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Peculiarities of the Nature and Status of the Russian Presidential Administration: Historical, Political and Legal Overview

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Abstract

The Presidential Administration in the Russian Federation has never been just an adminicular mechanism of the head of state. Unlike its western analogs, it has always possessed an incomparably large resource of power. While presidents were changed, the personal stuff, structure and authorities of this body were also changed, but its central place in the management system of the Russian state remained stable. The Administration of the President of the Russian Federation is an institution, whose legal status does not have a clear legal shape. Not without reason the journalists, as well as lawyers, political scientists and historians sometimes call it the shadow government or the secret order. However, the legal nature of the administration of the President of the Russian Federation is not quite clear. Even the name "Administration" is often misleading: whether the Administration of the President of the Russian Federation may be considered the executive power or the public administration in a wider sense? This and other disputes about the nature of the Presidential Administration of the Russian Federation and its legal status have arisen in the expert community with the beginning of complex work on the constitutional project, and are still ongoing today. In this regard, the author of this article decided to make one of the first attempts in the country to investigate what the Administration of the President of the Russian Federation really is, what are the problems associated with its functioning, and whether there are legal means to resolve them at the present stage. To answer these questions, the author thoroughly analyzes the models and arguments proposed at different stages of the development of the new Russia, and correlates them with the basic constitutional principles.

Keywords: Constitutional principles, Rule of law, Russian Presidential Administration, President, Chief of Staff, Constitutional commission, Constitutional assembly, Auxiliary offices, Head of state, Apparatus, Legal draft.

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Introduction

The problem of the legal status of the Russian Presidential Administration has a special position among multiple controversies around imperfections of Russian constitutional dispositions and their implementation in the current legislation and law enforcement.

Since 1991 when the Russian Presidency was established [i] and the body in question appeared [ii] and until very recently all the controversies around the Presidential Administration can be roughly divided into discussions of two crucial and inseparable issues:

1) What the legal nature of the Administration is and how it is to be reflected in the Constitution;

2) Which regulatory instruments and to what extent should define the way the Presidential Administration is created and operates, its terms of reference and responsibilities [iii].

But Russia is not a unique case in this respect. Various aspects of such phenomenon as presidential administration are being widely discussed by the experts in different legal systems. For the American administrative law, for example, the problem is whether an expanded sphere of “presidential administration” that operates free of the constraints of judicial review can be meaningfully constrained by precepts drawn from the process tradition [iv].

Although much time has passed since 1993 when the new Russian Constitution was adopted, the issues of the specific status of the Presidential Administration and of the regulation of its functions are still far from being resolved. The idea of a statutory entrenchment of its status is sometimes proposed even by representatives of the executive, who are traditionally reluctant to make such statements. When, especially, Mikhail Barshevsky, the President’s representative at the Higher Courts of Russia, proposed such an initiative at a meeting of the experts’ panel under the Speaker of the State Duma called “Law and other social regulators: interrelation and interdependence”, this met certain response of the Russian ruling circles [v].

In this paper we will try to evaluate the existing proposals and arguments concerning the first issue from the constitutional point of view.

On the nature of the Presidential Administration and its legal status

The controversy around the nature of the Presidential Administration and the entrenchment of its legal status emerged in the Russian expert community since the beginning of the complicated work over the constitutional project. As the result of the latter, on December 12, 1993, the structure in question which by that moment had already become an actual part of the public administration apparatus, was entrenched for the first time at the highest official level; according to the section “i” («и») of the Article 83 of the Constitution, the President was entitled with the authority to form his Administration.

This constitutional mention of the Presidential Administration was the result of a rather acute debate on appropriateness and admissibility of such a legal decision, caused for the most part by the uncertainty of its status and nature.

As early as in 1991 a working group of the Constitutional Commission formed by the First Congress of People’s Deputies proposed a Conception for the Executive [vi]. This document presumed five basic hierarchical levels of the executive power:

- the President;
- the Presidential Service (strategy and apparatus);

- the Government (economics and administration);
- the local representatives of the Federal power;
- the local administration (executive bodies of the local power and self-government).

