Available online at www.sciencedirect.com
SCIENCE DIRECT®
Communist and Post-Communist Studies
ELSEVIER
Communist and Post-Communist Studies 37 (2004) 187–211
www.elsevier.com/locate/postcomstud

Why politicians want constitutional courts: the Russian case

Carla Thorson *

Political Science Department, UCLA, 4289 Bunche Hall, P.O. Box 951472, 405 Hilgard Avenue, Los Angles, CA 90095-1472, USA

Abstract

Why are judicial review mechanisms being incorporated into so many democratizing states? This study analyzes why politicians create an independent judicial institution with the authority to overrule their own decisions. It sheds light on the role constitutional courts play in the consolidation phase of a democratic transition, focusing on one of those countries with no tradition of independent judicial review or of democratic forms of governance—Russia. Past practices and historical precedent do not support the formation of an independent judiciary in Russia, and yet a potentially powerful constitutional court now exists. Moreover, during the course of the transition from the Soviet state to the Russian Republic, there were three attempts to create an independent judicial review mechanism only one of which could be termed a success. This analysis focuses on the self-interested calculations of politicians in forming each of these three institutions, demonstrating that political actors establish a constitutional court to enhance their democratic credibility.

Keywords: Constitutional court; Judicial review; Independent judiciary; Rule of law; Democratization; Transition politics; Russia

Introduction

Judicial review[1] is one of the benchmarks of liberal democracy, and yet its existence outside the US is a relatively new phenomenon. The majority of courts endowed with judicial review powers were established only in the last 50 years.

* Tel.: +1-310-825-4331; fax: +1-310-825-0778.
E-mail address: cthorson@ucla.edu (C. Thorson).

[1] The power of a court to render binding decisions on the constitutionality of legislation or other government action.

0967-067X/$ - see front matter
doi:10.1016/j.postcomstud.2004.03.003

In the aftermath of World War II, many nations in Western Europe created constitutional courts.[2] Similar courts can also be found in a growing number of countries in Latin America, Africa, and Asia under post-colonial rule.[3] After 1989, in the wake of the revolutions in Eastern Europe and the dissolution of the Soviet Union, more and more states have opted in favor of judicial review mechanisms.[4] These courts are being created and sustained not only in countries with traditions that support independent judicial bodies, but also in countries with systems of governance and political traditions previously hostile to independent judicial review. The sheer number of such courts now functioning around the world raises some fundamental questions. Why are judicial review mechanisms being incorporated into so many democratizing states?

In seeking to answer this question, this study focuses on one of those countries with no tradition of independent judicial review or of democratic forms of governance—Russia. Past practices and historical precedent do not support the formation of an independent judiciary in Russia, and yet a new and potentially powerful constitutional court now exists. During the course of the transition from the Soviet state to the Russian Republic, there have been three attempts to create an independent judicial review mechanism, only one of which, the most recent, could be termed a success. In the absence of cultural traditions that support an independent judiciary, the Russian case permits the isolation of those factors that prompt politicians to create an independent constitutional court.

The institutional design of a constitutional court largely determines its level of independence. Ultimately, independence is measured by how capable judges are of rendering decisions solely on the basis of their understanding and interpretation of the law in the absence of influence from outside forces (Ferejohn, 1999). Constitutional provisions and enabling legislation for these courts outline the institutional safeguards of independence. These include: selection procedures, professional requirements, term of service, procedures for removal, financing, as well as procedural rules for the consideration of cases and the rendering of decisions.

Scholars have shown that a number of institutional innovations initiated during a transition to democracy can be traced to the self-interested calculations of politicians (Przeworski, 1986; Geddes, 1991; Geddes, 1995). It is reasonable to assume that the same considerations would affect decisions about courts. A constitutional court, it is argued here, is another key institution in a democratic system

[2] Austria and Weimar Germany did have constitutional review mechanisms for brief periods prior to World War II. Austria reestablished its constitutional court in 1945, and Germany's was formed in 1949. The French *Conseil Constitutionnel* was created in 1958 under the Fifth Republic Constitution. Other West European states with established review mechanisms include: Italy (1948); Portugal (1976); Spain (1978), and Belgium (1985).

[3] Brazil and Columbia have constitutional courts, while there are also quite a few states like Costa Rica and more recently Mexico that have supreme courts which have some judicial review powers.

[4] Constitutional courts have been created in Armenia, Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuanian, Poland, Romania, Slovakia, and Russia, and are in the process of being established in others.

that shapes the ability of political players to realize their interests. It is natural, therefore, that political actors during a transition to democracy would consider the creation of an independent court and it should be treated as a political institution (Knight, 1992; Knight and Epstein, 1996).

Constitutional courts often are established during the initial transition to democracy as part of the wave of anti-authoritarian reforms. In an evolutionary transition to democracy, politicians advocate the establishment of an independent judiciary to strengthen their democratic credentials in the eyes of the public. Those politicians who back the creation of a constitutional court endowed with the power to overrule their own decisions (judicial review) signal a future commitment to the rule of law, and differentiate themselves from other politicians.

In the case of evolutionary change, as in Russia, both those politicians already in power and those in opposition, had an interest in creating a judicial review mechanism in order to garner credibility both internationally and domestically, but not everyone wanted such an institution to be truly independent and powerful. Overlapping authority at different levels of government meant that various politicians were vying for power in the new system. An independent institution with judicial review powers was not perceived as a political benefit to everyone.

As a result, the idea of establishing a judicial review mechanism was placed on the political agenda early on by Soviet President Mikhail Gorbachev and reform-minded members of the Communist Party intelligentsia, but there were three different attempts to establish the institution (The Soviet Constitutional Oversight Committee 1989–1991, the first Russian Constitutional Court 1991–1993, and the second Russian Constitutional Court 1995–present), and with each attempt the design changed to reflect the existing distribution of political interests. In each case, the institution lost or gained certain measures of independence relative to politicians' interests. The politics of designing each of the three institutions, their major powers, and the membership of each will be discussed in terms of the politicians and the political forces involved.

1989 in Eastern Europe and 1991 in the Soviet Union are thought of by many as revolutionary years, but the events that unfolded were not so much a revolution as an abdication. Revolutions usually are characterized by the violent overthrow of the existing regime and its replacement wholesale by an alternative political order. In virtually every case of regime change in 1989 and 1991, there was no direct military involvement and no immediate alternative form of government to replace the old order. In effect, the authoritarian regimes based on Marxism–Leninism were disestablished not overthrown, leaving a vacuum of authority. This vacuum was filled in each case by a hodgepodge of political leaders and organizations that often lacked clearly formulated agendas.

The East European nations lacked defined political oppositions or organized social groups to offer immediate political and economic proposals, with the notable exception of Solidarity in Poland. In Russia, as well as several other states (Czechoslovakia and Hungary, for example), there were political figures with a measure of popularity who presented themselves to the population as opposition leaders. While it was generally clear what these leaders did not claim to represent, namely

the old communist political order, it was often uncertain for what they did stand. The question was not so much who could claim political power in Russia, but on what basis these leaders would assert their authority to lead. If Marxism–Leninism was officially dead as the state ideology, it needed to be replaced with a new source of legitimacy.

Initially, those politicians who advocated elected legislatures called themselves democrats, and gradually they adopted *constitutionalism* and *a law-based state* into their political platforms. New judicial mechanisms to enforce constitutional rule became the institutional embodiment of abstract notions, but significant differences emerged among political leaders over the design of these institutions. Politicians, engaged in a partisan struggle for power, manipulated the institutional design of the bodies proposed to oversee constitutional compliance in order to further their own interests.

