From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court

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From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court

Introduction

In June 1988 the 19th Party Conference of the Communist Party of the Soviet Union (CPSU) recognized the need to develop a "Socialist state under the rule of law" and consequently approved the introduction of a special institution to review and ensure the observance of constitutionality and legality in the Soviet political system. An amendment to the Soviet Constitution, adopted on December 1, 1988, provided for the establishment of a Committee of Constitutional Supervision of the USSR (Komitet konstitutsionnogo nadzora SSSR).

The creation of the Committee of Constitutional Supervision (CCS)
reflected conflict between competing political and legal tendencies. Some legal scholars advocated the creation of a constitutional court with power to nullify unconstitutional legislation and other illegal enactments. Others considered this idea either premature or outright counterproductive prior to the adoption of a new Soviet Constitution and a new framework of national relations in the Soviet Union. The parliamentary majority opted for a committee of constitutional supervision with mostly advisory and suspensive powers. This choice was supposedly compatible with both the prevailing notion of parliamentary supremacy and emerging assertions of republic sovereignty, yet would enable the CCS to contribute to the development of rule of law. This political compromise formula, however, turned out to handicap seriously the Committee's effectiveness.

Part I of this Article will attempt to assess the legal impact of the Committee and evaluate the quality of its "findings." Part II will focus on the Russian Constitutional Court, which was shaped by Russian legislators in response to the perceived weakness of Soviet constitutional supervision. The Court, which was elected on October 29, 1991, issued its first opinion on January 14, 1992. The decision gives rise to hopes that a "third power" is emerging in the Russian Federation and will assert constitutionality with the legal force and political courage necessary to promote a pervasive legal culture.

I. The Committee of Constitutional Supervision of the USSR

A. Election

On December 23, 1989, approximately half a year after an abortive initial attempt, the Congress of People's Deputies of the Soviet Union resumed legislative work on constitutional supervision. The Congress revised the new article 125 of the Constitution, passed the Law on Con...

4. See id. at 291-293.
stitutional Supervision in the USSR, and elected the Chairman (Professor Sergei S. Alekseev) and the Deputy Chairman (Professor Boris M. Lazarev) of the Committee of Constitutional Supervision. Since the Congress ran out of time on December 23 to elect the twenty-five members of the CCS, the Congress resolved that they were to be elected at the following session of the Supreme Soviet. The constitutionality of this resolution was highly questionable because the Constitution expressly assigned this competency to the Congress and did not envisage the delegation to other organs.

On April 26, 1990, the Supreme Soviet of the Soviet Union elected, without discussion, nineteen members of the CCS. Although there were supposed to be twenty-five members, the three Baltic republics refused to cooperate, and no complete agreement existed as to the four members who were to come from autonomous territorial formations within the USSR. In the meantime, other candidates, originally selected for membership, had accepted other positions. For example, the designated member from Kazakhstan reportedly went home to head his republic's constitutional supervision organ.

Under the Constitution, members of the CCS were to be "special-

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11. Vedomosti SSSR, No. 18, item 314 (1990), *Election of Members of the USSR Constitutional Review Committee*, translated in *CURRENT DIG. SOV. PRESS*, May 30, 1990, at 29. At the same time, Chairman Alekseev’s deputy status was terminated according to art. 25 of the Law on Constitutional Supervision. See Vedomosti SSSR, No. 18, item 315 (1990). In an interview with commentator Yuri Feofanov in Izvestia, Alekseev pointed out that the deputies had basic information on the candidates, but that the absence of a debate attested to a lack of awareness of the importance of these appointments. Izvestia, June 17, 1990, at 2.

12. Hausmaninger, *supra* note 2, at 298, 314. The Buriat, Bashkir and Tatar Autonomous Republics seem to have been “represented” on the CCS by members Boskholov, Maksinov and Iagudin, respectively. See the interview of Committee member Boskholov with Pravda Buriati, on the regional distribution of the four seats reserved for autonomous formations: one to North Caucasus, one to West and East Siberia plus the Far East, two to the Volga Lands (Povol’che). Pravda Buriati, Dec. 16, 1990, at 4 [hereinafter Boskholov interview].

13. Information received from Prof. Boris N. Topornin (Moscow) in July 1991.
ists in the area of politics and law." With two exceptions, all Committee members held higher law degrees; most of them were law professors. The Committee included one woman.

Under the March 14, 1990, Amendments to the Soviet Constitution, the President of the USSR would nominate members of the Committee. The Congress of People's Deputies ultimately decided, however, that the Chairman of the Supreme Soviet, not the President, would propose Committee members for election. This change was based on the argument that the Committee would review the President's decrees, and the Committee members should therefore not be the President's political appointees.

As provided by an apparently unconstitutional resolution of the Congress, the members of the Committee, upon their election, drew lots to reduce the term of office of one half of their number from ten to five years in order to ensure staggered renewal and a measure of continuity in the future. The results have not been announced. The Committee subsequently adopted a procedural reglement, which was also not published.

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16. Including Chairman Alekseev and Deputy Chairman Lazarev, 14 of the 21 Committee members held doctorates, five held candidate degrees in law. Id.

17. Rozalia I. Ivanova, Professor of Law, Moscow State University Law School. Id.


19. See Draft of Constitution, art. 123 (8), in Izvestia, March 5, 1990, at 1; see also the discussion of this draft article in the Congress of People's Deputies as reported in Izvestia, March 15, 1990, at 3, translated in The Extraordinary Third Congress of USSR People's Deputies, CURRENT DIG. Sov. Press, May 2, 1990, at 13-14 (Professor Kudriavtsev, Chairman of the Editorial Commission, endorsing a proposal to this effect by the Chairman of the Supreme Soviet Lukianov).

20. Konst. SSSR art. 108(11); The Law Establishing a USSR Presidency, supra note 18, at 22.

21. Konst. SSSR art. 124(2). ("The Committee] offers findings on the conformity of decrees issued by the President of the USSR to the Constitution and laws of the USSR.").

22. Vedomosti SSSR, No. 29, item 573, sec. 2 (1989); see Hausmaninger, supra note 2, at 315.

23. The Committee members I interviewed in July 1991 (Deputy Chairman Boris M. Lazarev, Vadim K. Sobakin and Liudvig M. Karapetian) found nothing questionable about this procedure, whereas Professor Boris N. Topornin, Director of the Institute of State and Law, Academy of Sciences of the USSR, considered it clearly unconstitutional.

24. Law on Constitutional Review, supra note 6, art. 28.

25. Although I was assured that the Rules were not secret, I was not able to obtain a copy.
1. Jurisdiction of the CCS

Under the Soviet Constitution and the Law on Constitutional Supervision in the USSR, the Committee could, either at the request of any of several high state organs or on its own initiative, examine the constitutionality of laws and the legality of certain other normative acts, such as decrees of the President and ordinances of the Council (later Cabinet) of Ministers of the USSR. The CCS would submit its “findings” (zakliucheniiia) to the Congress of People’s Deputies, the Supreme Soviet or other organs that had issued the respective unconstitutional or illegal acts. The findings were published in the Soviet Legal Gazette and had advisory, suspensive or nullifying force.

The CCS was originally designed to monitor the constitutionality of both federal and republic legislation. Since the republics, notably the Baltic states, refused to acknowledge federal jurisdiction over their legislative acts (and later claimed sovereignty, independence and supremacy of republic over federal law), a compromise had to be reached. Thus, the review authority of the CCS would not extend to republic law until a new Union Treaty was passed.