In this context it is worth reminding that the President was introduced to the construction of the 1978 Constitution that was in force in that period exactly as the head of the executive [vii]. The chapter 15.1 “President of the Russian Soviet Federal Socialist Republic”, added to that Constitution in 1991, to certain extent transformed the form of government from a Soviet republic to a presidential republic. Thus the issue of the status and the nature of the Presidential Administration has been from the very beginning coupled with the constitutional principle of separation of powers and with the issue of the nature of the office of the Russian President and its place within that system [viii].

Here we should mention the complexity of discussion and the huge influence of constitutional borrowings from both American and European practices at that particular period of total reconstruction of political and governmental systems of the state. And the US model of presidency was very attractive though unnatural for the Roman legal system [ix].

The Presidential Service was provided as well in the constitutional draft proposed by the Constitutional Commission itself. In the variant presented on September 6, 1991 [x], the President was supposed to “form” his service. However, Boris Yeltsin, dissatisfied with relatively small authority conferred to the President by this draft, advocated constitutional entrenchment of this structure as an institution of the executive. It was probably for this reason that in the variant proposed on September 16, 1991 [xi], the corresponding article already stated that the Presidential Service made part of the system of the federal executive power, headed by the President, together with the Security Council, the Council of State and the Council of Ministers.

A little-known fact is worth mentioning while examining the legal nature of the structure in question. Documents preserved in the archives tell that on October 1—2, 1991, Boris Yeltsin corrected the constitutional draft, mentioned above, with his own hand: “Add the word *Administration* throughout in the text” [xii]. This nuance, as purely linguistic as it might seem at the first glance, makes us examine the semantic content of the term *administration*.

Once we consult general and professional explanatory dictionaries of Russian of different period – pre-revolutionary, Soviet, and contemporary, -- we can argue that a kind of “genetic code” of the Russian word *administratsiya*, coming from the Latin *administratio*, management or governing, conditions executive-administrative functionality of the structure marked with such a label. The prevailing senses of the term *administratsiya* in Russia always included the following: governing; order; management; organization; governing bodies of the public administration; executive organs; system of bodies of executive and administrative power that ensure governing the state; state body providing governing as a whole; officials that head managing offices; officials of a steering office; managerial staff of an establishment or of an enterprise [xiii]. This meaning is more or less close to the public administration in Eastern tradition [xiv]. Studying the historical names of different public administration institutes in Russia allows the conclusion that the emergence in 1991 of a particular auxiliary body under the President called “Administration” was arguably the first example of this use.

In modern professional legal language in Russia, both oral and written, including many legal statutes, the term “Administration” is used primarily for the institution that is at the top of the system of the executive at the level of a federal entity (*oblast, krai*, autonomous *oblast* or autonomous district). Often this notion is used in the constitutional law as an umbrella term for all the governing bodies as a whole with the further specified level of public administration: a state, regional, or local administration or the administration of a particular territory [xv]. Using this term for a public body or an apparatus under a particular public official is

rather an exception than a rule. This proposition is corroborated by the Terminological dictionary in State Law “Constitutional lexicon”, compiled by Professor Suren Avakyan [xvi].

Therefore a petty correction of the constitutional draft actually entrenched the current name of the Presidential Administration coupled with an inherent contradiction between the factual authorities and the formal legal status.

Turning to the question of the constitutional drafting it is necessary to say that the controversy around the status of the Presidential Service (or Administration) and the appropriateness of its mention at the constitutional level never faded, as attested by the changing approach of the Constitutional Commission. For example, the constitutional draft dated October 24, 1991 [xvii], provided that it should be an auxiliary body making part of the system of the federal executive power, headed by the President and assisting him in the execution of his public authorities. It should include advisory, consultative, control, technical and other auxiliary subdivisions. But after some time, on March 2, 1992 [xviii], the language was further simplified: “The Presidential Service is an auxiliary apparatus that according to a federal law assists the President in executing his authorities”. And some later versions already lacked mentions of the Presidential Service (Administration) at all. Instead, a disposition according to which the President “establishes and forms other advisory and auxiliary bodies under the President” appeared [xix].