In each instance, the major political forces at work at the time influenced the design of these institutions. The first attempt, the USSR Constitutional Oversight Committee, took place in the midst of the struggle for power between the Soviet central government led by Mikhail Gorbachev and the leaders of the Soviet republics, chief among them, Latvia, Lithuania, Estonia, and the Russian Federation and it reflected these conflicting interests. The second attempt, the Russian Constitutional Court under Chairman Valerii Zorkin, emerged as a direct response to the perceived inadequacies of the Oversight Committee and was a means of establishing Russian President Boris Yeltsin's right to rule in place of the Soviet leadership. The third attempt, the Russian Constitutional Court under Chairman Vladimir Tumanov, was a significantly restructured institution that emerged in the aftermath of the storming of the Russian parliament and reflected the institutional struggle that took place in 1993 and subsequent political compromises between the executive, legislative, and judicial branches during the transition to a new constitutional structure.

Establishment of the USSR Constitutional Oversight Committee

Since 1917 communist leaders had claimed their right to rule Russia and the rest of the Soviet Union through the historic authority of the Communist Party to represent the working class. In the late 1980s, however, the party's authority declined significantly (Solomon, 1990: p. 185).[5] The search for alternative sources of legitimacy actually began in 1988 under Soviet leader Mikhail Gorbachev. At the 19th Party Conference in June of that year, the *pravovoe gosudarstvo* (law-based state) was added to the list of slogans: *perestroika* (restructuring), *glasnost'* (openness), and *demokratizatsia* (democratization), as a fundamental dimension of the new thinking (Pravda, 7 May 1988). It marked the beginning of a legal revolution, or more aptly a constitutional revolution.

The reorganization of Soviet government institutions and constitutional changes took place over a period of several years. Three branches of government were

[5] In the fall of 1989, Soviet leaders gave up the exclusive ruling position of the party, and in February of 1990 they forfeited the right to rule over government from posts in the party hierarchy.

established: the Congress of People's Deputies, the Presidency, and then the Constitutional Oversight Committee. The Oversight Committee was originally conceived as a mechanism that would give the constitution more authority as the legal foundation for governance. As President Gorbachev argued publicly, the committee would be, "a very substantial constitutional mechanism...—an instrument which would strengthen the constitution [and] ensure consistency in the implementation of the constitution's provisions" (Izvestiya, 12 June 1989, First session of the USSR Supreme Soviet).

There was, however, significant resistance among the major political actors to establish a powerful and independent judicial body that could hold sway over government. This reluctance emerged on several fronts. On the one hand, there was indication that the Soviet leadership continued to believe they would dominate the political agenda for the foreseeable future. At the same time it felt that some concessions were necessary to maintain power. Therefore, the Soviet leader and reformers within the Communist Party leadership demonstrated a willingness to increase representation in government institutions by allowing semi-competitive elections. On the other hand, there were pervasive, deep-seated suspicions of the judiciary among many politicians in the newly elected legislature rooted in Russian/Soviet history and the 70 or more years of communist abuse of the legal system. Hence, they exhibited a general unwillingness to delegate too much authority to these newly restructured institutions. Most importantly, due to the increasingly open "war of laws" between the republics and the central Soviet government in the late 1980s, leaders from the Soviet republics feared that the central executive would use this judicial body as a tool to exert control over the republics, if the committee had too much authority over the federal system.

While Soviet legal scholars, in principle, advocated the creation of a constitutional court with power to overturn unconstitutional legislation, many politicians from the executive branch, the legislative branch, and the federal subunits considered this idea to be premature prior to the adoption of a new Soviet constitution and a new all-Union treaty. Gorbachev accumulated political capital by advocating the creation of the Constitutional Oversight Committee, but this did not presuppose that the committee would have significant independent power. Gorbachev did not need or want to give this committee too much authority. For their part, the newly elected Supreme Soviet and leaders of the republics agreed to form a constitutional Oversight Committee with advisory powers only, because they were neither able to influence who would serve on the committee, nor were they committed to the federal structure of the existing Soviet constitution that it would be entrusted to preserve. The committee's formation and its design reflect these interests.

The 19th Communist Party Conference in June 1988 first announced the creation of the Constitutional Oversight Committee (TASS, 28 June 1988), but it was the Congress of People's Deputies which finally approved its creation in December 1989 after significant concessions were made to Baltic deputies and members of the "Intra-regional Reform Group" (TASS, 23 December 1989). Baltic deputies in particular, viewed this committee as a threat to sovereign rights that the Baltic republics were struggling to assert, while the Soviet executive branch confirmed its

own reluctance to cede too much authority to an independent judicial body (FBIS, 27 February 1990). As a result, the Constitutional Oversight Committee was largely prohibited from considering constitutional disputes between the all-Union and republican levels of government, and was given only advisory powers under most circumstances.

In this instance, the federal structure was not a voluntary or cooperative one. The members of the Soviet Union were not willing participants in this political structure. Members of a federal system must see some political advantage in maintaining the system that the body endowed with judicial review is expected to protect. The case of the Constitutional Oversight Committee demonstrates that judicial review mechanisms do not automatically thrive in federal systems.

Powers and jurisdiction of the Constitutional Oversight Committee

The USSR Law on Constitutional Oversight originally authorized the committee to review the correspondence to the USSR Constitution of draft USSR laws, of laws enacted by the USSR Congress of People's Deputies, of the constitutions and laws of the Union republics, and of edicts and decrees, among other things (USSR Law on Constitutional Oversight, Article 10). However, the approval of this legislation by republican leaders was only achieved after the Congress of People's Deputies suspended the committee's authority over the constitutions and laws of the Union republics except in cases where these laws potentially violated the human rights and freedoms protected by the Soviet Constitution or international law. The committee's authority was to be extended to include these republican laws only after amendments were made to the USSR Constitution that redefined the relationship between the Soviet government and the republics (Congress of People's Deputies Proceedings, TASS, 23rd December 1989). Ultimately, this meant a new Union treaty—a document that was destined never to be signed.

The committee could examine questions at the behest of the Congress of People's Deputies, the USSR Supreme Soviet or its commissions, the USSR President, the highest organs of state power in the Union republics, the USSR Supreme Court, and other government officials such as the USSR State Procurator. It could also examine questions submitted by all-Union organs of public organizations and the USSR Academy of Sciences. The most significant independent power granted to the committee was the ability to consider questions on its own initiative (USSR Law on Constitutional Oversight, Articles 12 and 13). The committee was not, however, expected to function as an appellate body, and individual citizens lacked standing.

Upon deciding that a particular law violated a constitutional principle or violated a statute, the committee was required to submit the finding to the government body that issued the law. The law would then be suspended for a period of three months, giving the issuing body time to amend the legislation. The committee's recommendation could also be overruled by a two-thirds majority vote of the relevant government body or of the Congress of People's Deputies (USSR Law on Constitutional Oversight, Articles 21 and 22). If after three months, the issuing body did not act, the suspension expired, but the law was not automatically nulli-

fied. The committee's ability to have any real impact on Soviet laws was therefore contingent upon explicit cooperation from the legislature and other government authorities. It had very weak advisory powers of judicial review.

Appointments to the Constitutional Oversight Committee

Suspicions regarding the Oversight Committee's independence from the Soviet leadership also arose as a result of the inability of the major political actors to influence appointments to it. The Chairman, Professor Sergei Alekseev and Deputy Chairman, Boris Lazarev, were appointed without debate and were widely touted as conservative jurists loyal to the Soviet leadership. Membership of the committee required "specialized knowledge of politics and law" and was intended to be representative of the numerous republics and regions of the Soviet Union. Nineteen additional members representing most of the republics were handpicked by Gorbachev and later approved without significant debate by the USSR Supreme Soviet in April 1990.[6]

The total complement of 25 members was never reached for a variety of reasons. First, there was a distinct lack of cooperation from the Baltic republics. Second, no clear decision on who would represent the Bashkir, Buriat, and Tatar Autonomous Republics was ever reached. Third, some candidates refused to take up their posts due to alternative commitments in their home republics; another indication of republican leaders' unwillingness to make the committee a viable institution. Leading politicians from the republics and regions did not have much influence over the appointment of these members in any event. The committee was viewed with distrust by the leadership of the republics and by opposition politicians within the Soviet legislature.