Nonetheless, there was to be one very notable exception: the CCS could immediately invalidate republic law that violated fundamental human rights and freedoms protected by the Union Constitution and international acts. In other cases of its jurisdiction, such as the violation of non-human rights provisions of the Soviet Constitution by a federal statute, a presidential decree, or a government ordinance, the CCS could merely issue a finding of unconstitutionality or illegality and suspend the legislative or executive act. It thereby appealed to the respective state organ to correct the faulty normative act within a statutory period of three months.

2. Work Procedures of the CCS

Little public information exists on internal work procedures of the CCS. According to a press interview given by Committee member Sergei S. Boskholov on December 16, 1990, the Committee worked in three sections: state law, economic law, and criminal law. An interview given by Deputy Chairman Lazarev one day later and several subsequent interviews and articles of Chairman Alekseev fail to provide more information on this subject.

27. Except for normative acts of the republics, see the legal provisions cited supra note 26.
28. Hausmaninger, supra note 2, at 298.
29. Konst. SSSR art. 124; Law on Constitutional Review, supra note 6, art. 21.
30. Law on Constitutional Review, supra note 6, arts. 21 and 22.
With the exception of a two-month summer recess in 1990, the CCS held monthly meetings of a few days each. During these meetings, it heard oral argument by representatives of government organs and testimony by experts on constitutional law in "open" session. After deliberating and voting in camera, the CCS publicly announced its findings. As of its fourth session in October 1990, all of the Committee's decisions were unanimous. The published findings indicated neither which members participated in a decision nor the members' respective votes. Dissents have been few and brief.

The CCS began its work in May 1990 on two floors of a building that houses a museum devoted to the life and revolutionary activities of Lenin's sister, Anna Ul'yanova-Yelisarova. The building, located close to the Kremlin, appears rather inconspicuous. This lack of physical visibility and accessibility may be viewed as symbolizing the status the CCS was accorded and prepared to accept.

Between its first official announcements of May 16, 1990, and the decision to dissolve on December 23, 1991, the CCS produced fewer than two dozen findings. Most of these findings nullified human rights violations by federal legislative and executive authorities. The Committee passed the majority of its findings on its own initiative. In some instances, union organs asked the CCS to nullify human rights violations by republic organs, which the Committee could not examine on its own initiative. In many human rights cases, the CCS referred to international human rights pacts such as the Universal Declaration of Human Rights of 1948 and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966. The

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33. "The Committee's meetings are conducted openly..." Law on Constitutional Review, supra note 6, art. 17. This provision was applied very restrictively. Hartwig, supra note 2, at 10, n.80, and Wieser, supra note 2, at 187, n.74, report that they were denied access to the CCS's "public" meetings.

34. Boskholov interview, supra note 12.


36. The address was 9 Manezhnaia ulitsa.

37. I heard two conflicting explanations for the absence of any sign indicating the presence of the "guardians of constitutionality" in this unlikely environment: first, that people would try to gain access and flood the Committee with petitions, not knowing that it had no jurisdiction over individual constitutional complaints; second, that the KGB also had no sign on its front door, and everybody knew exactly where to find it!

38. See infra notes 52-55 and accompanying text.

39. See infra note 160 and accompanying text.

Soviet Union had ratified both pacts, and the CCS insisted on their supremacy and immediate applicability over Soviet law.\(^4\)

In an interview with Izvestiia on June 17, 1990, Committee Chairman Professor Alekseev made it clear from the outset that the Committee’s work would focus on the protection of human rights and freedoms. This approach was apparently designed to dispel the frequently voiced concern of Soviet jurists and other intellectuals that the Committee’s establishment had been premature. These critics feared the CCS would be forced to uphold an obsolete and largely discredited Brezhnev Constitution against progressive perestroika legislation.

Alekseev pointed out that some provisions of the 1977 Constitution, viewed in the context of the evolving legal infrastructure of perestroika, could serve as starting points for the Committee’s work.\(^4\)\(^5\) Thus, he referred to the principle of glasnost’ mentioned in article 9,\(^4\)\(^4\) legality in article 4,\(^4\)\(^5\) court control over the activity of state officials in article 58,\(^4\)\(^6\) and the presumption of innocence in article 160.\(^4\)\(^7\) Alekseev added that important perestroika amendments had been passed on March 14, 1990,\(^4\)\(^8\) which included provisions for a multiparty system.\(^4\)\(^9\)

\(^4\) The USSR ratified both agreements in 1973. Vedomosti SSSR, No. 40, item 40 (1973). Article 124(4) of the Soviet Constitution authorizes a number of state organs to request a finding of the CCS “concerning the conformity of international treaty and other obligations of the USSR and the union republics with the Constitution of the the USSR and laws of the USSR.” The article does not authorize the CCS to enforce international human rights, but makes “the Constitution of the USSR and laws of the USSR” the legal standard for determining whether “an act or its specific provisions . . . violate the rights and liberties of citizens.” The Law on Constitutional Supervision, however, “expands” the authority of the CCS, cf. art. 18 (“whether the act . . . does or does not conform to the USSR Constitution or to USSR laws, or, when appropriate, to the USSR’s international commitments as well”); art. 21 (“that a particular normative legal act . . . violates basic human rights and liberties codified in the USSR Constitution and in international acts to which the USSR is a party . . .”).

\(^4\) Izvestia, June 17, 1990, at 2.


\(^4\) The basic direction of the development of the political system of Soviet society is the further unfolding of socialist democracy: . . . the extension of openness, and permanent consideration of public opinion.” Konstr. SSSR art. 9 (1977).

\(^4\) “The Soviet state and all its organs function on the basis of socialist legality and ensure the protection of the legal order, the interests of society, and the rights and freedoms of citizens. State and social organizations and officials are bound to observe the Constitution of the USSR and Soviet laws.” Id. art. 4.

\(^4\) “Citizens of the USSR have the right to address complaints against actions of officials and of state and social organs. Complaints must be considered in the manner and within the time limits established by law.

“Complaints may be brought to a court, in the manner established by law, against actions which violate the law or exceed the authority of officials and which infringe the rights of citizens.” Id. art. 58.

\(^4\) “No one may be convicted of the commission of a crime, as well as be subjected to criminal punishment other than by a judgment of the court and in accordance with the law.” Id. art. 160.

new forms of ownership,\textsuperscript{50} and separation of powers.\textsuperscript{51} By concentrating on civil rights under a doctrine of supremacy of international law over national legislation, the Committee valiantly attempted to enhance its legal as well as its political legitimacy.

B. The Committee’s Findings Prior to the August 19, 1991, Coup

On May 16, 1990, the Committee announced in the \textit{Soviet Legal Gazette} that it would examine, on its own initiative, the constitutionality of union legislation concerning residential permits,\textsuperscript{52} the exclusion of state employees from court protection in labor disputes,\textsuperscript{53} restrictions on sellers’ warranties in sales of defective goods,\textsuperscript{54} and President Gorbachev’s April 20, 1990, decree regulating mass meetings and demonstrations in Moscow.\textsuperscript{55}

On June 22, 1990, the CCS decided to examine whether several provisions of federal criminal law and criminal procedure legislation conformed with the constitutional presumption of innocence.\textsuperscript{56} The Committee at that time also accepted the proposal of Chairman of the Supreme Soviet Anatolii Lukianov to examine normative acts of republics that had suspended or abrogated federal legislation safeguarding housing rights of military personnel and of other categories of Soviet citizens on republic territories.\textsuperscript{57}

\textsuperscript{49} Art. 6 of the 1977 Constitution had formulated the political monopoly of the Communist Party (“The leading and guiding force of Soviet society and the nucleus of its political system, of all state organizations and public organizations, is the Communist Party . . . The Communist Party, armed with Marxism-Leninism, determines the general perspectives of the development of society and the course of the home and foreign policy of the USSR . . . ”). It was modified to read: “The Communist Party of the Soviet Union and other political parties, as well as trade union, youth and other social organizations and mass movements, participate in the formulation of the policy of the Soviet state and in the administration of state and social affairs through their representatives elected to the Soviets of People’s Deputies, and in other ways.” \textit{KONST. SSSR} art. 6 (1990). \textit{See also} the changes effected in art. 7. \textit{Id.} art. 7 (1990).

