

Not Guilty Until the Supreme Court Finds You Guilty: A Reflection on Jury Trials in Russia

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Abstract: This article analyzes the Russian Supreme Court's practice of overturning jury acquittals. Because juries acquit more often than judges, some prosecutors, judges, and legal scholars have expressed doubts about whether Russians are legally sophisticated enough to serve on juries. Yearly statistics provided by the Russian Supreme Court confirm that acquittals are appealed more often than convictions and that the Supreme Court overturns a much higher percentage of appealed acquittals than appealed convictions, most often because jury question lists fail to conform to the Criminal Procedure Code. While the Supreme Court has the legal authority to overturn acquittals, this article suggests that overturning acquittals in such high numbers undermines the future viability of jury trials. This article encourages the Russian Supreme Court not to be so quick to overturn acquittals. In a country where people were oppressed for so many years, jury acquittals play a vital role in protecting the fundamental rights of citizens.

Key words: acquittal, Criminal Procedure Code, jury trial, question list, Russia, Supreme Court

"Our people are not ready for jury trials."

—Aleksandr Dmitrievich Chernov, chairman of the Krasnodar Regional Court, 1999¹

In just more than ten years, a revolution has happened in the Russian judicial system. Russia went from a country with a Soviet judicial system and almost a 100 percent conviction rate to a country where juries are active in the gravest

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cases in eighty-eight² of Russia's eighty-nine regions and are acquitting in about 15–20 percent of the cases that they hear.³ With such a drastic change in the way justice is administered, it is not surprising that judges such as Chernov are skeptical about whether the Russian people are ready for jury trials. The Russian Supreme Court has also expressed its skepticism of jury trials by being particularly active in overturning jury verdicts, especially acquittals.⁴

This article argues that the practice of overturning jury acquittals in such high numbers is detrimental to Russia's fledgling jury system. The practice also raises questions about whether the jury system is right for Russia at this time or if some alternative would better reflect the current legal consciousness. If jury trials are to remain a permanent fixture in the new Russian judicial landscape, reforms are needed to ensure their long-term success. The first part of this article looks at the evolution of the right to trial by jury in Russia from 1993 forward.⁵ The second part examines the current jury trial system in practice, including the phenomenon of overturning acquittals. The third part analyzes whether the current appeals process violates Russian and international law. Finally, the fourth part takes a broader look at whether jury trials can survive in Russia and what it will take to ensure their success.

Evolution of the Right to Trial by Jury in Russia

Under the 1993 Russian Constitution, a defendant has the right to a trial by jury in cases provided for by federal law.⁶ What became known as the Jury Law was enacted by the Supreme Soviet on July 16, 1993.⁷ Under the Jury Law, jury trials were reintroduced in Russia on an experimental basis, and numerous limitations were placed on the right to jury trials.⁸ The law provided for jury trials in only nine of Russia's eighty-nine regions.⁹ Further, the right to jury trials was only available to defendants in regional and territorial courts (not in lower courts of general jurisdiction) and only for thirty-five of the most serious criminal offenses.¹⁰

As jury trials began to function in the nine regions, the Russian Constitutional Court was inundated with requests from people living outside the select regions, demanding their right to a jury trial under Article 20 of the Russian Constitution.¹¹ After more than five years of jury trials in the nine regions and no foreseeable expansion to other regions, the Russian Constitutional Court ruled that, at least with respect to defendants facing the death penalty, the right to a jury trial had to be provided for in all eighty-nine regions.¹² The court made it clear that the introduction of jury trials in only nine regions initially was supposed to be the beginning of a gradual reform process whereby jury trials would eventually be introduced throughout Russia.¹³ The court found that five years was more than sufficient time for the legislature to enact laws expanding the right to jury trials at least for capital cases.¹⁴ The court ordered the Federal Assembly to amend legislation to ensure that the right to a trial by jury for those charged with capital offenses exists in all territories of the Russian Federation.¹⁵ The court also suspended imposition of the death penalty in any cases until such time as a law guaranteeing the right to trial by jury comes into force in all territories of the Russian Federation.¹⁶

A new Criminal Procedure Code was adopted on November 22, 2001, and went into effect on July 1, 2002. Article 30(2) of the Criminal Procedure Code provides that a judge and twelve jurors shall try all cases involving crimes set forth in Article 31(3) of the code upon a motion by the defendant.¹⁷ The Criminal Procedure Code does not limit the right to a trial by jury to only certain regions of the country. By the end of 2003, jury trials were functioning in eighty-three regions and juries were introduced to an additional five regions in 2004. The Republic of Chechnya is the only region where the introduction of jury trials will be delayed until at least January 1, 2007.¹⁹

The Jury Trial System and the Appeals Process in Practice

In 1993, Russia had two jury trials throughout its vast territory.²⁰ In 1994, the first year that jury trials were up and running in the initial nine regions, there were one hundred and seventy-three jury trials.²¹ From 1994 until now, the number of jury trials has steadily increased.²² In 2003, there were four hundred and seventy-nine jury trials for nine hundred and thirty-six defendants.²³ Although four hundred and seventy-nine may not seem like a large number, it is almost a 500 percent increase in jury trials over a period of ten years and accounts for 8.2 percent of all criminal trials conducted in regional courts.²⁴ In 2004, the number of jury trials more than doubled to approximately one thousand.²⁵

The actual number of jury trials fails to fully account for the impact of the right to a jury trial on the Russian criminal justice system. There were twice as many demands for jury trials as there were actual trials in 2003—2,072 people in 954 cases demanded jury trials.²⁶ To put this number in perspective, approximately 18 percent of eligible defendants demanded jury trials.²⁷ Looking beyond just 2003, the Russian Supreme Court estimates that since jury trials were reinstated in the Russian Federation, approximately 20 percent of the people accused of qualifying crimes have requested jury trials each year.²⁸ In some regions, more than 60 percent of defendants demand jury trials.²⁹ Recent press accounts indicate that the number of defendants choosing jury trials is constantly increasing.³⁰ As of January 2003, some defendants had to wait six months to get a jury trial due to the backlogs of jury demands in the courts.³¹