Establishment of the first Russian Constitutional Court

Without a new Union treaty, the Soviet federal system was fragile, leaving the Constitutional Oversight Committee in the difficult position of trying to maintain a system that was not supported by all of its constituent members. Without standing for popular election, President Gorbachev was also vulnerable to challenges from other politicians. The highest judicial body in the country and the head of the executive branch were thus in similarly precarious political positions.

On the one hand, the Russian leader, Boris Yeltsin, directly challenged Gorbachev's "democratic" credentials. Yeltsin did win a contested election for the RSFSR Presidency in June 1991. The fact that Yeltsin was willing to submit to the people's choice was the most important propaganda tool used against Gorbachev

[6] Including Chairman Sergei S. Alekseev and Deputy Chairman Boris M. Lazarev, 14 of the 21 members held doctorates, and five held candidate degrees in law: A.M. Abramovich, A. Agzamkhodzhayev, S.S. Boskholov, F.G. Burchak, A.G. Bykov, R.I. Ivanova, G.Z. Intskirveli, S.A. Mirzoyev, I.Sh. Muksinov, M.I. Piskotin, A.I. Smokina, V.K. Sobakin, G.K. Tolstoy, R. Torgunbekov, O. Usmanov, V.D. Filimonov, and Sh.Sh. Yagudin. The other two: L. Karpetyan, Prorektor of Erevan University held a doctorate in philosophy, and M. Annanepesov, vice-president of the Turkmen Academy of Sciences held a doctorate in history, as reported in (Izvestiya, 26th April 1990, Report on the Third Session of the USSR Supreme Soviet).

during the final year of the Soviet Union. On the other hand, the creation of the Russian Constitutional Court was another key component in the propaganda war between the two leaders. Gorbachev was unwilling to make the USSR Constitutional Oversight Committee a genuine independent judicial body, while Yeltsin was willing to create a constitutional court endowed with the independent authority to overturn legislative and executive decisions.

A game of political one-upmanship played out over the course of 1991 between Soviet President Gorbachev and Russian President Yeltsin. During this period, legal and constitutional arguments were used to further political arguments. Both leaders sought to use the legal/constitutional arguments to win the war of laws between the all-Union institutions and the republics, while the judicial institutions were not simply arbiters in the dispute, above the political fray. They were entangled directly in this conflict, dragged down and dirty in the political mudslinging.

The coup accelerated the pace of this political game. When it occurred in mid-August 1991, Soviet President Gorbachev and Russian Federation President Boris Yeltsin along with the leaders of the other Soviet Republics were engaged in an all out struggle for sovereignty and political power—a war of laws pitting the authority of the central organs of the Union against those of the constituent republics. The coup, carried out the day before the treaty's scheduled signing, was a last ditch effort by conservatives within the Communist Party to prevent the all-Union treaty. This treaty would have granted de facto recognition of the secession of six republics from the USSR and stripped the central government of nearly all of its powers (All-Union treaty, Moskovskie novosti, 18th August 1991). In point of fact, the central authorities had already lost the battle because republican governments were simply refusing to abide by central directives, but the new treaty would have officially sanctioned the supremacy of republican laws.

For Yeltsin in particular, the coup was a golden opportunity to seize more power from the central authorities, and he did so in the name of the people of the Russian Federation. Yeltsin had rallied to Gorbachev's defense during the coup attempt, but at the same time he also seized as much Soviet central authority as possible. He issued a series of decrees assuming control of central organs; the most damaging to Gorbachev took control of the armed forces on Russian territory (Decrees of the RSFSR President, Rossiya, 19th August 1991). The RSFSR simply usurped Soviet authority. The coup had confirmed a fundamental weakness in the existing political structure, namely that the USSR Presidency, although theoretically endowed with substantial authority, lacked the power to enforce its will. At the same time the RSFSR President, by virtue of his popular election, had enough moral authority to command the loyalty of the population and, therefore, political power and ultimately, the military.

Having successfully asserted the alternative state legitimacy of the RSFSR government to counteract the central authority claimed by the leaders of the coup, undertaken by the State Committee for the Emergency Situation[7] (Thorson, 1991), Yeltsin continued to expand his executive power during the initial days following

[7] The *GKChP* or *Gosudarstvennii Komitet po Chrezvyichainomu Polozheniyu.*

the coup's collapse. Gorbachev's severely weakened position allowed Yeltsin to issue a series of far-reaching edicts, largely outside his jurisdiction, as well as dictate replacements in key central institutions, including the Soviet military and the KGB (Decrees of the RSFSR President, in Rossiya, 19th August 1991). By all appearances, Yeltsin was orchestrating a new configuration of political power replacing Gorbachev and the USSR government. In the war of laws between the center and the republics, the center had been so discredited by the coup that the RSFSR leader was able to force its full-scale retreat.

The RSFSR President's seizure of central authority was a response to the power vacuum created by the coup. It was consistent with the devolution of power and authority to the republics that would have been legally delineated in the all-Union treaty agreement. Other republican leaders reacted to this crisis by declaring their own independence from the center. Twelve out of 15 republics, all but the RSFSR, Kazakhstan and Turkmenistan, announced their secession or intention to secede from the USSR in the waning months of 1991; in effect, these republican governments all seized central authority over their own territories.

Against this backdrop, the first Russian Constitutional Court was established during these turbulent months in the latter half of 1991. As a direct challenge to the perceived inadequacies of the Oversight Committee, the Russian President and the RSFSR legislature, with advice from German constitutional scholars designed their new court with substantially more independence than the Oversight Committee (Hausmaninger, 1992). The USSR Law on Constitutional Oversight had authorized Soviet Republics to create their own institutions for constitutional review, and the Russian Federation was among the first of the republics to act. The law establishing the court was approved on 12 July 1991 during the fourth session of the RSFSR Congress of People's Deputies, just five weeks prior to the attempted *coup d'état* against Gorbachev.

It was not until October 1991 at the subsequent RSFSR Congress of People's Deputies that judges could be selected. At this congress, the deputies confirmed 13 of the 15 judges expected to serve on the RSFSR Constitutional Court. At that time, power had already shifted from Soviet institutions to Russia and Yeltsin's popularity was increasing. When the court took up its first case in January 1992, the Soviet Union had officially ceased to exist, and Yeltsin's executive authority was the major political force in the newborn Russian state. In this political climate, one would expect that the court would be beholden to the Russian President, just as the Oversight Committee had been to Gorbachev, but this did not turn out to be the case. The design of the Russian court was substantially different from that of the Oversight Committee leaving the judges in a position to act independently from the executive branch.

Power and jurisdiction of the Russian Constitutional Court

The first Russian Constitutional Court was endowed with significant power from the outset for two major reasons. First, the constitutional court was another propaganda tool for the Russian executive to gain political capital relative to the

Soviet executive. In order to gain popular support, Yeltsin and the Russian legislature collaborated to give this institution greater independent authority than Gorbachev had been willing or able to grant the Soviet Oversight Committee. Second, in 1991 the Russian executive (President Yeltsin) was not yet engaged in the institutional struggle for power with the members of the Russian legislature that would later erupt in 1992–1993. Thus, the legislators and the executive were willing to support a more independent court in 1991 because they had nothing to lose in the short term. They were assured some influence over the membership on the court and they were assured standing before the court. In a game of one-upmanship, politicians, both those in power and those in opposition, will advocate greater independence so long as they have access to the court.