\textsuperscript{50} \textit{See} the changes effected in \textit{KONST. SSSR} arts. 10-13 (1990).


\textsuperscript{52} \textit{Vedomosti} SSSR, No. 23, item 418 (1990).

\textsuperscript{53} \textit{Vedomosti} SSSR, No. 23, item 419 (1990); \textit{finding} (June 21) \textit{published in} \textit{Vedomosti} SSSR, No. 27, item 524 (1990).

\textsuperscript{54} \textit{Vedomosti} SSSR, No. 23, item 420 (1990); \textit{finding} (Sept. 14) \textit{published in} \textit{Vedomosti} SSSR, No. 39, item 776 (1990).

\textsuperscript{55} \textit{Vedomosti} SSSR, No. 23, item 421 (1990); \textit{finding} (Sept. 13) \textit{published in} \textit{Vedomosti} SSSR, No. 39, item 774 (1990).

\textsuperscript{56} \textit{Vedomosti} SSSR, No. 27, item 526 (1990); \textit{finding} (Sept. 13) \textit{published in} \textit{Vedomosti} SSSR, No. 39, item 775 (1990).

\textsuperscript{57} \textit{Vedomosti} SSSR, No. 27, item 525 (1990); \textit{finding} (Oct. 26) \textit{published in} \textit{Vedomosti} SSSR, No. 47, item 1003 (1990).
1. Findings Adopted by the Committee on its Own Initiative

The Committee's first decisions provide the best key to understanding its legal and political agenda. The Committee chose, on its own initiative, to examine violations of constitutionality and rule of law by the legislative and executive branches of Soviet government. The content and style of argument in these initial findings establish a pattern that is repeated in the Committee’s subsequent work. For the purpose of a general assessment of the Committee’s accomplishments it is thus unnecessary to analyze each and every later finding of the CCS.58

The Committee published its first finding, taken on its own initiative, on June 21, 1990.59 The finding granted court protection to Soviet state employees in labor disputes. In the past, some twenty million workers in transport, communications, and energy production, as well as doctors and teachers, had been denied the right to sue their employer, the Soviet state.60

In a lengthy introduction, the CCS stated that it had examined the question in light of article 58 of the Constitution,61 several statutes of the USSR, and international human rights acts.62 It then published a list of nullified Soviet normative acts and individual provisions of such acts. It did not elaborate how international covenants fit into the formula it used for nullification of these provisions and simply said the covenants did “not correspond to the Constitution and laws of the USSR.”63

In its finding the Committee also noted its assumption that new procedures for the settlement of labor disputes would be “established by the Supreme Soviet of the USSR according to article twenty-two of the USSR Law ‘On Constitutional Supervision in the USSR’ within a three months’ period.”64 In making this statement, the CCS seemed to overstep its legal authority.65 Article twenty-two appears to apply only to cases of suspension, not to cases of immediate nullification (as in the present finding of violation of human rights). The Committee should have exercised its right of legislative initiative under article twenty-three, which does not envisage a time limit within which the legislature has to

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58. For critical evaluations of the first findings of the CCS, see also Hartwig, supra note 2, at 11-14; Schroeder, supra note 2, at 291-297; Wieser, supra note 2, at 190-93.
60. See Yurii Feofanov, Prawo na isk, Izvestia, June 25, 1990, at 1.
61. See supra note 46.
62. See Universal Declaration of Human Rights, supra note 40, art. 7. (“All are equal before the law and are entitled without any discrimination to equal protection of the law. . . .”); International Covenant on Civil and Political Rights, supra note 40, art. 2, item 3(b):

Each State Party to the present Covenant undertakes . . . (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy . . . .
64. Id. at 763.
65. Hartwig, supra note 2, at 12.
respond. The Supreme Soviet did subsequently adopt the appropriate changes in the law.

In the same session on June 21, the Committee reached a preliminary conclusion on President Gorbachev’s decree concerning mass events in Moscow and circulated its draft to all parties concerned, inviting their comments within fifteen days. Under an ukaz of the Presidium of the Supreme Soviet of the USSR of July 28, 1988, confirmed on October 28, 1988, by the Supreme Soviet as the Law of the USSR on the Procedure for Organizing and Holding Meetings, Rallies, Street Processions and Demonstrations, local authorities have the right to prohibit mass events that contravene the Constitution or threaten public order and the safety of citizens. The City of Moscow’s unwillingness to curb antigovernment demonstrations had angered Gorbachev. He claimed that Moscow had special status as the seat of Soviet government and determined by presidential decree of April 20, 1990, that the Council of Ministers, not the City Soviet, should exercise jurisdiction over rallies and demonstrations in the Soviet capital.

On September 13, 1990, the Committee of Constitutional Supervision declared the President’s ukaz unconstitutional and suspended its application. Under article 127.7 of the Constitution, the President may pass decrees on the basis of the Constitution and Soviet laws, but he is not empowered to change existing legislation. Thus, Gorbachev had exceeded his constitutional authority. The Committee noted with obvious relief that eight days earlier, on September 10, the President had submitted proposals for legislative resolution of the question to the Supreme Soviet. At least one author has suggested that the Committee could have chosen the more forceful approach of considering the President’s decree a violation of the right of assembly under article 50 of the Constitution, thereby immediately nullifying the unconstitutional ukaz. Nevertheless, the CCS was fully justified in addressing the issue as one of regulatory authority rather than as a civil rights violation.

On the same day, the CCS found that norms permitting the regis-

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67. Izvestia, June 22, 1990, at 2. Art. 17 of the Law on Constitutional Supervision provides that “a draft of the Committee’s conclusions and relevant materials are sent to the meeting’s participants no later than 15 days before the meeting.” Law on Constitutional Review, supra note 6, art. 17.
71. Hartwig, supra note 2, at 12.
72. “In accordance with the interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press, of assembly, of meetings and of street marches, and demonstrations . . . .” Konst. SSSR art. 50.
ration of a person as a criminal without a preceding court judgment\textsuperscript{73} violated the constitutional presumption of innocence.\textsuperscript{74} The CCS found unconstitutional and violative of international human rights acts a law that "decriminalized" petty crime by transferring certain violations from the jurisdiction of regular courts to administrative agencies or com-
rades' courts, yet permitted registration of convicted defendants as criminals. The Committee voided the registration rule but did not null-
ify as human rights violations a number of other unconstitutional legis-
lative acts. The Committee merely postulated their removal in the

course of the impending criminal law and criminal procedure reform.