It is not clear why only 20 percent of eligible defendants request jury trials when Russia's experience demonstrates that juries acquit more often than judges.³² Accounts differ as to the exact number of jury acquittals versus judge acquittals, but the difference is significant by any count. Juries are between ten and twenty times more likely to acquit than judges.³³ Judges acquit less than 1 percent of defendants,³⁴ whereas juries acquit 15 to 20 percent of defendants.³⁵

The reasons juries are acquitting more people than judges is open to speculation. At a roundtable held in Krasnodar, Russia in 1999 to assess the first five years of jury trials, some judges and scholars expressed views that Russians do not have the legal consciousness needed for jury trials.³⁶ At the roundtable, Judge Aleksandr Dmitrievich Chernov, chairman of the Krasnodar Regional Court, provided an example supporting his claim that Russians are not ready to be jurors. According to Judge Chernov, some reporters interviewed a group of jurors who

acquitted a defendant of murdering a young woman. When the jurors were asked why they acquitted the defendant, the answer was not that they thought the defendant was innocent of all charges. Instead, according to Judge Chernov, one juror indicated that she knew the defendant was guilty but thought to herself, "I have a son the same age as the defendant." Another juror reportedly justified the acquittal based on the fact that the victim was not entirely sober and did not behave herself.³⁷ Judge Chernov expressed concern that such situations should not exist.³⁸

Regional Court Judge Nikolai Aleksandrovich Karpenko expressed similar concerns about the motivations behind jury acquittals. According to Judge Karpenko, jury verdicts, especially acquittals, are not always legal or founded.³⁹ In his experience presiding over jury trials, he found that juries more often base their verdicts on emotions rather than evidence.⁴⁰ He also found that juries make decisions based on pity for the defendant.⁴¹ Judge Karpenko is not alone in this view. Russian newspapers have referred to the psychology of the "man of the street" to rationalize acquittals.⁴² Because citizens historically do not trust the police or the government, "[s]ympathy for 'a person just like me' has become especially pervasive in Russia."⁴³

Some in the legal community have argued that acquittals are a result of the fact that "common people are incapable of understanding complex issues" and that educated people manage to avoid jury duty.⁴⁴ There are some judges, however, who still have faith in the jury system and believe that the denouncement of acquittals is a result of lack of information on the part of critics. Saratov Regional Court Judge Evgeny Druzin reported that the majority of jury verdicts that he has witnessed have been fair and based on the evidence.⁴⁵ Judge Druzin, unlike Judge Chernov and Judge Karpenko, has been impressed with "how wise a decision jurors can make in a very complicated situation."⁴⁶ Former Moscow City Court Judge Sergei Pashin supports acquittals in Russian courts as well.⁴⁷ According to Judge Pashin, Russian citizens have "the highest standards of legal culture."⁴⁸ He sees acquittals as a result of the fact that the legal culture of the people does not match the legal culture of the state.⁴⁹ In Judge Pashin's opinion, acquittals are the result of juries nullifying cruel criminal laws.⁵⁰

Judge Pashin's comments reflect the current schizophrenia of the Russian legal system that is straddling the old and the new. Because prosecutors, investigators, and judges spent most of their careers working in the old system, where acquittals were unheard of, they cannot understand why juries are acquitting at much higher rates than judges. Jurors finally have the ability to be the voice of Russian society against the state. They have the ability to express their views about the criminal laws through their verdicts. Juries also have the ability to fulfill a role as representatives of citizens against the state and express their dislike for the old system. Regional Court Judge Vladimir Pavlovich Lazovsky views the current legal culture that results in acquittals as one where "people do not like courts, do not like police, and do like the procuracy. [Legal professionals] are strangers for them."⁵¹

Some scholars argue that the reason for the rate of acquittals is based on the change in standards in the Russian legal system that came with the introduction of jury trials rather than based on the legal consciousness of jurors or the inabil-

ity of jurors to perform the task. In trials before judges with no jury, prosecutors and investigators do not have to be as vigilant about making sure their evidence meets the proper standards for admission. Judges often overlook procedural violations and allow technically inadmissible evidence.⁵² In contrast, legal provisions requiring the exclusion of inadmissible evidence are actually upheld in jury trials.⁵³ According to Aleksandr Shurygin, the chairman of the Supreme Court's appeals panel, cases often fall apart in preliminary hearings because evidence does not meet the legal standard.⁵⁴ By the time the case gets to trial, the prosecutor is barred from presenting any of the evidence the investigators gathered, the defense attorney focuses on the lack of evidence, and the jury acquits.⁵⁵ As a

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result, prosecutors and investigators actually have to work harder to prove their case and cannot get by with inadmissible evidence.

With the expansion of jury trials across Russia and the dramatic increase in the number of acquittals, it is not surprising that the system has developed some critics during the last ten years. One could

argue that it is healthy to have juries voice their opinions through acquittals and outspoken critics help deepen the legal consciousness of the Russian population. However, critics do more than merely speak out against jury trials; they appeal acquittals. According to Judge Nina Stus of the Krasnodar Regional Court, who has presided over more than one hundred jury trials, “[w]hen a not-guilty verdict is passed, the prosecutors begin to dig around It is a card prosecutors keep up their sleeve in case there is a not-guilty verdict.”⁵⁶ Often a triumph for the people's legal consciousness and the victory of the citizen against the state does not last long.

Statistics from the past few years show that the Cassation Chamber of the Russian Supreme Court does not like acquittals either. In 2005, four hundred and twenty-six matters involving eight hundred and forty-four defendants tried in trials by jury were appealed to the Cassation Chamber.⁵⁷ Six hundred and ninety-five appealed cases involved defendants who were found guilty and one hundred and forty-eight appealed cases involved defendants who were acquitted. One hundred and one or 14.5 percent of appealed guilty verdicts were overturned and sent back for a new trial, whereas seventy-two or 49 percent of appealed not-guilty verdicts were overturned and sent back for a new trial. This number of overturned jury acquittals is higher than in recent years. In 2003, only 24 percent of appealed jury acquittals were overturned by the Cassation Chamber of the Russian Supreme Court and sent back for a new trial.⁵⁸ In 2002, 32.4 percent of appealed jury acquittals were overturned and in 2001, 43 percent of appealed jury acquittals were overturned.⁵⁹ By comparison, appealed convictions were overturned and

sent back for a new trial at a much lower rate: 5 percent in 2003,⁶⁰ 5.9 percent in 2002,⁶¹ and 6.7 percent in 2001.⁶²

According to the Russian Supreme Court, the main reason for overturning judgments based on jury verdicts during the last several years has been improper formulation of question lists (interrogatories) presented to the jury and failure of the presiding judge to take measures to eliminate vagueness and contradictions in jury verdicts.⁶³ A closer look at the provisions of the Criminal Procedure Code governing jury question lists sheds some light on why this confusing area of law can lead so many acquittals to be overturned.