The first draft of the new RSFSR Constitution, published early in 1991, granted the constitutional court substantial authority. It outlined the principal functions of the court as follows: the court would be empowered to rule on the constitutionality of laws and presidential decrees; to settle constitutional/legal disputes between the RSFSR and other Soviet republics as well as disputes between republics within the Russian Federation. It would also be able to find the RSFSR president acting in violation of the constitution and to initiate proceedings to remove him (Constitution of the Russian Federation: Draft with Commentary, 1991).

Reflecting the devolution of power to the Soviet republics, the enabling legislation passed in July outlined the court's functions more cautiously vis à vis the other parts of the Union. The general provisions of the constitutional court law empowered the court to examine the constitutionality of international treaties if they have not been ratified according to established procedure and have not entered into force; laws of the RSFSR and other normative acts of the Congress of People's Deputies of the RSFSR, the Supreme Soviet of the RSFSR, or the Presidium of the Supreme Soviet of the RSFSR; other normative acts of the highest state bodies of the RSFSR, including normative acts issued by the President of the RSFSR and the Council of Ministers of the RSFSR; laws and other normative acts of the highest state bodies of the constituent republics of the RSFSR (RSFSR Law on the Constitutional Court, 1991, Article 57). It did not allow for judicial review of drafts of international treaties or normative acts (RSFSR Law on the Constitutional Court, 1991, Articles 1 and 32). This latter provision would prevent politicians from engaging the court directly in legislative negotiations.

The direct reference to court arbitration of disputes between the Union republics or among the republics of the Russian Federation was no longer provided for, but some jurisdictional authority over international agreements was included. Under "additional powers", the court could assume jurisdiction over disputes between republics of the Federation "as well as other matters", on referral from the Congress of People's Deputies with the consent of the parties involved (RSFSR Law on the Constitutional Court, 1991, Article 80). These provisions made no reference to the court's ability to initiate the removal of the RSFSR president for acting unconstitutionally, but the court did have the authority to judge the constitutionality of presidential decrees as well as most other types of legislation, as noted above.

Political cooperation from Russian legislators in the passage of the court law was ensured by making the rules regarding standing extremely loose. If politicians were assured of access to the court, then they would be more inclined to support the creation of an independent court. Petitions for abstract and concrete review could be filed with the court by:

> the Congress of People's Deputies of the USSR, the Supreme Soviet of the USSR, the President of the USSR, the Congress of People's Deputies of the RSFSR, the Supreme Soviet of the RSFSR, the Council of the Republic, the Council of Nationalities, the Presidium of the Supreme Soviet of the RSFSR, a people's deputy of the RSFSR, the President of the RSFSR, the Council of Ministers of the RSFSR, the Supreme Court of the RSFSR, the Higher Arbitrage Court of the RSFSR, the Procurator General of the RSFSR, the highest bodies of state power of the constituent republics of the RSFSR, and social organizations (RSFSR Law on the Constitutional Court, 1991, Article 59).

In addition, other courts, individual citizens and citizen organizations could file concrete review requests. Perhaps most significant of all, the constitutional court itself could take up issues within its jurisdiction "on its own initiative". These were very liberal rules for standing.

The law imposed few restraints. The constitutional court was expected to submit findings, "led solely by the RSFSR Constitution and its sense of justice, refraining from establishing or researching the actual circumstances in all instances where these issues lay within the competence of other courts or other organs" (RSFSR Law on the Constitutional Court, 1991, Article 1). The constitutional court was, therefore, limited to constitutional questions, leaving other issues to the lower courts. The major restraint was that the court was specifically prohibited from considering "political questions" (RSFSR Law on the Constitutional Court, 1991, Article 1). What constituted a "political question", as opposed to a constitutional or legal issue was, of course, an open question subject to a broad range of interpretation.

Unlike the advisory powers of the Soviet Constitutional Oversight Committee, the decisions of the RSFSR Constitutional Court were considered to be, "binding (*obyazatel'nye*) across the entire territory of the RSFSR, for all government and administrative organs, and the courts, as well as all enterprises, institutions, organizations, public officials and citizens". Once informed of a court decision, the Congress of People's Deputies or the Supreme Soviet was obligated to amend the legislation to reflect the court's evaluation when it involved a statutory violation or the law was overturned when it was found unconstitutional. "Demands of the constitutional court of the RSFSR on the elimination of violations of the Constitution of the RSFSR discovered by it... shall be binding on all bodies, officials, and citizens to whom they are addressed", but the body that had issued the law would be given time, up to 30 days to revise the legislation (RSFSR Law on the Constitutional Court, 1991, Article 1). But any law, or the section thereof, found unconstitutional by the court would be considered void from the moment the declaration is announced (RSFSR Law on the Constitutional Court, 1991, Articles 8, 32, and 65).

At least in principle, this court had substantially greater authority to find laws unconstitutional than did the USSR Constitutional Oversight Committee; a fact that Russian President Yeltsin was apt to point out in the waning months of 1991 to increase his popular profile relative to Gorbachev. Yet, this was not the only reason for this new court's relative independence. The Russian President did not act unilaterally to establish the court and appoint the first judges. Rather, the constitutional provisions and enabling legislation were designed by respected Russian legal scholars in consultation with representatives from the *Bundesverfassungsgericht* (German Constitutional Court). Russian legislators also supported an independent court in order to increase their political prospects vis à vis the Soviet legislature. The nominations were made in consultation with the major political forces in the RSFSR legislature at the time.

Appointments to the Russian Constitutional Court

The court enabling legislation specified that judges were to be nominated by the Chairman of the RSFSR Supreme Soviet (at that time, Yeltsin) and, after a review by a special committee, be approved by a simple majority of the Congress of People's Deputies. The first 13 judges were selected from among 23 candidates submitted by Yeltsin, but these candidates were sponsored, in fact, by various parliamentary factions (see Table 1).

Criticism was still voiced about the process of selection both during and after the Congress. In May 1991, when candidates were first announced, many of the deputies objected to the lack of representation of minority nationalities. Also, despite the fact that the law outlined elaborate criteria for a judge to be nominated to serve on this court, the deputies were only allowed 5 min of questioning for each candidate before voting. Many complained that the nominees lacked strong judicial training and that only the Chairman, Valerii Zorkin, possessed a national reputation consummate with the office. The court was expected to have 15 justices, but no agreement was ever reached on the final two appointments.

To ensure the court's independence, the legislation included some measure of job security. The judges were appointed, essentially, for life (until age 65). Judges sitting on the court could not be forced to retire or moved to another position without their consent, but the Congress of People's Deputies could remove a judge from the court if the deputies decided to decrease the overall number of judges on the court (RSFSR Law on the Constitutional Court, 1991, Article 16). The judges were expected to avoid conflicts of interest and be nonpartisan. The constitutional court and its judges were, ''subordinated only to the RSFSR Constitution''. A judge could not serve concurrently as a people's deputy, a member of a political party or movement, or as a representative of government or social organizations, enterprises, and so on. They also could not act as legal counsels in other courts, although they could continue to be members of an academic institution (RSFSR Law on the Constitutional Court, 1991, Articles 6 and 14). The members of the court were therefore, in principle, insulated from partisan influence by other government bodies, political figures or social organizations when rendering their decisions.