On the second and final day of its September 1990 session, the CCS
surprisingly declared legislative provisions that permitted restrictions of
sellers' warranties for defective goods unconstitutional.\textsuperscript{75} The Commit-
tee chose article 39, a dubious constitutional foundation, on which to
establish its role as an advocate of consumer protection,\textsuperscript{76} and provided
neither legal reasoning nor legal remedy such as nullification or

Later the CCS, on its own initiative in its monthly sessions, found
unconstitutional legal norms concerning residence permits;\textsuperscript{77} norms
permitting forced medical treatment of alcoholics and drug addicts;\textsuperscript{78}
acts withdrawing Soviet citizenship from emigrants to Israel;\textsuperscript{79} unpub-

\textsuperscript{73} Finding (Sept. 13), \textit{published in} Vedomosti SSSR, No. 39, item 775 (1990).
\textsuperscript{74} Konst. SSSR art. 160.
\textsuperscript{75} Finding (Sept. 14), \textit{published in} Vedomosti SSSR, No. 39, item 776 (1990).
\textsuperscript{76} "Citizens of the USSR enjoy the full range of the socio-economic, political,
and personal rights and freedoms proclaimed and guaranteed by the Constitution of
the USSR and Soviet laws. The socialist system ensures the widening of rights and
freedoms and the continuous improvement of the living conditions of citizens in
accordance with the fulfillment of the programs of socio-economic and cultural
\textsuperscript{77} Vedomosti SSSR, No. 47, item 1004 (1990). The CCS had already noted in a
tentative decision (\textit{reshenie}) of Sept. 12, 1990, \textit{published in} Vedomosti SSSR, No. 39,
item 773 (1990), that the Council of Ministers of the USSR had reacted to the Com-
mittee's suggestions and had repealed 30 illegal acts, and that the Committee's
future finding should be based on a broad public discussion of the issue. The Law on
Constitutional Supervision does not provide for interlocutory decrees of this type.
Even in its subsequent finding of October 26, 1990, the CCS failed to reach the obvi-
ous conclusion of unconstitutionality and nullification of a broad range of legal
norms. It voided a few specific legal provisions and with respect to the great majority of
evidently unconstitutional regulations merely demanded that they be eliminated
from legislation "step by step," thus again exceeding its legal authority. Regarding
its follow-up finding of Oct. 11, 1991, see \textit{infra} notes 140-52 and accompanying text.
\textsuperscript{78} Konst. SSSR arts. 41, 158. Accepted for examination, Vedomosti SSSR, No.
40, item 798 (1990); finding (Oct. 25), \textit{published in} Vedomosti SSSR, No. 47, item
\textsuperscript{79} Accepted for examination Sept. 14, 1990, Vedomosti SSSR, No. 40, item 799
(1990); finding (Feb. 14), \textit{published in} Vedomosti SSSR, No. 9, item 205 (1991). In
response to the Committee finding of Nov. 29, 1990, on unpublished normative acts,
the Soviet Legal Gazette published on page 270 of its issue Vedomosti SSSR, No. 8,
(Feb. 20, 1991) without item number the \textit{ukaz} of the Presidium of the Supreme Soviet
of February 17, 1987, automatically depriving emigrants to Israel of their Soviet citi-
zenship upon their leaving the USSR.
lished norms affecting rights, freedoms and obligations of Soviet citizens; restrictions imposed on an effective defense in criminal trials; and restrictions imposed on labor and employment rights of various categories of workers.

On June 27, 1991, the CCS, on its own initiative, adopted a finding on the highly important question of delegation of sweeping legislative powers from the Soviet legislature to the President. The Committee upheld as constitutional the Supreme Soviet Resolution of September 24, 1990, On Additional Measures for the Stabilization of the Country's Economic and Public-Political Life, which had granted the Soviet President the right to pass legislative decrees up to March 1992. Even though constitutional law scholars had criticized this abdication of responsibility by the Soviet legislature, the Committee saw no violation of the separation of powers concept of the Constitution. It pointed out that the President's legislative authority did not extend to criminal law and criminal procedure or to the introduction of new taxes or other

In its finding of February 14, 1991, the Committee, in a one-page opinion, refers to the preamble of the Law on the Citizenship of the USSR which, in accordance with the Universal Declaration of Human Rights, proclaims that "[i]n the USSR every citizen has a right to citizenship. Nobody may be arbitrarily deprived of citizenship or the right to change his citizenship." According to art. 23 of the Law, withdrawal of citizenship is permissible only "with respect to a person living abroad who has committed acts inflicting considerable damage to state interests or to the state security of the USSR." The Committee states that the Supreme Soviet Presidium ukaz of 1967 violates this law, the Universal Declaration of Human Rights, and article 34 of the USSR Constitution regarding the equality of citizens. The Committee does not expressly nullify the ukaz, however, and merely notes that the regular session of the Supreme Soviet will repeal it in connection with the second reading of the Draft Law on Exit from and Entry into the USSR. The Committee also refers to its right of legislative initiative (article 23 of the Law on Constitutional Supervision) in suggesting that the Supreme Soviet grant citizens access to court protection in all matters of citizenship, including its loss. On the technical side, it may be noted that the Committee does not provide a specific citation to the Universal Declaration (article 15), or to its binding nature, or to the Soviet Law on Citizenship of May 23, 1990, Vedomosti SSSR, No. 23, item 435 (1990).

80. Accepted for examination on Sept. 14, 1990, Vedomosti SSSR, No. 40, item 800 (1990); finding (Nov. 29) published in Vedomosti SSSR, No. 50, item 1080 (1990); see also the report by A. Davydov, Secret Acts Invalidated, Izvestia, Nov. 30, 1990, at 1, translated in Current Dig. Sov. Press, Jan. 2, 1991, at 31. The Committee declared all unpublished acts affecting citizens' rights, freedoms and obligations invalid under article 22 of the Law on Constitutional Supervision unless published within a three-month period. According to information supplied to the CCS, 70% of the 210 legal acts concerning rights and freedoms of citizens were classified. Id.


83. Vedomosti SSSR, No. 29, item 856 (1991). The Committee had already stated on February 15 that it was studying this question. At the same time the CCS announced that it was looking into the legality of the Soviet government's measures terminating the validity of 50- and 100-ruble notes in January 1991. See Izvestia, Feb. 14, 1991, at 3.

levies. Without substantive argument, the CCS in its June 27 finding simply stated that

[the] Constitution of the USSR does not contain provisions that permit or forbid one government organ to delegate part of its competencies to another, but established practice of legislative organs of the USSR and the republics assumes that such delegation is permissible. The institution of delegated legislation is also recognized in the practice of foreign countries.85

2. Findings Issued at the Request of Other State Organs

In a relatively small number of cases Union organs, such as the President of the USSR, the Chairman of the Supreme Soviet, the Supreme Soviet itself or one of its committees, asked the CCS to invalidate republican enactments that violated human rights. For the most part, republican violations of the Union Constitution, including violations of constitutionally or internationally guaranteed human rights, were declared unconstitutional by presidential decree under article 127.3 of the Soviet Constitution.86

In only one case did a republic organ—the Supreme Soviet of the Russian Soviet Federated Socialist Republic (RSFSR)—request that the CCS examine the constitutionality of a union act, President Gorbachev's decree instituting joint military and police patrols.87 The republics apparently expected to receive little support and understanding of their legal position vis-à-vis the central government from the CCS, and thus generally refrained from asking its (predictable) opinion in jurisdictional disputes.

A brief examination of the Committee's responses to requests for findings will demonstrate that most cases concerned civil rights violations on the part of republics. The CCS did not hesitate to declare these unconstitutional. The responses provide few further insights other than confirming the limitations placed on the Committee's functions by the government's expectations and the Committee's own choosing. Although the Committee did not expressly reject requests from other state organs to examine questions of constitutionality, evidence shows delay and inactivity. To escape public criticism for procrastination the CCS stopped announcing in the Soviet Legal Gazette issues it had chosen or accepted for examination.