The debate around the status of the Presidential Administration saw a new outbreak during the work of the Constitutional Assembly convened by the President when the constitutional project presented by Boris Yeltsin was being discussed [xx].

Thus during the meeting on June 11, 1993, the following wording was discussed: “The President of the Russian Federation appoints and dismisses the Head of Staff of the Presidential Administration and other officials of the Administration”. The Supreme Court Justice Yury Sergeev proposed to eliminate the clause “as an excessive confirmation of the Presidential right to do so” [xxi]. The Constitutional Court Justice Boris Ebzeev who also advocated its elimination noticed: “If the Administration is the Presidential office, then its chief has no place in the Constitution. If it is a body in its own right that will be able to compete some day with the Premier and the Government as a whole, then we are to provide the Administration here. But by doing so we would provide a possibility for future conflicts between them, and I am not sure that the Government would sustain in these conflicts” [xxii]. The chairman of this meeting, Professor Alexander Yakovlev, took a vote during which the majority opposed this clause as a part of the constitutional project. An anonymous participant of the Assembly stated post factum: “In fact, they opposed the mention of the Presidential Administration as it was perceived as a rival to the executive, a rival to the Government <...> but it is a body that organizes the activities of the President and in no way a body of executive power. We do not assign any executive authority to this body. But we are to keep the constitutional right of the President to have such an Administration and to oblige the Parliament to provide budgetary funds for this Administration ...” [xxiii]. Finally the overwhelming majority voted for the disposition (an amendment proposed by the administration of the Sakhalin oblast), according to which the President “establishes and forms auxiliary bodies under the President” [xxiv].

Nevertheless during the meeting on June 21, 1993, it was decided to revert to the wording “forms the Presidential Administration of Russia and appoints its Chief of Staff”. The variant “establishes and forms auxiliary bodies under the President” was rejected, as, according to the chairman, the Chief of Staff of the Presidential Administration, “in this case we could have both the Administration and something alongside it, which would be a disaster” [xxv].

The nearer was the end of the work over the constitutional project, the more rose the tension at the discussion of all the issues, including the issue of the constitutional regulation of the Presidential Administration that had already existed and continued to develop intensively. On October 18, 1993, after

the tragic Moscow events, Sergey Filatov, objecting to another demand to exclude the mention of the Presidential Administration from the Constitution, replied: "If the issue were more about an apparatus, I would agree with you. But as it is all about the structure that the President uses for work and this structure includes a great lot of bodies, it seems we cannot do that, as otherwise we would limit his possibilities, and if very meticulous deputies appear the President would be always rebuked" [xxvi].

Furthermore, during this very meeting a discussion emerged about the adequacy and sufficiency of the term "Administration" to encompass everything that the President needed and would need in this domain, proposed by the Constitutional Court Justice Tatyana Morschakova, who suggested to find out another term. In this discussion, Sergey Filatov directly articulated his vision of the true nature and role of the Presidential Administration. He said literally: "*Government and Administration* are the two terms that encompass everything" [xxvii]. He went further on, responding to the comment of the former deputy of the Supreme Soviet's Legislative Commission Igor Bezrukov who had said that the "Administration" should be very precisely specified, as, for example, in the United States Administration means everything, including the Government, by the following remark: "And here, Administration is everything minus the Government" [xxviii]. This example is quite telling.

Even then the Administration was not perceived just as an auxiliary apparatus analogous to the ones that exist under other executive bodies. It is not by mere chance that the Constitution does not mention any other apparatus, save the laconic wording "forms the Presidential Administration of Russia" without any further dispositions on the status of its structure, its functions and regulation, that is leaving room for variations and respectively for endless debate.

It is enough to recall the anger of many deputies when the Regulation on the Presidential Administration of Russia, approved by the Presidential Decree dated on October 2, 1996, № 1412 "On approval of the Regulation on the Presidential Administration of Russia" [xxix] defined it as a *State body* that ensures the activities of the President. The adherents of the conception according to which this structure had auxiliary and service functions and denied its status even as a state body (let alone the one of a public authority) challenged this provision before the Constitutional Court [xxx]. But after the Regulation was amended and the functions of the Presidential Administration were somewhat limited [xxxi], the request was revoked and the Constitutional Court lost the chance to add some certainty to the issue of its status on the official level.