Table 1
Constitutional Court Justices, appointed in 1991

Valerii Dmitrievich Zorkin: Chairman, RSFSR Constitutional Court: Professor, Department of State and Law at the Ministry of Internal Affairs (MVD) Higher Judicial Correspondence School; member, RSFSR Supreme Soviet Constitution Drafting Commission; Doctor of Juridical Science.
Ernest Mikhailovich Ametistov: Leading Researcher, All-Union Scientific Research Institute of Soviet Administration and Legislation; Doctor of Juridical Science.
Boris Safarovich Ebzeev: Professor, Department of Soviet State Law at the Saratov Judicial Institute; Doctor of Juridical Science.
Gadis Abdullaevich Gadzhiev: Chairman, Permanent Commission of the Dagestan Supreme Soviet for Legislation, Law, and Law Enforcement; Candidate of Juridical Science; RSFSR People's Deputy from Dagestan SSR.
Anatolii Leonidovich Kononov: Deputy Chairman, RSFSR Supreme Soviet Commission on Clemency; Candidate of Juridical Science.
Viktor Osipovich Luchin: Senior Fellow, Russian Social and Political Institute (formerly, Moscow Higher Party School); Candidate of Juridical Science.
Tamara Georgievna Morshchakova: Senior Researcher, All-Union Scientific Research Institute of Soviet Administration and Legislation; Doctor of Juridical Science.
Vladimir Ivanovich Oleinik: Chairman, RSFSR Supreme Soviet Subcommittee on Freedom of Religion, Confessions, Grace and Charity; RSFSR People's Deputy.
Yurii Dmitrievich Rudkin: Secretary Constitutional Court, Deputy Chairman, RSFSR Supreme Soviet Committee for Legislation; Candidate of Juridical Sciences.
Nikolai Vasil'evich Seleznev: Prosecutor, Kemerov Oblast'.
Oleg Ivanovich Tiunov: Chairman, RSFSR Supreme Soviet Subcommittee for International Affairs and Foreign Trade; Doctor of Juridical Science; RSFSR People's Deputy.
Nikolai Trofimovich Vedernikov: Chairman, RSFSR Supreme Soviet Commission on Clemency; RSFSR People's Deputy; Doctor of Juridical Science.
Nikolai Vasil'evich Vitruk: Deputy Chairman Constitutional Court, Chief of the Department of State and Law at the MVD Higher Judicial Correspondence School.

There were suspicions early on in the legislature that these judges were already in Yeltsin's pocket, but in reality, the parliamentary factions that sponsored particular candidates proved to be a good indicator of where on the political spectrum the judges would fall in subsequent decisions and actions by the court (see Table 2). Valerii Zorkin, the court Chairman, was proposed by the Communists for Democracy faction, a group of reformist CPSU members led by soon to be Vice President Aleksander Rutskoi, which later developed into the People's Party of Free Russia. Three other judges, Viktor Luchin, Oleg Tiunov, and Nikolai Vedernikov were nominated by either pro-Communist or pro-nationalist factions, which later in April 1992 formed the hard-line Russian Unity bloc. All of these groups were conservative or hard-line politicians who rallied behind parliamentary Chairman Ruslan Khasbulatov and Vice President Rutskoi in the 1993 political showdown between parliament and the President.

Table 2
Nominating factions as a predictor of voting behavior

Conservative	Moderate	Liberal
Luchin	*Ebzeev*	Ametistov
Tyunov	*Gadzhiev*	Kononov
Vedernikov	*Rudkin*	Morshchakova
Zorkin	*Seleznev*	Oleinik
	Vitruk	

Sided with parliament in 1993
Sided with president in 1993
Publicly neutral

On the other side of the spectrum, Ernst Ametistov was the only justice nominated by the pro-Yeltsin democratic bloc. Tamara Morshchakova was the nominee of the Nonparty Deputies' Faction (deputies who had never been CPSU members). In the middle of the spectrum, Deputy Court Chairman, Nikolai Vitruk, was a candidate of the centrist New Generation—New Policy Faction (subsequently part of the Civic Union). A couple of the justices were chosen to represent particular minority constituencies: one from Dagestan, Gadis Gadzhiev; one from the Volga Tatar region, Boris Ebzeev; and finally, one former Prosecutor from Kemerov Oblast, Nikolai Seleznev.

The remaining justices were put forward by parliamentary committees and already had been elected to committee posts in parliament. For example, Anatolii Kononov was Deputy Chairman of the RSFSR Supreme Soviet Commission on Clemency and was nominated by the parliamentary Human Rights Committee. Vladimir Oleinik was Chairman of the parliamentary subcommittee on Freedom of Conscience, Religious Confession and Charitable Works, and Yurii Rudkin (Secretary to the constitutional court), was Deputy Chairman of the parliamentary committee for Legislation. These members all proved to be either pro-executive or at least publicly neutral in the 1993 political showdown.

The first Russian Constitutional Court in history was designed loosely on the German model, but had even more power and was accessible to myriad political actors. No one had any experience with this type of institution in Russian politics, but the design of the constitutional court guaranteed that it would not go unnoticed. Contrary to initial fears, the court proved to be quite independent from the executive, and because of the liberal rules for standing and the "initiative" provision, the court was politically active to an unprecedented degree.

The political interests that shaped this court were based on collaboration between the Russian executive and legislature in an effort to challenge the authority of the Soviet central government. Once this obstacle had been overcome and the Soviet Union collapsed, the focus shifted to a more traditional partisan struggle between the executive and legislative branches of the new Russian government. The constitutional court became embroiled in this political dispute, and ultimately chose to side with the parliament and lost. When parliament was dissolved and

new elections called, the constitutional court was also suspended in October 1993, and what emerged in 1994 was a redesigned institution, based on a different configuration of political interests.

Establishment of the second Constitutional Court

By the end of 1993, the political climate had changed dramatically. President Yeltsin had won the institutional battle with parliament, and uncertainty shrouded the Constitutional Court, as well as its future members. A new legislature was elected and a new Russian Constitution passed a referendum vote on 12 December 1993. This document did contain a provision for the Constitutional Court, but the new institution could not function without revised enabling legislation and the appointment of new justices, all of which took an additional 14 months of political negotiations. Under these circumstances, one would have expected any new Constitutional Court to be substantially weakened by the events of 1993, and that members of the court might be replaced. One might also have expected, that the executive would exercise significantly greater oversight of the court, reduce the independent powers of judicial review, and that new appointments would be dictated by the executive branch. None of these things turned out to be the case.

International attention was focused on the Russian Presidency, the new parliamentary elections and the ratification of the new constitution in the aftermath of the storming of the parliament. The justices themselves had political supporters and had established some credibility in the political community that could not be ignored. Public opinion and the press continued to favor the existence of a Constitutional Court despite its actions during the presidential-parliamentary conflict. The newly elected members of the legislature after December 1993 did not quietly acquiesce to presidential desires, and the members of the new upper house remained the appointed representatives of the republics and regions who had been seated before the October crisis. All of these interests conspired to make it impossible for the President to act unilaterally. He could not dissolve the Russian Constitutional Court or make it subservient to the executive branch.

The new Constitution established a powerful presidential republic and a new political playing field for the court. The legislature (Federal Assembly) is bicameral, consisting of a lower house, the State Duma, which holds 450 elected deputies, and an upper house, the Council of the Federation, in which representatives from the constituent parts of the Federation sit (two representatives from each of the 89 republics and regions). The presidency is very powerful, and the Government (or cabinet), has a more clearly defined jurisdiction over economic policy. Most importantly, despite threats by the President to the contrary, the judiciary maintained its independence and the Constitutional Court continued to exist.

Article 125 of the Constitution states (Constitution (Basic Law) of the Russian Federation—Russia, 1993):

1. The Constitutional Court of the Russian Federation consists of 19 judges.

2. The Constitutional Court of the Russian Federation on request by the President of the Russian Federation, the State Duma, one-fifth of the members of the Federation Council or deputies of the State Duma, the Government of the Russian Federation, the Supreme Court of the Russian Federation and Supreme Arbitration Court of the Russian Federation, bodies of legislative and executive power of subjects of the Russian Federation shall resolve cases about compliance with the Constitution of the Russian Federation of:

   (a) federal laws, normative acts of the President of the Russian Federation, the Federation Council, State Duma, and the Government of the Russian Federation;
   (b) republican constitutions, charters, as well as laws and other normative acts of subjects of the Russian Federation and joint jurisdiction of bodies of state power of the Russian Federation and bodies of state power of subjects of the Russian Federation;
   (c) agreements between bodies of state power of the Russian Federation and bodies of state power of subjects of the Russian Federation;
   (d) international agreements of the Russian Federation that have not entered into force.