Articles 338 and 339 of the Russian Federation Criminal Procedure Code govern jury question lists. The presiding judge in a criminal trial “takes into account the results of the trial and closing arguments” and then drafts a list of questions for the jury to answer.⁶⁴ Article 338(2) gives the parties in the case the right to make comments regarding the content and wording of questions and offer additional questions.⁶⁵ The jury is not present in the courtroom during the discussion and formulation of questions.⁶⁶ Article 339 of the Criminal Procedure Code requires the judge to pose three questions to the jury in the question list: (1) was the act committed; (2) did the defendant commit the act; and (3) is the defendant guilty of committing the act.⁶⁷ Judges can combine the three elements above into one question.⁶⁸ Further, the basic question about the guilt of the defendant “*may* be followed by separate questions about such circumstances as affect the degree of guilt or modify its nature, or absolve the defendant of liability.”⁶⁹ The judge also may include separate questions about the “degree to which criminal intent was present, reasons why an act was not completed and the degree and nature of each of the defendants’ involvement in the crime.”⁷⁰ In addition to the three required questions mentioned above, the judge must include in the question list presented to the jury all questions submitted by the defendant or defense counsel regarding exoneration, lesser included offenses, and leniency.⁷¹ If the jury finds the defendant guilty of a charged crime or lesser included offense, then it must also determine whether the defendant deserves leniency.⁷² However, no questions may be asked that require the jury to make a legal determination in rendering its verdict.⁷³

In applying Articles 338 and 339 of the Criminal Procedure Code, judges are far from uniform in the number of questions posed to the jury and the amount of detail in each question.⁷⁴ Judges sometimes include hundreds of questions on the question list presented to jurors.⁷⁵ Complex cases with lesser included crimes and multiple defendants may involve numerous questions so that the jury is presented with all variations of possible factual scenarios underlying the case and can make a decision on what it believes are the true facts.⁷⁶ The more questions judges include on the list, the more there is a possibility for error in how some of the questions are formulated or for a contradiction between questions.

It is not surprising that the Russian Supreme Court has overturned the most jury verdicts based on improper formulation of question lists, because Russian judges have struggled with this aspect of criminal procedure. Not only is the sheer number of questions on the question list problematic, but the fact that juries are only supposed to determine questions of fact and not questions of law has led to some

confusion in question formulation.⁷⁷ For example, judges are perplexed by whether aggravating or mitigating factors or questions involving the defendant's mental state are questions of law or fact.⁷⁸ If even one of the possible hundreds of questions posed to a jury in a question list requires a legal determination on the part of the jury, the prosecutor has grounds for an appeal to the Supreme Court.

Despite twelve or thirteen years of experience with jury trials in some regions, the Supreme Court is still overturning an alarming number of jury verdicts based on improper formulation of questions in question lists presented to juries. In some instances, verdicts were overturned as a result of question lists that did not contain what the Supreme Court thought were crucial questions to assess the guilt or innocence of the person.⁷⁹ In other cases, the Supreme Court overturned jury verdicts because juries were required to make legal judgments to answer some of the questions in the question list.⁸⁰ In trying to strike the balance between posing enough questions to ensure that the jury shows a factual basis for its verdict but not so many questions that the jury is asked to make legal judgments or contradict itself in answering different questions, judges are bound to make errors.

Another oft-cited cause for overturning jury verdicts is because procedures used in the trial breach the limits of competence of juries or judges. For example, the Supreme Court has overturned jury verdicts in cases where judges failed to adhere to Article 335 of the Criminal Procedure Code by deciding questions of whether evidence was admissible or not in the presence of the jury.⁸¹ Jury verdicts have also been overturned for unlawfully influencing the jury,⁸² judges' failures to tell the jury to go back to the jury room to clear up contradictions in their verdict,⁸³ and judges' failures to remind the jury in their parting words that juries are not allowed to rely on unproven evidence.⁸⁴

It is clear from the Supreme Court's yearly reviews of the work of the Cassation Chamber with respect to jury trials that there are numerous possibilities to overturn jury verdicts based on "technical" violations. Chapter 42 of the Criminal Procedure Code,⁸⁵ which outlines procedures for trial by jury in a criminal case, is so detailed that it is not that difficult to come up with a basis for overturning a verdict by finding one article that has been violated. If procedural violations are rampant in jury trials in Russia, why are reversals not based on violations equally pervasive in trials that end in acquittals and trials that end in convictions? Why is it that only 5–15 percent of convictions are overturned and as many as 50 percent of acquittals are overturned?⁸⁶ Although it is certainly possible that juries and judges make more mistakes in trials that end in acquittals, it is also possible that the phenomenon of overturning more acquittals says something about how the judges in the Cassation Chamber of the Supreme Court view the jury trial system.

The title of a recent Russian newspaper article sums up the current attitude of the Russian Supreme Court toward jury trials: "Supreme Court Doesn't Believe Jurors."⁸⁷ The Supreme Court appears not to believe jurors more often when they acquit. According to judicial reform scholar Ludmila Mikhailovna Karnozova, the Supreme Court has its own politics, and their politics in connection with acquittals appears biased.⁸⁸ Although the Supreme Court has managed to estab-

lish numerous legal bases for the reversal of acquittals, the detailed provisions of the Criminal Procedure Code ensure that it is not difficult to find a basis for overturning acquittals. The law allows the judges to manipulate the system to get their desired outcome.

Overturing Acquittals: Illegal or Just a Bad Idea?

With the overwhelming number of acquittals that have been overturned, a question arises as to whether it is legal to overturn an acquittal in the first place. The Russian Constitution guarantees that “[n]o one may be *convicted* twice for one and the same crime.”⁸⁹ This double jeopardy protection, however, does not protect an acquitted defendant from being retried.⁹⁰ According to Sergei Lukashovsky, director of the Center for Research of Civil Society in Moscow, “[t]here are a lot of cases where the prosecutor’s office makes appeals for years on the same case, until they get what they want, and that is the verdict of guilty.”⁹¹ The reality is that no acquitted Russian defendant can be absolutely certain that he or she will not be tried again for the same crime.