President Gorbachev's first request of the Committee88 was to examine the Resolution of the Russian Congress of People's Deputies of

87. See infra notes 108-10 and accompanying text.
June 20, 1990. The resolution forbade state officials to hold other offices, including those in political or sociopolitical organizations. Boris Yel'tsin, then Chairman of the Russian parliament, had left the Communist Party and used the resolution to challenge Gorbachev to relinquish his position as Secretary General of the Communist Party on the grounds that it was incompatible with his position as President. In its finding of October 25, 1990, the CCS sided with President Gorbachev.

After closed deliberations lasting two hours, the majority approved a finding that the Russian resolution "does not conform to the Constitution of the USSR, to the labor legislation of the USSR and international obligations of the USSR concerning human rights. It therefore loses force at the moment of adoption of this finding." The Committee based its finding on articles 6, 48 and 51 of the Soviet Constitution as well as on international human rights pacts. Members Boskholov and Bykov issued a very brief dissenting opinion.

89. Vedomosti RSFSR, No. 4, item 52 (1990).
92. See supra note 90.
93. Article 6 of the Constitution, as amended March 14, 1990, reads:
   "The Communist Party of the Soviet Union and other political parties, as well as trade union, youth and other social organizations and mass movements, participate in the formulation of the policy of the Soviet state and in the administration of state and social affairs through their representatives elected to the Soviets of People's Deputies, and in other ways."

   Article 48 states:
   "Citizens of the USSR have the right to participate in the administration of state and public affairs, and in the discussion and adoption of laws and decisions of general state and local significance."
   "This right is ensured by the possibility to participate in elections for, and to be elected to Soviets of People's Deputies and other elective state organs, and to take part in nationwide discussions and votes, in people's control, in the work of state organs, social organizations, and organs of social initiative, and in meetings of labor and residential collectives."
   KONSTR. SSSR art. 48.

   Article 51, as amended March 14, 1990, reads:
   "Citizens of the USSR have the right to form political parties and social organizations and to participate in mass movements which promote the development of political activeness and independent activity and the satisfaction of their manifold interests."
   "Social organizations are guaranteed the conditions for the successful fulfillment of their statutory tasks."
   KONSTR. SSSR art. 51.
95. In their view, the Russian Resolution was not concerned with limiting rights but with establishing legal conditions to be observed by persons aspiring to positions of leadership in organs of state power or administration. By agreeing to occupy such office, these persons voluntarily assume the duty of observing certain indispensable...
On December 21, 1990 the Committee acceded to a second request by President Gorbachev and invalidated legislation of the Latvian republic as unconstitutional. The legislation had imposed restrictions on the housing rights of members of the Soviet Armed Forces.

On October 26, 1990, at the request of Chairman of the Supreme Soviet Lukianov, the Committee invalidated legal acts of the three Baltic republics and Moldavia (now Moldova), which had suspended or abrogated Union legislation safeguarding special housing rights of Soviet military personnel and their dependents in the republics. Committee member Intskirveli appended a brief dissent to this opinion.

On February 15, 1991, the Committee, responding to another request by Lukianov, declared amendments to the Lithuanian Criminal Code of October 4, 1990, unconstitutional. The amendments had introduced the death penalty for Lithuanian citizens participating in the activity of another state or foreign organization aimed at a violation of the sovereignty of the Lithuanian republic.

On May 24, 1991, at the request of the Chairman of the Supreme Soviet, the Committee examined the Lithuanian Law on the Citizenship of the Lithuanian SSR of November 3, 1989. It found that provisions of the law, such as forcing Lithuanian citizens who retained their Soviet citizenship to relinquish their Lithuanian citizenship, and treating non-Lithuanian Soviet citizens as foreigners, violated rights and freedoms of Soviet citizens under the Soviet Constitution, the Soviet Citizenship Law, and article fifteen of the Universal Declaration of Human Rights. Committee member Intskirveli wrote a dissenting opinion.

Acting on proposals of the Supreme Soviet of the USSR of February 21, March 11, and March 25, 1991, which concerned republic legislation (acts of the Lithuanian, Moldavian, Armenian, Georgian, Latvian, Estonian and Kazakh republics) and impeded the conduct of the legal requirements connected with the exercise of these functions. As a sovereign state, Russia had the right to establish such conditions.

98. Intskirveli saw no foundation for declaring normative acts of these republics unconstitutional. In his opinion, they did not abridge but rather confirmed that the housing rights of servicemen and their families were equal to those of other citizens of the respective republics. In contrast, ordinances of the Union government granted unwarranted privileges to servicemen who had been transferred to the reserve or retired and who demanded from the Defense Ministry, the KGB or the MVD that lodgings be allocated in locations of their choice.
101. He took a political rather than a legal approach. In view of Lithuania’s declaration of independence and the unresolved question of its further membership in the USSR, it was inadvisable to find Lithuanian laws unconstitutional.
referendum on a future USSR on March 17, 1991,\textsuperscript{105} the Committee, on April 3, passed a resolution (\textit{postanovlenie})\textsuperscript{106} confirming its March 5 declaration (\textit{zaiavlenie})\textsuperscript{107} that all republic legislation abridging free participation of citizens in the union referendum of March 17 violated the Constitution. Since the respective republic legislation had become moot by March 17, it could no longer be designated unconstitutional in a finding. The Committee insisted, however, that the union law on holding national referendums be amended to address a number of vital points. Specifically, The CCS demanded that future legislative drafts be submitted to the Committee so that it could issue a timely response.

At the request of the Russian Supreme Soviet, the Committee examined President Gorbachev's decree of January 29, 1991,\textsuperscript{108} instituting joint military and police patrols to maintain public order. In its finding of April 3, 1991, the Committee declared itself basically satisfied that its earlier recommendations\textsuperscript{109} to eliminate inconsistencies and shortcomings had been taken into account in draft legislation pending before the Supreme Soviet.\textsuperscript{110}

On July 27, 1991, the CCS published a decision (\textit{reshenie})\textsuperscript{111} accepting the proposals of the Chairman of the Supreme Soviet of the USSR and of the Supreme Soviet's Committee on Glasnost', Rights and Petitions of Citizens to examine RSFSR President Yel'tsin's decree of July 20, On Terminating the Activities of the Organizational Structures of Political Parties and Mass Public Movements in State Agencies, Institutions and Organizations of the RSFSR.\textsuperscript{112} Yel'tsin's departyization decree caused a major political uproar.\textsuperscript{113} On July 26, the Plenary Session of the Central Committee of the Communist Party condemned it as

\textsuperscript{105} Of the 147 million voters that participated, 112 million (76\%) voted in favor of maintaining a USSR. \textit{See Resolution of the Supreme Soviet on the Results of the Referendum}, Vedomosti SSSR, No. 13, item 350 (1991).

\textsuperscript{106} Vedomosti SSSR, No. 17, item 499 (1991).

\textsuperscript{107} \textit{IZVESTIIA}, March 6, 1991, at 2.

\textsuperscript{108} Vedomosti SSSR, No. 6, item 173 (1991).


an unlawful restriction of civil rights. President Gorbachev, still leading the Soviet Communist Party as its Secretary General, threatened to nullify Yel’tsin’s decree with one of his own. The Russian Council of Ministers, on the other hand, said the decree ensured "equal rights for various public associations in the administration of state affairs" by repealing privileges of the Communist Party.