3. The Constitutional Court of the Russian Federation shall resolve disputes over jurisdiction:

   (a) between the federal state bodies;
   (b) between state bodies of the Russian Federation and state bodies of the subjects of the Russian Federation.

4. The Constitutional Court of the Russian Federation, proceeding from complaints about the violation of constitutional rights and freedoms of citizens and requests from courts shall review the constitutionality of the law applied or due to be applied in a specific case in accordance with procedures established by federal law.
5. The Constitutional Court of the Russian Federation on request by the President of the Russian Federation, the Federation Council, State Duma, the Government of the Russian Federation, legislative bodies of subjects of the Russia Federation shall interpret the Constitution of the Russian Federation.
6. Acts and their provisions deemed unconstitutional shall lose force thereof; international agreements of the Russian Federation shall not be enforced and applied if they violate the Constitution of the Russian Federation.
7. The Constitutional Court of the Russian Federation on request of the Federation Council shall rule on compliance with established procedures when charging the President of the Russian Federation with state treason or other grave crime.

The chief arbiter of disputes between the executive and the legislature was still the Russian Constitutional Court. An earlier presidential draft constitution had significantly reduced the Constitutional Court's authority by creating a "Judicial

Assembly'' that would have, in effect, subordinated the Constitutional Court and the judiciary as a whole to the executive branch and there was also some discussion about giving the Russian Supreme Court jurisdiction over concrete review, and issues arising in the lower courts. Substantial international pressure, and support for the Constitutional Court from within the President's legal department led to these provisions being removed from the final compromise draft (Mityukov, 1996).

The Constitutional Court, under this constitution, retained its authority to oversee the compliance of all laws and decrees at the federal level, and to resolve jurisdictional disputes between federal bodies. The presidency does have some quasi-judicial authority and reduces the Constitutional Court's impact on federal relations. The President has the authority to mediate disputes between federal structures and government bodies in the constituent parts of the Federation as well as disputes between members of the Federation. In cases where no resolution is found he may then turn the matter over to the Constitutional Court. The President also has the authority to suspend acts by the executive branch of Federation components when these acts contradict the constitution, federal laws or international treaties on human and civil rights. Previously, this authority had rested firmly in the hands of the Constitutional Court.

Powers and jurisdiction of the second Constitutional Court

Nonetheless, the Constitutional Court actually retained much of its power. The new enabling legislation for the Constitutional Court law, which was drafted with significant input from the acting Chief Justice, Nikolai Vitruk and the other sitting justices, was approved on 12 July 1994. It reflected some of the lessons learned in the first 2 years, and the court's powers of review were even expanded somewhat.

Article 3 gives the court jurisdiction over the constitutionality of federal laws, constitutions of the republics and regional charters, federal/state agreements, and international treaties. The court is also the arbiter of disputes between federal organs, between state governments and between federal organs and state organs of government. In addition, the court may hear complaints regarding constitutional rights and freedoms of individual citizens, may interpret the constitution, give an advisory opinion with regard to presidential impeachment procedures, and finally the court may ''take legislative initiative on matters within its jurisdiction'' (Federal Constitutional Law on the Constitutional Court of the Russian Federation, 1995). The interpretive function, in particular, is a new one, giving the court more latitude to interpret conflicting provisions in the constitution, and the initiative provision remains. Conspicuously, lacking is the provision expressly prohibiting the court from considering political questions.

The membership of the court was expanded from 15 to 19 justices, perhaps intended as a means of diluting the power of those anti-Yeltsin members. At least three-quarters of the membership must be filled in order for the court to function. The provisions for appointment of judges remained virtually unchanged; however, the term of service was significantly altered. Justices are no longer appointed for

life, but for 12-year nonrenewable terms with an obligatory retirement age of 70[8] (Federal Constitutional Law on the Constitutional Court of the Russian Federation, 1995, Chapter 1, Article 12). The original 13 judges, however, may serve until age 65 and after much debate, were exempted from this new limited term of service. The justices and members of the legislature also successfully prevented efforts by President Yeltsin to ensure the removal from the court of Chairman Zorkin and several other justices, who openly sided with the parliament (Federal Constitutional Law on the Constitutional Court of the Russian Federation, 1995, Chapter 15, Section 5).

The only way a judge can be suspended is, if the court gives consent for the arrest of a judge for criminal acts, or if the judge cannot perform his duties due to ill health (Federal Constitutional Law on the Constitutional Court of the Russian Federation, 1995, Chapter 1, Article 17). Aside, from this procedure, the law explicitly states that justices are irremovable and gives detailed provisions to protect the independence of the court and its members. A justice's powers can be terminated only by a decision of the court itself under certain conditions such as expiration of term, voluntary resignation, death, or loss of citizenship. One provision open to interpretation is Article 18, Section 7, which allows for termination in light of "the judge's continuation of occupations or actions incompatible with his office in spite of the warning by the Constitutional Court of the Russian Federation" (Federal Constitutional Law on the Constitutional Court of the Russian Federation, 1995, Article 18, Section 7).

One such action now clearly noted in Article 11 addresses one of Chairman Zorkin's most controversial tendencies.

> No judge of the Constitutional Court of the Russian Federation shall, when appearing in print, in other means of mass media, or before any audience, publicly express his opinion on the matter which may be subject to consideration by the Constitutional Court of the Russian Federation, as well as one which is currently under consideration or has been admitted for consideration by the Constitutional Court of the Russian Federation until the decision on the matter has been handed down" (Federal Constitutional Law on the Constitutional Court of the Russian Federation, 1995, Article 11).

The organizational structure of the new court also more closely resembles the German Constitutional Court. With 19 justices, plenary sessions are held for certain types of questions, while two chambers consisting of 10 and 9 justices, respectively, hear most cases. Plenary sessions are required for cases involving constitutional challenges to republic constitutions and regional charters, constitutional interpretations, presidential impeachment, and on taking legislative initiatives. In addition, plenary sessions decide housekeeping matters such as rules of procedure, election of the court officers, and the sequence for consideration of cases on the docket and their distribution to the two chambers.

[8] This is analogous to the German court.

Unlike the German Court, the jurisdiction of the two chambers is not clearly delineated. The plenary sessions are used to distribute the cases between the two chambers, and the enabling legislation does not specify the competency of each chamber. It does suggest that cases be divided broadly between specific challenges to laws, agreements and international treaties on the one hand, and disputes of competence between federal organs, between federal and state organs, between state organs on the other. A third area is individual complaints by citizens regarding constitutional rights and freedoms (Federal Constitutional Law on the Constitutional Court of the Russian Federation, 1995, Articles 21 and 22).

In terms of remedies, when the court finds a "normative act" (broadly construed to include decrees, declarations and laws) or an international treaty in whole or in part unconstitutional, the document is considered void from the moment the decision is published. Only political actors can challenge the constitutionality of normative acts and international treaties (Federal Constitutional Law on the Constitutional Court of the Russian Federation, 1995, Article 79). While a law as applied can also be found unconstitutional, it results only in a recommendation to the legislature that the law be reviewed, revised, or repealed. Thus, the court does not have the authority to void statutory laws when individual complaints from citizens regarding civil rights violations are considered (Federal Constitutional Law on the Constitutional Court of the Russian Federation, 1995, Article 100).

The Chairman, Deputy Chairman, and Secretary of the court are elected by a simple majority of the court itself for 3-year renewable terms, and these positions remain powerful in that these officers determine the agenda for plenary sessions and other matters of administration. The Chairman is also elected for a 3-year term and can only hold two consecutive terms, a limitation not found under the first court law (Federal Constitutional Law on the Constitutional Court of the Russian Federation, 1995, Article 23).