The Russian Constitutional Court recently heard a case calling for the interpretation of the double jeopardy provision of the Russian Constitution in relation to acquittals.⁹² In that case, defendants S. A. Belichenko, D. V. Lunev, and A. V. Vaniushin were acquitted by a jury verdict, and judgment in the Moscow Regional Court and the Cassation Chamber of the Supreme Court upheld the verdict and judgment of the regional court, making it a final judgment.⁹³ The prosecutor then filed a protest with the presidium of the Supreme Court, which overturned the final judgment entered by the Cassation Chamber and remanded the case for a new trial.⁹⁴

The Russian Constitutional Court issued a decision stating that a new trial would be unconstitutional and would conflict with international law.⁹⁵ Specifically, the court referred to Article 50(1) of the Russian Constitution and Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR).⁹⁶ Unlike Article 50(1) of the Russian Constitution, which only refers to convictions, Article 14(7) of the ICCPR states that “[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally *convicted or acquitted* in accordance with the law and penal procedure of each country.”⁹⁷ Citing Article 15(4) of the constitution, the court ruled that international law trumps when there is a conflict with domestic law.⁹⁸ In other words, the broader language in the ICCPR trumps the narrower language in the Russian Constitution.

Although this decision seems like a triumph for acquitted defendants, it has limited applicability. The court focused on whether a final judgment of acquittal could be appealed. In this case, the court found that the verdict only had the force of law when the Cassation Chamber upheld it.⁹⁹ Any verdicts that are reached in lower courts that have not yet been ruled on by the Cassation Chamber are not final within the meaning of Russian law. Therefore, the decision seems to leave room for a large number of appeals of acquittals to the Cassation Chamber.¹⁰⁰

Even if some appeals of acquittals are allowed in accordance with Russian and international law, the Criminal Procedure Code appears to limit appeals of jury

verdicts in general to cases of legal error.¹⁰¹ According to the Criminal Procedure Code, there are only three grounds for modification or reversal in the Cassation Chamber of the Supreme Court of lower court judgments based on a jury verdict: (1) violation of law on criminal procedure; (2) erroneous application of criminal law; or (3) unfair sentence (either too lenient or too harsh).¹⁰² Article 385 appears to place more limits on the ability to appeal an acquittal than those listed above. According to Article 385, a judgment of acquittal may be reversed pursuant to a prosecutor's representation to the court of cassation for review "only if there were such violations of the criminal procedural law as interfered with the right of the procurator, victim or victim's representative to present evidence or affected the content of the questions submitted to the jurors and the answers thereto."¹⁰³ Given the sheer number of acquittals that have been overturned by the Cassation Chamber of the Supreme Court, it appears that these provisions of the Criminal Procedure Code are construed very liberally in favor of the prosecutor. Sergei Nasonov, a professor of criminal law at Moscow State Law Academy, recently told the *Washington Post* that "[t]he reasons for overturning jury verdicts were supposed to be very limited, but the Supreme Court has interpreted the law very broadly. A jury verdict is hardly ever the final word."¹⁰⁴

Even if technically not a violation of the Russian Constitution or international law, acquittals should not be overturned so readily. Although it might be possible to make some exceptions based on egregious procedural violations, overturning acquittals should be the exception and not the rule. International newspapers are full of accounts of defendants who are tried two or three times because the Supreme Court had no faith in the original jury verdict.¹⁰⁵ Local Russian newspapers and television stations report details of cases as they are tried and retried as well.¹⁰⁶ Some judges have speculated that "large numbers of appeals and retrials could lead jurors and potential jurors to believe that their work was a waste of time, and not worth the effort to respond to the jury invitation."¹⁰⁷ In a country where it is already extremely difficult to get citizens to serve as jurors,¹⁰⁸ undermining the verdicts of those who actually do serve does not bode well for future jury trials. Retired federal judge Sergei Pashin sees a clear trend: "The Russian judicial system is successfully devouring the institution of trial by jury."¹⁰⁹

The Future of Jury Trials in Russia and How to Ensure Their Success

The high rate of acquittals and the practice of overturning them raise a larger question of whether jury trials can survive in Russia. Although a number of civil law countries, including Russia, experimented with jury trials after the aborted European revolution of 1848, most of them abandoned the all-lay jury in favor of mixed tribunals at the beginning of the twentieth century.¹¹⁰ Even those countries that still use lay juries have seen a marked decline in the number of jury trials over the last century. In England, jury trials account for only approximately 1–2 percent of all criminal trials with the rest of criminal cases being decided by judges.¹¹¹ In the United States, there has been a steady decrease in the number of jury trials in criminal cases over the past thirty years as the number of plea bargains has almost tripled.¹¹²

The Russian jury trial system faces many of the same problems that caused other countries to abandon or cut back on such a system. It would not be surprising to soon start hearing Russian scholars echo Professor Langbein's comments from almost thirty years ago that juries "have become ever more complicated, time consuming, and expensive" and are "unworkable as a routine dispositive procedure."¹¹³ Jury trials in Russia strain the budget and require elaborate legal procedures that do not promote efficiency.¹¹⁴ Elaborate question lists that are often incorrectly formulated are only part of the problem. The Criminal Procedure Code, like the 1993 Jury Law that preceded it, allows jurors to ask questions of witnesses during trial¹¹⁵ and allows them to request that evidence be reopened and additional witnesses be produced after jury deliberation has begun.¹¹⁶ Although these procedures increase the participation of the jury in the process, they also decrease efficiency and add to the delays that are already a problem for jury trials. Witness and participant no-shows are also common, which can drag out trials for an unreasonably long time.¹¹⁷ Jurors begin to lose patience and fail to show up as well.¹¹⁸ Further, getting jurors to the courthouse in the first place is incredibly difficult in a climate where more than 80 percent of prospective jurors fail to respond to calls to jury service and those who do show up face a real risk of losing their job.¹¹⁹ These problems increase costs, unnecessarily expand the judicial workload, and threaten the future of the system.¹²⁰