In its decision to examine the decree for violations of constitutional human rights, the CCS suggested to the Russian President that he suspend the implementation of the decree (it was to become effective on August 4) during the Committee’s examination. President Yel’tsin expressly refused, and, not surprisingly, remained unmoved by a similar plea made by V. Kuptsov, First Secretary of the Russian Communist Party, on August 13. President Gorbachev, in discussing the issue with Yel’tsin, did not push too hard for the decree’s suspension or repeal, apparently not wanting to risk the deterioration of a precarious alliance forged with a view to adopting the Draft Union Treaty on August 20.

In a press conference following the meeting of the CCS, Chairman Alekseev admitted that the Committee had already received requests to review similar legislation on the part of Moldova and the Baltic republics as much as six and eight weeks earlier. He pointed to the complexity of the legal problem and promised an early decision that he hoped would have a calming effect. In fact, the CCS was in no hurry to reach a conclusion. According to Soviet press reports, Committee hearings on the issue were scheduled for September 10 and 11, after the summer vacations, and a decision could not be expected before the end of September.

In the aftermath of the coup of August 19, 1991, which the CPSU had helped prepare and execute, the Communist Party was sus-

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Thus the question of constitutionality of President Yeltsin's decree on departyization of the workplace became moot. But another Yeltsin decree, On the Activity of the CPSU and the RSFSR Communist Party, which outlawed the Communist Party in Russia on November 6, 1991, provided another hotly contested legal issue. Prominent legal scholars criticized the decree as clearly unconstitutional. Since the Russian Constitutional Court had become operative on October 30, 1991, with the swearing in of its first thirteen judges, the leaders of the Russian Communist Party asked it to review the decree.

C. The CCS After the Coup of August 19, 1991

While most Committee members had left Moscow for their summer vacations, the August 19 coup and its aftermath produced a fundamentally different political and legal situation. Chairman Alekseev and four Committee members—S. Boskhov, S. Mirzoev, M. Piskotin and V. Filimonov—met immediately after announcement of the state of emergency, demonstrated civic courage and managed to have a statement, albeit censured, printed in Pravda and Izvestiia. The statement somewhat obliquely questioned the legality of the self-styled State Committee for the State of Emergency's assumption of power and imposition of a state of emergency in various parts of the country. On August 21, after the coup had failed, the full CCS quickly decided to examine the


decrees of the Emergency Committee. The issue became moot on the following day, when Gorbachev signed a presidential decree repealing all decisions issued by the Emergency Committee or any of its members.

On September 2, 1991, the CCS raised its voice in defense of constitutional procedures and insisted that the sweeping constitutional changes envisaged in a Statement by the President of the USSR and the Top Leaders of the Republics required the approval of the Congress of People’s Deputies. On September 5, the Congress adopted a corresponding USSR Law on USSR Bodies of State Power and Administration During the Transitional Period. Without being expressly designated as such, the provisions of the law were intended as constitutional amendments; in fact article eight of the law states: “The provisions of the USSR Constitution are in effect insofar as they are not at variance with this law.”

The law did not mention the CCS, but affected its functions by abolishing the Congress of People’s Deputies, granting a new Supreme Soviet power to make constitutional changes subject to ratification by the republic parliaments, and giving every republic the right to suspend any laws passed by the USSR Supreme Soviet that did not correspond to the republic’s constitution.

In a Soviet television interview on October 11, 1991, CCS Chairman Alekseev attempted to conduct “business as usual.” He reported that the Committee had discussed the important question of ownership rights, and that a finding could be expected in four to six weeks. He also directed attention to the CCS’s public statement (zaiavljenie), which criticized violations of legality and constitutionality on all levels.

Chairman Alekseev stated that the Committee had again addressed

134. USSR Law on USSR Bodies, supra note 133, art. 80.
135. Id. art. 1.
136. Id. arts. 4 and 8.
137. Id. art. 2.
the question of residence permits. In its finding of October 11, 1991, the CCS followed up on its previous finding of October 26, 1990. The Committee deplored that no legislative action had been taken in the meantime to abolish, or at least to modify, an unconstitutional denial of civil rights perpetrated by existing procedures of granting or withholding residence permits by administrative authorities. In its initial finding, the Committee had insisted on the need to bring legal regulations concerning the residence permit (propiska) system into accord with the Soviet Constitution and international human rights conventions, in particular article thirteen of the Universal Declaration and article twelve of the International Covenant on Civil and Political Rights. At that time, rather than striking down all norms denying Soviet citizens freedom of movement and free choice of domicile, the CCS suggested their gradual revision by the legislature. The Committee had declared only a small number of specific limitations unconstitutional and immediately inapplicable. Apparently, the CCS had exercised restraint because, on the one hand, the Soviet Constitution itself did not provide the rights in question, and on the other hand, the immediate nullification of the residence permit system might have caused major housing and unemployment problems.

In its finding of October 11, 1991, the CCS stated that

Provisions regarding residence permits as approved by the USSR Council of Ministers, as well as other resolutions by the USSR government on residence registration establishing an obligation for individuals to obtain permission from administrative bodies to reside, be employed or enrolled in educational establishments, sell residential houses, apartments, country houses, garages, as well as establish responsibility for the breach of these obligations, are not consistent with the USSR Constitution, the Declaration on Human Rights and Freedoms [or] international acts on human rights.

The Committee declared immediately invalid those provisions that "restrict the right of property owners to possess, manage and use at their discretion their residential houses, apartments and other property," or provisions that concern "responsibility of individuals for the breach of residence permit rules." All other unjustified residence rules would not be void until January 1, 1992, in order to give the government sufficient time to pass new regulatory acts.

140. Vedomosti SSSR, No. 46, item 1307 (1991); Conclusion of the USSR Constitutional Committee Concerning the Residence Permit Procedures Applied to Individuals, FEDERAL NEWS SERVICE Oct. 15, 1991, available in LEXIS, Nexis Library, Current File [hereinafter Conclusion of the USSR Constitutional Committee on Residence Permit Procedures]. This is the last finding of the CCS published in Vedomosti SSSR.
142. Id.
143. Conclusion of the USSR Constitutional Committee on Residence Permit Procedures, supra note 140.
144. Id.
In reaching these conclusions, the CCS emphasized that the legal foundations of the residence permit regulations had "ceased to exist" with the adoption of article 21 of the Declaration of Human Rights and Freedoms.\textsuperscript{145} This sort of legal reasoning is difficult to follow. It would seem that these regulations had never had any constitutional or statutory basis. Moreover, the Declaration of Human Rights and Freedoms, adopted by the Congress of People's Deputies on September 5, is of doubtful rank in the hierarchy of Soviet legal norms. It was promulgated in the \textit{Soviet Legal Gazette}\textsuperscript{146} but was not designated a statute (\textit{zakon}) or a constitutional amendment. During the parliamentary debate concerning adoption of the Declaration, Deputy I.B. Shamshev specifically asked: "Article twenty-one reads 'Every person has the right to move freely within the country and to choose a place of residence.' How will this be implemented, for example, when we have restrictions on residence permits?"\textsuperscript{147} Deputy V. N. Kudriavtsev, Chairman of the Preparatory Group on the Draft Declaration, replied:

The declaration should be implemented in several forms. First, we think that if a USSR Constitution is adopted, the Declaration should be a part of it. Second, when the Union republics draft their own Constitutions they should rely on the text of this declaration. Third, specific laws that would make it possible to implement the provisions of the Declaration should be devised and worked out. For example, in order to implement the right to move freely within the country, it is necessary to change the residence permit situation . . . .\textsuperscript{148}

Kudriavtsev and the Congress apparently did not consider the Declaration to be immediately applicable constitutional law.