Management of caseloads was slightly improved. Cases are still considered consecutively, although the two chambers can hear cases assigned to them in plenary session concurrently, and cases can also be considered in plenary sessions while others are under consideration in the two chambers. The Chairman assigns petitions submitted to one or several judges for preliminary review, and these results are then reported to the plenary session, which then makes the final decision on whether a case shall be heard (preliminary review takes two months, and plenary review must be completed no later than one month after the preliminary review). The court may also require that a disputed act be suspended until the court can evaluate it (Federal Constitutional Law on the Constitutional Court of the Russian Federation, 1995, Article 50).

Discussion of cases and voting on decisions are conducted in camera and the results not made public. The plenary session, which must pass each decision, votes by roll call and these votes are public. A majority of those voting is all that is required (ties are in favor of constitutionality), but a decision of constitutional interpretation must be made by a two-thirds majority vote.

Perhaps the most important change is who has standing. Regarding the constitutionality of acts by organs of state government and agreements between them

and international treaties, the president, the Federation Council, the State Duma, one-fifth the number of deputies of the Federation Council (36) or of the State Duma (91), the Government, the Supreme Court, the Superior Arbitration Court, bodies of legislative and executive power of constituent parts of the federation all have standing. Significantly, with regard to challenges about competence, the petitioner can be any organ of state government party to the dispute, but not individual members of that government organ (Federal Constitutional Law on the Constitutional Court of the Russian Federation, 1995, Article 84). In the first court legislation, representatives of a government organ could file individual petitions and many took advantage of this provision. Any disgruntled politician could appeal to the court under the previous legislation. This revision places serious limitations on the number of challenges regarding jurisdictional disputes. Individual citizens, associations, and governmental bodies may still file complaints regarding constitutional rights and freedoms. The limitations on standing are indicative of the power of the executive branch to dictate the terms by which the court could continue to function.

Appointments to the second Russian Constitutional Court

The new enabling legislation dealt with many of the problem areas that had arisen during the court's first term, but the other unresolved issue was what, if anything, to do about the justices on the court that had become embroiled in the political quarrel between the executive and legislative branches. On 1 January 1994, the day the new constitution came into force, the President issued a decree, "On Filling Vacancies for Federal Justices" that called on the Ministry of Justice and the All-Union Congress of Judges in addition to the Federation Council, to submit candidates for the Constitutional Court (Pravda, 6th January 1994). This decree included replacements for the original 13 Constitutional Court justices. In particular, the fate of two justices Zorkin and Luchin, both of whom had been suspended from the court on 1 December 1993 by the other justices, was in question.

Despite the decree, the President did not have the constitutional authority to remove a judge from the Constitutional Court; only the justices themselves had that power. Pressure from the executive branch to remove at least these two judges was evident, but the acting Chief Justice, Nikolai Vitruk, and the other members of the court resisted. Vitruk signaled the court's position by publicly attributing the court's involvement in political disputes to a failure in the court's enabling legislation. Several days later, Luchin went on a hunger strike to protest his suspension and the judges shortly thereafter voted 7:4 to reinstate him. They put off a decision on Zorkin, but they ultimately voted to restore him to his position by a vote of 7:3 (held in the absence of acting Chairman Vitruk)[9] (Izvestiya, 27th January 1994). Meanwhile, the press challenged the legality of the President's decree, and Vitruk,

[9] Also the hunger strike was not widely reported in the press, but was confirmed by the judge, Viktor Luchin, in an interview with the author, 26th June 1996.

working behind the scenes, convinced the President that changes to the court's operating procedures and the appointment of additional justices would safeguard against further political activities by the court.

The original 13 survived, and an additional six members of the court were nominated by President Yeltsin and approved by the Federation Council, but this process was not completed until February of 1995. Whereas, the first 13 justices were nominated by political parties, parliamentary factions and other institutions and confirmed rapidly with only a few minutes of debate by the Congress of People's Deputies, the additional six appointees were subject to rigorous review. The 1994 law provided for presidential nomination based on recommendations from a judicial qualifications commission. The nominees then had to be approved by a simple majority of the Federation Council (not the State Duma). The upper house was not dominated by political parties but by regional and republic leaders, reducing the influence of political parties over the choice of candidates. Now that politicians were more aware of the potential power of the court, the nomination process was much more carefully scrutinized.

The expansion of the court may have been designed to pack the court with justices friendly to the President, but this "court packing" plan was thwarted when the Federation Council rejected four of the most liberal nominees, three of whom were resubmitted by the President and rejected twice. The original six nominations were M. Mityukov, Deputy Chair of the Duma and former Chair of the Supreme Soviet Legislation Committee (later the President's official representative at the court); M. Krasnov, Doctor of Law and Sector Head of the Institute of State and Law; V. Tumanov, Doctor and Professor of Law; O. Khokhryakova, Doctor of Juridical Science, Sverdlovsk; V. Savitsky, Sector Head of the Institute of State and Law; and V. Yaroslavtsev, member of the St. Petersburg City Court. Tumanov, Khokhryakova and Yaroslavtsev were eventually confirmed. The president, then submitted five additional candidates two of whom had been on the original list: Krasnov and Savitsky; and R. Bektagraf, Y. Danilov, and Y. Kalmykov. Of these, only Danilov was confirmed; the others were rejected as too liberal or too pro-presidential. The remaining two seats went eventually to Strekozov and Baglai (see Table 3).

Thus a process, which by law should have taken 30 days, took an additional seven months, and in February 1995, a frustrated president announced that he would stop proposing candidates for the court if the Federation Council continued to reject them out of hand. The 19th member, Marat Baglai, was finally approved on 9 February 1995. The court, after more than a year in suspension, could begin to work again.

Within days of Baglai's confirmation, the justices elected Vladimir Tumanov as Chairman and Tamara Morshchakova as Deputy Chairman of the court, and divided into the two chambers to begin hearing cases. Of the original 13 members only one had any practical legal experience (as a prosecutor) and of the six new appointees, only one was a professional judge. Most of the others were legal academics with no real judicial experience before serving on the court. Their careers demonstrated how well they were socialized into the highly politicized Soviet legal process and their relative success at moving up through that hierarchy.

Table 3
New justices appointed in 1994

Marat Baglai: Born 1931; graduate of the Institute of State and Law; lecturer and assistant professor at the Institute of International Relations at the Ministry of Foreign Affairs; Head of the Department at the Institute of International Workers Movements at the Academy of Sciences; Assistant Dean of the Academy of Labor and Social Relations.
Yuri Danilov: Born 1952; graduate of the law faculty of Voronezh State University; judge of the Voronezh Regional Court; Deputy Minister of Justice and Deputy Chairman of the State Committee on Anti-Monopolistic Policy and Support of New Economic structures.
Olga Khokhryakova: Born 1937; Institute of Legislation and Comparative Law; head of department of Labor and Social Law.
Vladimir Strekozov: Born 1940; graduate of Military Political Academy in 1973; assistant to the Dean of the Military Academy of Economy.
Vladimir Tumanov: Born 1926; Professor at the Institute of State and Law, Russian Academy of Sciences since 1959; member of the International Academy of Comparative Law; President of the UNESCO International Association of Legal Science in 1994, member of the Duma Committee on Legislation, Judicial and Court Reform.
Vladimir Yaroslavtsev: Born 1952; Judge St. Petersburg City Court.

The Russian President's victory over parliament in 1993 and the dissolution of the first Constitutional Court was not a complete rout of legislative and judicial authority. With both international and domestic pressures on the Russian president and the government to make good on their promises to establish a more democratic system of government, Yeltsin could not afford to write both independent bodies out of the new constitution entirely. As a result, the new constitution and the new enabling legislation for the court maintained a balance of power between the three branches. Russian politicians, in particular legislators who had used the court successfully to challenge executive actions or majority legislative actions, had seen the political value of the Constitutional Court, and they lobbied hard to keep it. Moreover, the justices themselves were political actors of some consequence, and they too fought successfully for their own survival.