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In addition to the steep costs and technical problems that ensure lengthy jury trials, the new form of criminal procedure has caused other problems as well. Different scholars have estimated the average acquittal rate to be somewhere between 15 percent¹²¹ and 20 percent.¹²² This high acquittal rate has challenged core legal and social values and threatens the long-term sustainability of jury trials.¹²³ The large number of acquittals has produced “a strong negative response among the population”¹²⁴ and has even been criticized by lawyers and judges.¹²⁵ A recent survey of four hundred and five judges, lawyers, and advocates revealed that 69 percent of those who opposed jury trials feared that there was a “real risk of acquitting guilty people.”¹²⁶ A big impetus for the abandonment of jury trials in the early twentieth century in Europe were “scandalous acquittals” that were thought to be “‘nullification of the law’ resulting either from emotion, ignorance, or outright rebellion.”¹²⁷ As discussed previously in this article, these same arguments are being made against Russian jury trials today. Juries do not only acquit defendants that they think are innocent. They also acquit as a protest against the state and the harsh laws that prosecutors try to enforce.

Despite the real concern that jury acquittals that are perceived as jury nullifications could lead to a backlash against jury trials similar to what happened

on the European continent, real and perceived jury nullifications help ensure Russia's successful democratic transition. (In contrast, the Supreme Court's practice of overturning those acquittals undermines the role of the jury in that democratic transition.) "The right of juries to decide according to their conscience and refuse to apply the law is essential to the democratic role claimed for the jury."¹²⁸ When juries acquit, they are providing valuable information about how the average Russian citizen views the judicial system. If the system is working properly, jury acquittals force investigators and prosecutors to do a better job of gathering evidence and proving their case. When large numbers of these acquittals are being overturned, as they currently are in Russia, it sends a message to law enforcement that their "mistakes" will be overlooked. Jury nullification sends a message to the authorities that there are some uses of state power that people are not willing to tolerate.¹²⁹ Whether they acquit or convict, "members of the jury are valuable because their subjective opinion reflects the times as they are."¹³⁰

In a country where people were oppressed for so many years under a dictatorial regime, the institution of jury trials represents an aspiration to be more free and democratic. Juries serve as an important barrier against the unchecked judicial power that existed under Communist rule. In the majority opinion in *Duncan v. Louisiana*, Justice White wrote that

A right to jury trial is granted to criminal defendants in order to prevent oppression by the government. . . . Providing an accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.¹³¹

Tamara Morschakova, former deputy chair of the Constitutional Court, expressed similar sentiments about jury trials in Russia. "Trial by jury is a perfect counterweight to the tyranny of the state. In Russia nowadays, it is the most effective guarantee against corruption and dependant courts."¹³² Because Russians have an inherent distrust of the government and the judiciary, jury trials play a vital role in protecting the fundamental rights of citizens.

Given the important role that juries serve, steps need to be taken to ensure the survival of the jury trial system. First and foremost, the Supreme Court needs to stop overturning so many acquittals. A continued insistence in overturning jury decisions has a detrimental impact on the collective psyche and undermines the role of the juror in making meaningful decisions that keep the government in check. Russians have lived under a system for years where they cannot trust the government or the courts to give them justice. For the first time in almost a hundred years, the people have a true role in the administration of justice.¹³³ The importance of this role far surpasses the importance of a minor legal error that leads an acquittal to be overturned.

The Supreme Court cannot be faulted, however, for enforcing the law against lawyers and judges handling jury cases in lower courts. Lower court judges need to work to ensure that the trial is conducted in a manner that is free of any "errors" that can be challenged by prosecutors in an appeal to the Supreme Court.

In November 2005, the Supreme Court passed Resolution No. 23, which provides detailed guidance designed to assist lower courts to correctly and uniformly apply the rules of criminal procedure in jury trials.¹³⁴ The Supreme Court's resolution is a step in the right direction, but more needs to be done to ensure the success of jury trials in Russia. Perhaps a concerted effort by the Russian government to train judges, prosecutors, and defense attorneys could help resolve this issue. Training manuals and judicial conferences could possibly help alleviate some of the errors in this area as well.

Whatever reforms are undertaken to ensure the competence of lower court judges, Russians should avoid undertaking any drastic overhauls of the new Russian Criminal Procedure Code. The code that was passed in late 2001 provides the right to a jury trial, the presumption of innocence, and a number of other important human rights guarantees for Russian citizens accused of crimes. Changing this law again would not ensure the protection for criminal defendants that a jury trial is supposed to afford. Even defense attorneys whose clients are found guilty support the current law. Boris Kuznetsov, whose firm defended Igor Sutyagin, recently said that he does not "think that there is any need to amend current laws. We just need to observe the laws that exist."¹³⁵

Even if the laws do not need to be completely rewritten, some serious reforms are needed in the way laws are implemented. Jury question lists are one area that needs the greatest reform. Because formulation of questions for juries has caused the greatest numbers of reversals of acquittals for several years in a row, it is time for a change. Professor Stephen Thaman offered some possible solutions to this problem back in 1995, but the problem still continues. Thaman focused on the need for legislation or practice that provides clear guidelines to judges on what constitutes a question of law and what constitutes a question of fact.¹³⁶ Other questions that need to be resolved through practice or legislation, according to Thaman, include determining how much detail should go into questions and whether descriptive or aggravating factors are matters for the judge or jury.¹³⁷ Jury trials are still a new concept in post-Soviet Russia. Better question lists will come with more experience in writing questions.

Even if judges become more skilled at formulating questions for the jury, that will not be enough to ensure the long-term success of jury trials. A change of mentality among Russian lawyers and the Russian people as a whole is needed. Prosecutor Boris Lotnikov recently said of juries that "[h]ousewives and engineers should not assess the work of investigators."¹³⁸ Comments like this make it clear that the old system is still butting heads with the new. They also reinforce the views of the average Russian reluctant to serve on a jury that they are governed by the "rule of bureaucrats" and not the rule of law.¹³⁹ Although some scholars and practitioners have argued that Russians are not ready for jury trials, juries provide hope for a more democratic Russia that respects human rights. The best way to ensure the continued success of jury trials and the inculcation of a mentality of acceptance is to keep having jury trials. As Russia's Human Rights Commissioner Vladimir Lukin so aptly said recently "[m]any people say today that we are not yet mature enough [to have jury courts], but we will never mature without practice."¹⁴⁰

NOTES

1. L. M. Karnozova, ed., *Sud prisiazhnykh: piat' let raboty: itogy, problemy, perspektivy* (Moscow: Obshchestvennyi tsentr sodeistviia reforme ugovnogo pravosudiiia, 1999), 6 (material from a roundtable with judges from the Krasnodar region, prosecutors, and advocates).