It is not clear why the CCS on the one hand refrained from fully utilizing the opportunities offered by the wording of article twenty-one of the Law on Constitutional Supervision\textsuperscript{149} in declaring international human rights accords immediately applicable in its first finding on residential permits, and on the other hand relied so strongly on article twenty-one of the (Soviet) Declaration as a foundation for its second finding.

On the practical side, Committee Chairman Alekseev explained in his press conference on October 11, 1991, that a hearing conducted by the CCS had shown that representatives of all state agencies concerned had agreed that the existing residence permit rules had outlived their

\textsuperscript{145} Id.

\textsuperscript{146} Vedomosti SSSR, No. 37, item 1083 (1991).

\textsuperscript{147} Izvestia, Sept. 6, 1991, at 6.

\textsuperscript{148} Id. at 6, \textit{translated in} CURRENT DIG. SOV. PRESS, Oct. 9, 1991, at 10.

\textsuperscript{149} "A conclusion by the USSR Constitutional Review Committee stating that a particular normative legal act or individual provisions thereof violates basic human rights and liberties codified in the USSR Constitution and in international acts to which the USSR is a party entails the voiding of this act or individual provisions thereof from the moment that the Committee's conclusion is adopted." CURRENT DIG. SOV. PRESS, Apr. 4, 1990, at 15.
usefulness. Izvestiia commentator Yurii Feofanov wondered how the republics would react to this finding. Moscow Vice Mayor Yurii Luzhkov was quick to point out that Russian laws had precedence over Union legislation in Moscow, and, given that more than 800,000 people were on the waiting list for housing, and in light of Moscow’s notorious food shortages, the city government would make no changes in the system of mandatory residence permits in Moscow prior to “serious preparatory work.”

D. The Final Days of the CCS

The last regular two-day working session of the CCS seems to have taken place immediately preceding Chairman Alekseev’s press conference on November 29, 1991. In this session, the Committee found unconstitutional the Armenian parliament’s resolution abolishing the autonomy of the Nagorno-Karabakh Autonomous Oblast. The Committee also pointed to a need for revision of the law on the militia and state security bodies concerning the tapping of telephone conversations, entry into dwellings and opening of mail. The Committee furthermore proposed that the Union and republic parliaments protect civil rights more effectively by cancelling or at least more clearly defining in these legislative acts general clauses such as “non-fulfillment of laws,” “open civil disobedience” and “not taking measures to remove the causes and conditions of law violations.” Chairman Alekseev also informed journalists that he had received an offer to head a scientific, inter-republic, private law center. Stressing the importance of such an institution to society, he was obviously preparing a dignified exit from the sinking ship.

On December 11, 1991, the CCS issued a statement reacting to the Minsk Declaration of December 8 by the presidents of Russia, Belarus and Ukraine that the “USSR as an entity in international law and as a geopolitical reality has ceased to exist.” According to the CCS this

153. Committee for Supervision of the Constitution on Judicial Life of Country, BBC Summary of World Broadcasts, Dec. 2, 1991 (TASS, Nov. 29, 1991), available in LEXIS, Nexis Library, BBCSWP File. The decisions of this and the following sessions of the CCS have not been published in Vedomosti SSSR.
154. Id.
155. Id.
156. Id.
assertion was "without legal force."\textsuperscript{158} Although the republics were free to conclude treaties among themselves, they could not thereby determine the fate of third parties. The USSR could only be dissolved in an appropriate constitutional procedure.

In one of its last sessions, on December 12, 1991, sensing the inevitable break-up of the Union, the Committee passed a resolution emphasizing that multilateral international treaties of the USSR remained in force and binding even on the republics that had not expressly affirmed their obligations under these treaties (especially nuclear non-proliferation and human rights treaties).\textsuperscript{159}

The final word from the Committee came on December 23, 1991, when it acknowledged that the Soviet Union had ceased to exist and dissolved itself.\textsuperscript{160} Committee Chairman Alekseev expressed the belief that the Commonwealth of Independent States would need a legal organ "to protect human rights, promote democracy and stop arbitrariness of any authorities as well as to solve interstate conflicts."\textsuperscript{161}

E. Evaluation of the Findings

The content and style of the Committee's findings frequently leave the reader baffled. The findings are usually extremely brief; their references to legal sources vague; their language abounds with sweeping generalities and often lacks legal precision. The Committee's opinions are devoid of the rigorous interpretation and analysis that marks their Western counterparts; they convey no sense of opposing viewpoints to a constitutional dispute or of scholarly theory.

More than once they leave the reader with the impression that the Committee timidly preferred to act as an advisor to and lobbyist for the legislative and executive branches of government rather than as the forceful representative of an equal "third power,"\textsuperscript{162} which would openly argue and assert the tenets of constitutionality against the other branches.

The Committee's cautious approach met with some success. Many findings contain specific suggestions for future legislative activity that were promptly taken up by the Soviet parliament. Even outside the framework of its findings, the CCS occasionally made formal use of its right of legislative initiative.\textsuperscript{163} Thus, on April 4, 1991, the Committee


\textsuperscript{161} Id.


\textsuperscript{163} Law on Constitutional Review, supra note 6, art. 23.
adopted a resolution (postanovlenie) urging the Supreme Soviet to accede to the Optional Protocol to the International Covenant on Civil and Political Rights. The Supreme Soviet responded without delay.

On May 23, the CCS suggested that the Supreme Soviet consider leasing as a major form of privatization of state enterprises.

Furthermore, according to public statements by Chairman Alekseev and Deputy Chairman Lazarev, illegal administrative acts beyond the purview of the Committee were protested by the Procuracy or changed by order of the Council of Ministers once the Committee had declared their statutory or substatutory legal foundations unconstitutional.

Chairman Alekseev and other members of the Committee repeatedly complained in the press about the unfortunate term and concept of "constitutional supervision." They demanded instead the institution of a genuine Constitutional Court, with the right of nullifying, instead of only suspending, legislation, including the laws of the republics. They were dissatisfied that they could not examine all constitutional violations on their own initiative, and they deplored their limited powers to investigate prior to adopting a finding, and to monitor the implementation of findings.

Chairman Alekseev tried to impress his legal views on legislators, on Party meetings and on the public at large—by giving regular press conferences after the monthly sessions of the Committee, frequently speaking at sessions of the Soviet parliament, giving interviews on television, and publishing articles. Nevertheless, some of these activities may have hurt rather than helped his campaign for judicial independence and respect for law. Alekseev frequently engaged in political lobbying, such as favoring a strong president of the USSR or a new system of property relations. He was also openly involved in Communist Party politics, as his speech at the Central Committee Meeting of the CPSU on February 7, 1990 demonstrates.

Although these activities may have been intended to promote the visibility and influence of the CCS, they

166. I received a copy of the resolution from Dep. Chm. Lazarev; it was not printed in Vedomosti SSSR.
167. See Ovcharenko, supra note 32, at 2 (Lazarev interview).
169. Cf. id.; see also Sergei Alekseev, Konstitutsia i vlast', IzVESTHA, Dec. 3, 1990, at 3; Ovcharenko, supra note 32; Alekseev, supra note 2, at 200.
were perceived by others as personal political ambition and dependence on the part of the Committee chairman. This impression may have reinforced a latent skepticism and aloofness of the Soviet intellectual establishment, without whose active support and involvement no effective legal system and no pervasive legal culture will take root.