When comparing directly the Zorkin court with the Tumanov court, there are relatively few substantial changes to the institutional design. The most important ones are the increase in the number of justices from 13 to 19; the court's ability to offer interpretations of constitutional provisions; and the new limits on standing that prevent individual politicians from filing constitutional challenges.

Taking each in turn, the increase in the size of the court certainly had the effect of diluting the anti-Yeltsin group of justices, but it did not ensure a pro-presidential court either. It also gave the new political actors in parliament an opportunity to influence the appointment of justices on the court. This provision ensured that more politicians in the new legislature would seek to maintain a more independent court.

The second court's jurisdiction also remained largely unchanged, while the new interpretive provision represented an actual increase in the court's power, allowing it to offer authoritative definitions of constitutional provisions that might be in

conflict, and to resolve jurisdictional disputes over these constitutional provisions before legislation is drafted. The fact, that the second court did not see its authority restricted is a testament to the political value of the Constitutional Court that was evident to both the executive and the legislature even during the tumultuous period in 1993. The Constitutional Court demonstrated its political value in spite of Zorkin's extrajudicial behavior and apparent political bias.

The final and most important change affecting the court's political role, the reduction of those politicians with standing, is a substantial alteration to the operation of the court. This new rule on standing does not have the effect of reducing the Constitutional Court's overall political power so much as it reduces the individual politician's power to involve the court in frivolous political arguments. The "one-fifth" requirement is not a small number, but it is also not insurmountable. Politicians in the legislature are thus assured the ability to appeal to the court when at least 91 deputies in the lower house or 36 deputies in the upper house agree to sign the petition. In practice, this does have the affect of reducing the number of political challenges that come before the court, but it does not stop them entirely. The balance of political forces may have shifted to the executive, but not enough to allow the president to act unilaterally.

Conclusions

The limited powers of the Soviet Constitutional Oversight Committee are easily understood in the context of the political implosion of the Soviet federal system that was taking place in 1989–1991. The political actors involved in the negotiations to form this body did not see any political advantages in creating an independent powerful institution for judicial review. In fact, such a body was replete with risk under the circumstances. The first experiment with judicial review was a failure in light of the bankruptcy of the Soviet federal system, and its record is one of weak judicial review (Hausmaninger, 1992).

The first Russian Constitutional Court, on the other hand, benefited from a rallying of legislative and executive forces to present a more "democratic" demonstrable political alternative to the Soviet leadership. In a game of political one-upmanship, advocating an independent judicial body with explicit powers of judicial review can provide a distinct political advantage. The powers given to this court were unprecedented in Russian and Soviet history, and the number of politicians with access to the court also made it a potentially valuable political tool. This proved to be a double-edged sword for the second experiment with judicial review in Russia.

The first 2 years of the Constitutional Court (1991–1993) demonstrated to political actors in the new Russian regime that such a court could prove to be a valuable political tool (Sharlet, 1993). The court did not always side with the executive, and in fact, it often was able to overturn legislation that would otherwise have been approved and put into force. The court offered clear advantages to opposition politicians seeking to influence legislative outcomes and this is also demonstrated in

the work of the second Russian Constitutional Court despite the changes to its design.

The Russian experience with judicial review during the transition from the authoritarian rule of the Soviet system is instructive on several fronts. It sheds some light on the role a constitutional court may play in the transition and consolidation phases of an emerging democracy, and it contributes to the growing body of comparative work on constitutional courts around the world. By focusing on the interests of politicians, this study offers one possible answer for why constitutional courts are being created and sustained in so many states around the world, even those previously hostile to independent judiciaries.

This analysis identifies the political interests that motivate politicians to establish constitutional courts, and how these interests may explain why some of these institutions are more successful than others. It reveals definite incentives for political actors to create an institution endowed with judicial review but shows how the level of independence of these institutions may vary significantly depending on the balance of interests among the political elites and the reasons why. Politicians who seek support from both the citizenry and the international community may advocate the creation of a constitutional court in order to signal their future commitment to rule by law, but those that are more certain of their future positions may seek to limit the authority of that constitutional court, while those who are more uncertain about the future will seek a more independent court.

References

Constitution (Basic Law) of the Russian Federation—Russia [Konstitutsiya (Osnovnoi Zakon) Rossiiskoi Federatsii—Rossii], 1993. Izdaniye Verkhovnogo Soveta Rossiiskoi Federatsii, Moscow.

Constitution of the Russian Federation: Draft with Commentary [Konstitutsiya Rossiiskoi Federatsii: proekt s kommentariyami], 1991. Moscow and Krasnoyarsk.

Congress of People's Deputies debate on the creation of the Committee for Constitutional Oversight, 1990. Foreign Broadcast Information Service, 27th February.

Federal Constitutional Law on the Constitutional Court of the Russian Federation [Federal'nii Konstitutsionnii Zakon o Konstitutsionnom Sude Rossiiskoi Federatsii], 1995. Gazette of the Constitutional Court of the Russian Federation [Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii], vol. 1.

Ferejohn, J., 1999. Independent judges, independent judiciary: explaining judicial independence. Southern California Law Review 72, 353–384.

Geddes, B., 1991. A game theoretic model of reform in Latin American democracies. American Political Science Review 85.

Geddes, B., 1995. The Leninist legacy in comparative perspective. Comparative Political Studies 28 (2), 239–274.

Hausmaninger, H., 1992. From the Soviet committee of constitutional supervision to the Russian Constitutional Court. Cornell International Law Journal 25, 305–337.

Izvestiya, 26th December 1989. USSR Law on Constitutional Oversight in the USSR [Zakon CCCP Konstitutsionnogo Nadzora v CCCP].

Izvestiya, 26th April 1990, "Report on the Third Session of the USSR Supreme Soviet".

Izvestiya, 27th January 1994, "Constitutional court vote on Luchin and Zorkin".

Knight, J., 1992. Institutions and Social Conflict. Cambridge University Press, Cambridge.

Knight, J., Epstein, L., 1996. On the struggle for judicial supremacy. Law and Society Review 30, 87–120.

Mikhail Alekseyevich Mityukov, Presidential Representative to the Russian Constitutional Court. Interview with the author, 19th June 1996.

Moskovskie novosti, 18th August 1991. All-Union treaty.

Pravda, 7th May 1988. Resolution of the 19th All-Union Conference of the CPSU on Legal Reform, [Rezolyutsii XIX Vsesoyuznoi Konferentsii KPSS: O pravovoi reforme].

Pravda, 6th January 1994, ''Presidential decree on 'filling vacancies for federal justices'''.

Przeworski, A., 1986. Some problems in the study of the transition to democracy. In: O'Donnell, G., Schmitter, P.C., Whitehead, L. (Eds.), Transitions from Authoritarian Rule: Comparative Perspectives. The Johns Hopkins University Press, Baltimore and London.

Rossiya, 19th August 1991. Decrees of the RSFSR President.

RSFSR Law on the Constitutional Court [Zakon Rossiiskoi Federativnoi Sotsialisticheskoi Respubliki o Konstitutsionnom Sude RSFSR], 1991. Gazette of the Congress of People's Deputies and the Supreme Soviet of the RSFSR [Vedomosti, S'ezda Narodnykh Deputatov RSFSR i Verkhovnogo Soveta RSFSR].

Sharlet, R., 1993. The Russian Constitutional Court: the first term. Post Soviet Affairs 9, 1–39.

Solomon, P.H., 1990. Gorbachev's legal revolution. Canadian Business Law Journal 17, 184–194.

Thorson, C., 1991. Constitutional issues surrounding the coup. Report on the USSR 3, 19–22.

TASS 28th June 1988. XIX All-Union CPSU Conference Proceedings.

TASS 23rd December 1989. Congress of People's Deputies Proceedings.