2. William Burnham, Peter B. Maggs, and G. M. Danilenko, *Law and Legal System of the Russian Federation*, 3rd ed. (Yonkers, NY: Juris, 2004), 532.

3. See, e.g., Vladimir Voronov, "Russian Juries Twenty Times as Likely to Acquit Than Judges," *Agence France Presse*, January 27, 2004, available at WESTLAW, 2004 WL 66168869.

4. According to Vyacheslav Lebedev, Chairman of the Russian Supreme Court, the main reasons for invalidation of jury trial verdicts are procedural violations and the jurors are not to blame. *Ibid.*

5. Russia had a jury trial system in place from 1864 to 1917. The focus of this article, however, is on the new post-Soviet jury trial system.

6. Konstitutsiya Rossiyskoy Federatsii [Russian Federation Constitution], art. 47, sec. 2 and art. 123, sec. 4. See also Russian Federation Constitution, art. 20, sec. 2 (granting the right to a trial by jury in all capital cases).

7. See Stephen C. Thaman, "The Resurrection of Trial by Jury in Russia," *Stanford Journal of International Law* 31 (1995): 80 n.122 (noting that the "Jury Law" is actually a series of new laws and amendments to existing laws, including the law "On Court Organization of the RSFSR," the Code of Criminal Procedure of the RSFSR, the Criminal Code of the RSFSR, and the Code of the RSFSR on Administrative Infractions).

8. See Leonard Orland, "A Russian Legal Revolution: The 2002 Criminal Procedure Code," *Connecticut Journal of International Law* 18 (2002): 145.

9. Thaman, "The Resurrection of Trial by Jury in Russia," 80.

10. *Ibid.*

11. Vladimir Voronov, "Juries on Trial," *Russian Life* (November-December 2004): 50.

12. Pastanovleniye Konstitutsionnogo Suda Rossiyskoy Federatsii po delu o proverke konstitutsionnosti polozheniy stat'i 41 i chasti tret'yey stat'i 42 UPK RSFSR, punktov 1 i 2 postanovleniya Verkhovnogo Soveta Rossiyskoy Federatsii ot 16 iyuliya 1993 goda "O poryadke vvedeniya v deystviye Zakona Rossiyskoy Federatsii "O vnesenii izmeneniy i dopolneniy v Zakon RSFSR "O sudoustroystve RSFSR," Ugolovno-protsessual'nyy kodeks RSFSR, Ugolovnyy kodeks RSFSR i Kodeks RSFSR ob administrativnykh proavonarusheniyakh" v svyazi s zaprosom Moskovskogo gorodskogo suda i zhalobami ryada grazhdan (February 2, 1999), http://ks.rfnet.ru/pos/p3_99.html.

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*

16. *Ibid.* Russia currently has a moratorium on the death penalty, because Chechnya has not yet implemented jury trials.

17. Ugolovno-Protseesualny Kodeks Rossiyskoy Federatsii [Criminal Procedure Code of the Russian Federation], art. 30, sec. 2. Crimes listed in Criminal Procedure Code art. 31, sec. 3 that are eligible for jury trials include murder, rape or abduction resulting in death or other grave consequences, terrorism, particularly egregious hostage taking, organized crime, hijacking, sabotage, and espionage, to name a few.

18. Obzor po delam rassmotrennym sudami s uchastiyem prisiazhnykh zasedateley v 2003 godu, *Byulleten' Verkhovnogo Suda*, no. 6 (2004), <http://www.supcourt.ru/>.

19. *Ibid.*

20. Thaman, "The Resurrection of Trial by Jury in Russia," 62.

21. Valery Rudnev, "Jury Trials Rated Highly in First Year of Revival," *Izvestia*, March 16, 1995, available at LEXIS, *Current Digest of the Post-Soviet Press*, April 19, 1995.

22. Overall, the number of jury trials has risen but the numbers have not been entirely

consistent from year to year. In 1999, there were 422 jury trials compared with 296 in 2001 and 240 in 2002. *Obzor praktiki kassatsionnoy palaty Verkhovnogo Suda RF za 2002 god po delam, rassmotrennym kraevymi i oblastnymi sudami s uchastiyem prisiazhnykh zase-dateley*, *Byulletin' Verkhovnogo Suda*, no. 5 (2003), <http://www.supcourt.ru/>.

23. *Byulleten' Verkhovnogo Suda*, no. 6 (2004).

24. Burnham, Maggs, and Danilenko, 532 (citing the Web site of the Judicial Department of the RF Supreme Court, http://www.cdep.ru/material.asp?material_id=3).

25. Vladislav Kulikov, "The Judges Were Instructed to Speak Plainly," *World News Connection*, December 14, 2005, available at WESTLAW, EURONEWS.

26. *Byulletin' Verkhovnogo Suda*, no. 6 (2004).

27. *Ibid.*

28. Russian Federation Supreme Court Plenum Resolution No. 23, November 22, 2005: "On the Application of the Rules Regulating Jury Trials in the Russian Federation Code of Criminal Procedure by the Courts," available at WESTLAW, EURONEWS.

29. Voronov, "Juries on Trial," 51 (Demand for jury trials hit 62 percent in Kalmykia, 70 percent in the Ivanovo Region, and 82 percent in the Leningrad Region).

30. "Jury Trial Begins to Act throughout Russia," *A&G Information Services*, January 22, 2003, available at WESTLAW, 2003 WL 10370600.

31. *Ibid.*

32. The frequency of jury acquittals is often a headline in Russian newspapers. See, e.g., Anastasia Kornya, "Juries Acquit More Often," *Vremya MN*, April 30, 2003; Yelena Dmitriyeva, "Acquittals are More Frequent in Jury Trials," *Kommersant*, September 17, 2002.