The Regulation on the Presidential Administration of Russia that is approved by the Presidential Decree № 490 "On approval of the Regulation on the Presidential Administration of Russia" [xxxii] and currently in force also defines that the Administration is a *state body*, formed according to the section "i" («и») of the Article 83 of the Constitution, that ensures the activities of the President and maintains control over the enforcement of his decisions. This definition situates the Presidential Administration on a par with other auxiliary structures, such as the Apparatus of the Government, which, according the legal definition, is a *state body*, formed to ensure the activity of the Government and the President of the Government and the organization of the control over the implementation of their decisions by the executive public authorities. In other words, to define the status of the Presidential Administration a more general category is used, within which the bodies invested with public authority are always given a special status. The Constitution that uses different categories to specify the structures created in the State, places "state bodies" and "bodies of the local self-government" on a par as a generic term (see article 33) and further specifies subtypes: "bodies of state authority" or "bodies of legislative, executive, and judicial power" that corroborates our earlier assumption.

Therefore, the Presidential Administration is, if we follow the general logic, an auxiliary apparatus deprived of an autonomous powerful component. But the analogy with the Apparatus of the Government, as far as the regulation of the status is concerned, essentially ends here, as the activities of the Government is

defined not only by the constitutional text, but also by the Federal Constitutional Law of December 17, 1997 № 2-FKZ “On the Government of the Russian Federation” [xxxiii] as well as by the Rules of the Government that described all the aspects of its work, including the resolution of the conflicts, lawmaking and other issues. The activity of the auxiliary apparatus is based on all the statutes specified above as well as on the Regulation of the Governmental Apparatus, where the standards of executing the governmental orders, term extension, and deregulation are described [xxxiv]. This does not apply and hardly can apply to the President and his Administration.

If we take into consideration the process of creation of the Presidential Administration it becomes clear that this body is very specific in its nature, functioning, construction and latent potential that go beyond the category of “apparatus” which was properly noticed by Sergey Filatov. But the name of “Administration” and the direct mention in the Constitution are not to mislead scholars neither in constitutional neither in administrative law. The Russian Presidential Administration can hardly be considered to be a power body, a part of public administration in the broad sense, as its status and its functions are defined by the functions of the President himself. The Presidential Administration is “a third thing”, something special in particular from the point of view of its legal nature.

Conclusion

We may suggest that the Presidential Administration is a symbiotic formation at the intersection of the constitutional and administrative law that functions as an element of the presidency, inherently related to and inseparable with other elements of this institution. The presidency itself is a relatively separate group of interrelated constitutional norm that define the position and the role of the President as a state body within the general system of state bodies, *as well as regulating the activity of the bodies and people who ensure the fulfillment of his duties by the President*. This approach presumes a rethinking of the status of this body and of the legal regulation of its authorities and operating procedure, as well as a specification of the constitutional principles that define its functioning. And it is specialists in constitutional and administrative law who are supposed to do it together.

For the time being, the problems of the legal status of the Presidential Administration and of the adequate regulation of its activity are not properly studied by scholarship. In practice this situation entails the phenomenon of a body which is not limited by any substantive rules, functions according to its internal logic, and, as the experience has shown, is not subject in fact to any control.

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[^{xxx}] The Decision of the State Duma № 781-II GD «On referring the Constitutional Court of Russia», November 11, 1996» // Collection of legislative acts of the Russian Federation. 1996. № 49. Art. 5506.

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[^{xxxii}] Collection of legislative acts of the Russian Federation. 2004. № 15. Art. 1395.

[^{xxxiii}] Collection of legislative acts of the Russian Federation. 1997. № 51. Art. 5712.

[^{xxxiv}] The Decision of the Government of the Russian Federation of June 1, 2004 № 260 «On the Rules of the Government of Russia and the Regulation on the Apparatus of the Government» // Collection of legislative acts of the Russian Federation. 2004. № 23. Art. 2313.