a test in determining and evaluating in good faith whether the defendant has in fact been selectively pros-

²²¹ See GERSHMAN, *supra* note 74, at § 4.9.

²²² Prosecution: Prosecutorial Discretion, *supra* note 97.

²²³ See *United States v. Graham*, 146 F.3d 6 (1st Cir. 1998); *see also* *United States v. Nelson*, 137 F.3d 1094 (9th Cir. 1998); *see also* *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

²²⁴ See DIETZ ET AL., *supra* note 69, at § 983; *see also* Goldsamt, *supra* note 86.

²²⁵ See Ostrovsky, *supra* note 123; *see also* Biryukov, *supra* note 123.

²²⁶ Testimony of Tim Osborne, *supra* note 124; Project for Human Rights, *supra* note 203.

ecuted. Moreover, since Russian citizens lack faith in the Russian judicial system, it may be necessary to establish an independent judicial committee for evaluating the selective prosecution claims, or alternatively, such claims should be addressed by the Constitutional Court, including the claims of the selective prosecution based on the political reasons. Nevertheless, since Russia is not a common law country, it may also be appropriate to have a legislatively passed law expressly prohibiting selective prosecution.

By adopting selective prosecution defense, Russia will strengthen its relationship with the United States and benefit diplomatically. After all, selective prosecution restricts citizens' constitutional rights, a foundation for a democracy.²²⁷ And now, the United States is interested in partnering with Russia both economically and in the fight against terrorism.²²⁸ Given President Putin's emphasis on his commitment to democracy,²²⁹ establishing a statutory or judge-made selective prosecution defense would not only be consistent with Russia's goals, but will also legitimize the judicial system in the eyes of Russian citizens and the international community.

²²⁷ International Federation of Library Associations and Institutions and International Publishers Association, *supra* note 175.

²²⁸ Vershbow, *supra* note 176.

²²⁹ Vladimir Putin, Putin Democracy Pledge, *supra* note 185.