33. Voronov, "Russian Juries Twenty Times as Likely to Acquit Than Judges," 51.

34. Various press reports indicate that judges acquit somewhere between .3 percent and .8 percent of defendants. See, e.g., Voronov, "Russian Juries Twenty Times as Likely to Acquit Than Judges" 51; Douglas Birch, "Little Chance of Acquittal in Russia," *Baltimore Sun*, June 15, 2004.

35. Voronov, "Russian Juries Twenty Times as Likely to Acquit Than Judges"; Kornya, "Juries Acquit More Often"; Dmitriyeva, "Acquittals Are More Frequent in Jury Trials." By way of comparison, American juries in federal courts acquit in about 15 percent of jury trials. *Judicial Facts and Figures*, table 3.5, <http://www.uscourts.gov/judicialfactsfigures/table3.05.pdf>. (However, it is difficult to compare the two systems given the extensive use of plea bargaining in the American system.)

36. Karnozova, *Sud prisiazhnykh*, 6–7.

37. *Ibid.*

38. *Ibid.*

39. *Ibid.*, 8–9.

40. *Ibid.*

41. *Ibid.*, 9.

42. Bulat Stolyarov, "Ladies and Gentlemen of the Jury, Will the Trial Go On?" *Noviye Izvestia*, March 11, 1998, available at LEXIS, *Current Digest of the Post-Soviet Press*, April 15, 1998.

43. *Ibid.*

44. See Irina Dline and Olga Schwartz, "The Jury Is Still Out on the Future of Jury Trials in Russia," *East European Constitutional Review* 11 (2002): 108.

45. *Ibid.*

46. *Ibid.*

47. Sergei Pashin and Lev Ponomarev, "Judicial Reform and Human Rights in Russia," address before Belfer Center for Science and International Affairs, John F. Kennedy School of Government, Harvard (June 1, 2001), http://bcsia.ksg.harvard.edu/publication.cfm?type=event_reports&item_id=27.

48. *Ibid.*

49. *Ibid.*

50. Ibid.
51. Karnozova, *Sud prisiazhnykh*, 27.
52. Dline and Schwartz, "The Jury Is Still Out on the Future of Jury Trials in Russia," 108.
53. Ibid.
54. Stolyarov, "Ladies and Gentlemen of the Jury."
55. Ibid.
56. Peter Finn, "In Russia, Trying Times for Trial by Jury," *Washington Post*, October 31, 2005.
57. *Obzor statisticheskikh dannyykh za 2005 god*, <http://www.supcourt.ru/>. The Russian Supreme Court does not appear to have published numbers that show what percentage of not-guilty verdicts rendered by juries were overturned in 2004. However, it does provide information noting that 84 not-guilty verdicts rendered by juries were overturned and 67 guilty verdicts were overturned. *Obzor kassatsionnoy praktiki sudebnoy kollegii po ugolovnym delam Verkhovnogo Suda Possiyskoy Federatsii za 2004 god*, <http://www.supcourt.ru>. Without statistics detailing the number of guilty verdicts and not-guilty verdicts that were appealed in 2004, it is difficult to know whether the percentage of overturned jury acquittals was higher or lower than in previous years.
58. *Byulletin' Verkhovnogo Suda*, no. 6 (2004).
59. *Byulletin' Verkhovnogo Suda*, no. 5 (2003).
60. *Byulletin' Verkhovnogo Suda*, no. 6 (2004).
61. *Byulletin' Verkhovnogo Suda*, no. 5 (2003).
62. Ibid.
63. *Byulletin' Verkhovnogo Suda*, no. 6 (2004); *Byulletin' Verkhovnogo Suda*, no. 5 (2003); *Obzor sudebnoy praktiki rassmotreniya ugolovnykh del s uchastiyem prisiazhnykh zasedateley*, *Byulletin' Verkhovnogo Suda*, no. 7 (2002), <http://www.supcourt.ru/>.
64. Criminal Procedure Code, art. 338, sec. 1.
65. Criminal Procedure Code, art. 338, sec. 2.
66. Criminal Procedure Code, art. 338, sec. 3.
67. Criminal Procedure Code, art. 339, sec. 1.
68. Criminal Procedure Code, art. 339, sec. 2.
69. Criminal Procedure Code, art. 339, sec. 3.
70. Ibid.
71. Criminal Procedure Code, art. 338, sec. 2.
72. Criminal Procedure Code, art. 339, sec. 4.
73. Criminal Procedure Code, art. 339, sec. 5. However, the jury does make a determination of whether the defendant is guilty of committing the act according to Criminal Procedure Code art. 339, sec. 1.
74. Thaman, "The Resurrection of Trial by Jury in Russia," 116. Professor Thaman has observed numerous jury trials. In jury trials in the early years, he observed a case where jurors were asked nineteen questions related to one murder count. In another case, forty-one questions were asked that were collateral to a murder charge. He also observed a theft case where each item allegedly stolen was listed in the questions. Ibid.
75. One group of jury trial observers reported that there are jury interrogatories with as many as three hundred questions. See Shireen Fisher, Tom Munsterman, and Annette Kirby, "Jury No Show Assessment," *Assessment Final Report* (Burlington: Russian American Rule of Law Consortium, 2002), 15, http://rarolc.net/programs/program_detail.php?id=42.
76. Fisher, Munsterman, and Kirby, "Jury No Show Assessment," 15.
77. See discussion on preparing questions for the jury in Thaman, "The Resurrection of Trial by Jury in Russia," 114–24.
78. Ibid., 117, 121.
79. *Byulletin' Verkhovnogo Suda*, no. 6 (2004). (For example, the Supreme Court overturned a verdict acquitting Barmin of murder because some circumstances surrounding the commission of the murder did not find their way into the question list.)

80. *Ibid.* (Question lists were also faulted for using legal terms such as “premeditated murder” or “murder with particular cruelty.”)
81. *Ibid.*
82. *Byulletin' Verkhovnogo Suda*, no. 7 (2002).
83. *Ibid.*
84. *Byulletin' Verkhovnogo Suda*, no. 6 (2004). See also Finn, “In Russia, Trying Times for Trial by Jury” (noting the verdicts have been overturned because the judge failed to officially notify a relative of one of the victims of his right to make a final statement to the jury, because of errors in the judge’s written charge to the jury and because of posttrial discovery that jurors concealed information about themselves, such as criminal records or previous service in the police).
85. Criminal Procedure Code, art. 324–53.
86. Finn, “In Russia, Trying Times for Trial by Jury.”
87. Zoya Svetova, “Supreme Court Doesn’t Believe Jurors,” *Russky Kuryer*, June 10, 2004.
88. Karnozova, 60.
89. Russian Federation Constitution, art. 50, sec. 1 (emphasis added).
90. Paul J. De Muniz, “Judicial Reform in Russia: Russia Looks to the Past to Create a New Adversarial System of Criminal Justice,” *Willamette Journal of International Law and Dispute Resolution* 11 (2004): 92.
91. Douglas Birch, “In Russian Trials, ‘Not Guilty’ Often Is Not an Option,” *Baltimore Sun*, June 13, 2004.
92. See *Opredefeniye ob otkaze v prinyatii k rassmotreniyu zaprosa sud’i Moskovskogo Oblastnogo Suda N.V. Grigor’evoy*, *Vestnik Konstitutsionnogo Suda RF*, no. 5 (1997) (on file with author).
93. *Ibid.*
94. *Ibid.*
95. *Ibid.*
96. *Ibid.*
97. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 14 (7), 999 U.N.T.S. 171 (emphasis added).
98. *Ibid.* See Russian Federation Constitution, art. 15, sec. 4 (“If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied”).
99. *Vestnik Konstitutsionnogo Suda*, no. 5 (1997). A Court of Cassation is granted the power to determine whether a judgment or other court decision is “lawful, well-founded, and fair.” Criminal Procedure Code, art. 373.
100. See Burnham, “Law and Legal System of the Russian Federation,” 544.
101. As discussed in part 3 of this article, “legal error” appears to be rampant in juror trials resulting in acquittals.
102. Criminal Procedure Code, art. 379, 381–83.
103. Criminal Procedure Code, art. 385.
104. Finn, “In Russia, Trying Times for Trial by Jury.”
105. See, e.g., Steven Lee Myers, “Verdict in Russian Courts: Guilty Until Proven Guilty,” *New York Times*, June 20, 2004; Douglas Birch, “Little Chance of Acquittal in Russia.”
106. This is especially true for high-profile cases like that of physicist Valentin Danilov. Numerous articles appeared in Russian newspapers about his trial, acquittal, overturn of that acquittal by the Russian Supreme Court, and, finally, his conviction in November 2004.
107. Fisher, Munsterman, and Kirby, “Jury No Show Assessment,” 15.
108. See generally Fisher, Munsterman, and Kirby.
109. Sergei Pashin, “Jury of Prosecutors,” *Noviye Izvestia*, Apr. 8, 2004.
110. Douglas G. Smith, “Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform,” *Alabama Law Review* 48 (1997): 461.

111. Sally Lloyd-Bostock and Cheryl Thomas, "The Continuing Decline of the English Jury," in *World Jury Systems*, ed. Neil Vidmar, (New York: Oxford University Press, 2000).
112. *Judicial Facts and Figures*, table 3.05.
113. John H. Langbein, *Comparative Criminal Procedure: Germany* (St. Paul: West, 1977), 119.
114. Dline and Schwartz, "The Jury Is Still Out on the Future of Jury Trials in Russia," 105.
115. Criminal Procedure Code, art. 331, sec. 1.
116. Criminal Procedure Code, art. 344, sec. 5.
117. Dline and Schwartz, "The Jury Is Still Out on the Future of Jury Trials in Russia," 109.
118. *Ibid.*
119. Fisher, Munsterman, and Kirby, "Jury No Show Assessment," 10–11.
120. *Ibid.*
121. Peter H. Solomon Jr., "Threats of Judicial Counterreform in Putin's Russia," *Demokratizatsiya* 13, no. 3 (July 1, 2005), available at WESTLAW, 2005 WLNR 16686317.
122. Gennady M. Danilenko and William Burnham, *Law and Legal System of the Russian Federation*, 2nd ed. (Yonkers, NY: Juris, 2000), 485. See also Dline and Schwartz, "The Jury Is Still Out on the Future of Jury Trials in Russia," 107.
123. Dline and Schwartz, "The Jury Is Still Out on the Future of Jury Trials in Russia," 107.
124. *Ibid.*
125. Judge Yelena Snegirova has described the high rate of acquittals as one of the "negative qualities" of jury trials. Statement by Judge Yelena Snegirova, in "Symposium on Prosecuting Transnational Crimes: Cross-cultural Insights for the Former Soviet Union," *Syracuse Journal of International Law and Commerce* 27 (2000): 75.
126. Statement by Professor Gordon Smith, in "Symposium on Prosecuting Transnational Crimes: Cross-cultural Insights for the Former Soviet Union," *Syracuse Journal of International Law and Commerce* 27 (2000): 70.
127. Stephen C. Thaman, "Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedure," *Saint Louis-Warsaw Transatlantic Law Journal* (2001–2002): 90–91.
128. Lloyd-Bostock and Thomas, 87.
129. Richard O. Lempert, "Citizen Participation in Judicial Decision Making: Juries, Lay Judges and Japan," *Saint Louis-Warsaw Transatlantic Law Journal* (2001–2002): 8.
130. Vladimir Simonov, "The Difficult Return to Trial by Jury in Russia," *RIA Novosti*, July 6, 2004, available at WESTLAW, 2004 WL 82037052.
131. *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968).
132. Sergei Gromov, "Federal Security Service Distrusts Housewives," *Vremya Novostei*, March 5, 2004.
133. Though lay assessors participated in criminal cases alongside judges during Soviet times, they were regarded as "tools of the regime" and derogatorily referred to as "noddors," because they nodded along with whatever the judge said. Scott Boylan, "The Status of Judicial Reform in Russia," *American University International Law Review* 13 (1998): 1339.
134. Russian Federation Supreme Court Resolution No. 23.
135. Voronov, "Juries on Trial," 54.
136. Thaman, "The Resurrection of Trial by Jury in Russia," 123.
137. *Ibid.*
138. Gromov, "Federal Security Service Distrusts Housewives," 1–2.
139. Voronov, "Juries on Trial," 54.
140. "Putin Favors Improving Work of Jury Trials," *Interfax: Presidential Bulletin*, October 29, 2004.