The public perception of the CCS seems to have been based both on exaggerated expectations that the Committee was unable to fulfill, and on a profound distrust of its potential. Many of my impatient Russian friends lamented that the history of the Committee is one of missed opportunities. According to some observers, not a single genuine reformer was included in the Committee membership. Influential Committee members were said to owe personal loyalty to either Gorbachev or Lukianov, who had a stronger interest in preserving an improved version of the old system than in radical renewal. In view of the impending transformation of the political system under pressure from the republics, Committee members were maneuvering for appointments to the future Constitutional Court projected under the Draft Union Treaty, a court necessarily much smaller than the Committee of twenty-seven or twenty-one. One may speculate from which point in time and to what extent these legitimate worries influenced the deliberations and decisions of the Committee. Chairman Alekseev, at any rate, seems to have kept his options open; according to recent press accounts, he now functions as Chairman of the Inter-Republic Research Center on Private Law172 and plans to establish a Legal Center on Private Enterprise.173

In retrospect, the Committee members could have shown more political courage and legal enterprise. They could have worked much harder, could have passed more findings, should have developed more constitutional theory, and certainly might have created much more publicity and public support. Such efforts would not have been lost on their legal and political environment. But it should also be noted that the Committee did not receive the sort of attention and support it was entitled to from either the press or the scholarly establishment. On the one hand, the press, with very few exceptions, such as the highly intelligent, politically perceptive and untiring efforts of Izvestia commentator Yurii Feofanov,174 could and should have made much greater efforts in highlighting legal developments and urging more respect of the law. On the other hand, Soviet legal scholars, somewhat to their discredit, failed to analyze each and every finding of the Committee critically, and to enter into a public dialogue to develop constitutional doctrine and educate

174. See, e.g., IZVESTIA, Nov. 11, 1990, at 3; (interview with Yurii Feofanov concerning disrespect for Soviet laws); see also Yurii Feofanov, Sposobna li vlast' byt' chestnoi, IZVESTIA, Dec. 16, 1990, at 3; Feofanov, Pravo na vlast', supra note 162.
politicians and the population about the values of separation of powers and rule of law.

In fairness to the Committee and its critics, however, it should be noted that the centrifugal forces in the political system, the surviving strength of administrative bureaucracies and their lawless ways, the traditional lack of judicial authority, and resultant enforcement deficits posed powerful obstacles to the effective work of the CCS. Even if it had multiplied its efforts and had received the full support of the entire legal and intellectual community, it would probably not have been able to overcome these formidable shadows of the past.

The Committee's successes and failures showed lawyers and politicians the need for a stronger third power in a functioning system of separation of powers with appropriate checks and balances. In many instances the Committee succeeded in alerting legislative and executive authorities to the need for more careful constitutional examination of their enactments. One of its most important and constructive contributions to Soviet legal thought was no doubt its initiative in interpreting the Soviet Constitution and all Soviet legislation in the light of international human rights accords. By including them in the Soviet legal system as immediately applicable law, the Committee raised the standard of Soviet law to an unprecedented level of Western legal culture.

The Committee thus served as an essentially positive transition towards a strong Russian Constitutional Court, which is currently in the process of establishing its authority. The draftsmen of the 1991 Law on the Constitutional Court of the RSFSR have benefitted both from studying Western models and from observing the problems and limitations of the brief experiment with Soviet constitutional review. Much as there would not be Yeltsin without Gorbachev, the CCS paved the way to a modern and effective system of constitutional review, the capstone of rule of law not only in Russia, but possibly also in other republics who may continue to look to Russia for guidance in their legal reform.

Depending on the degree of political and legal integration that may eventually be achieved in the Commonwealth of Independent States, it may be necessary to establish a Commonwealth Court with jurisdic-

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175. See supra notes 40 and 41 and accompanying text.
tion transcending the framework of republic constitutions. This would not be a Constitutional Court as originally envisaged in the Draft Union Treaty, but rather a Human Rights Court, similar to the judicial mechanism set up in Strasbourg under the European Convention for the Protection of Human Rights and Fundamental Freedoms, or a Court similar to the European Court of Justice established by the European Community in Luxembourg.

II. The Russian Constitutional Court

A. Establishment of the Court

The USSR Law on Constitutional Supervision in the USSR of December 23, 1989, authorized the union republics and autonomous republics to

177. The “final version” of the Draft Treaty on a Union of Sovereign States that had been agreed upon by Gorbachev and republic leaders on July 23, 1991, Izvestia, July 24, 1991, at 1, was scheduled for signature on Aug. 20 by Russia, Kazakhstan, Uzbekistan, Belorussia (now Belarus) and Tadzhikistan. It was expected that others (Azerbaijan, Turkmenia, Kyrgyzstan and also Ukraine) would follow in the fall. Izvestia, Aug. 7, 1991, at 1; Izvestia, Aug. 10, 1991, at 1.

Art.17 of this Draft Treaty provided for a Constitutional Court of the Union of Sovereign Republics which examines questions of conformity of legislative acts of the Union and the republics, of decrees of the President of the Union and the presidents of the republics, and of normative acts of the Cabinet of Ministers of the Union with the Union Treaty and the Constitution of the Union, and also decides disputes between the Union and republics as well as among republics . . . .


The August 19 coup d’état, though abortive, encouraged centrifugal forces and completely undermined any further attempts to renew the federal system from above. Agreement on a revised draft was announced by President Gorbachev and representatives of seven republics after a State Council meeting on Nov. 14. Izvestia, Nov. 15, 1991, at 1, translated in G. Alimov, Get Used to the Words: Union of Sovereign States (USS), Current Dig. Sov. Press, Dec. 18, 1991, at 10. In a follow-up meeting on Nov. 25, originally intended for formal approval, the representatives of the republics not only completely reworked the draft but refused to sign it prior to its submission to the republic parliaments. This stillborn draft no longer envisaged a union constitution or a constitutional court. It did, however, retain a Union Supreme Court (art. 17) that makes decisions on questions of the compliance of union laws and laws of the states party to the treaty with the present treaty and with the Declaration of Human Rights and Freedoms; hears civil and criminal cases of an interstate nature, including cases concerning the protection of citizens’ rights and freedoms . . . .


179. Treaty Establishing the European Economic Community arts. 164-188. See also Alekseev, supra note 2, at 203.
establish organs of constitutional supervision.180 Whereas some of the republics followed the example of the Union and created Committees of Constitutional Supervision, Russia established a genuine Constitutional Court.

The Russian Supreme Soviet adopted a comprehensive and detailed Law on the Constitutional Court of the RSFSR on May 6, 1991.181 The Russian Congress of People's Deputies approved the law with minor alterations on July 12, 1991.182 Guided by Western models, including that of the United States, but primarily by German, Austrian and Italian constitutional models,183 the Russian Constitutional Court will not merely render findings, but opinions that are final184 and have immediately nullifying effect.185 The fifteen judges will enjoy tenure until age sixty-five186 and additional strong protection of judicial independence.187 They will entertain citizens' complaints against unconstitutional practices of judicial and administrative agencies.188

The election of the judges of the Constitutional Court was postponed until the fall session of the Congress. On October 29, 1991, the session of the Fifth RSFSR Congress of People's Deputies opened. Deputies briefly heard and questioned twenty-one candidates for membership in the Russian Constitutional Court.189 The Congress elected thirteen judges by secret vote.190 The following day, the first thirteen judges of the Constitutional Court were sworn in and the Court became operational.191 The election of two more judges was postponed until

180. *Law on Constitutional Review*, supra note 6, art. 2.
181. Vedomosti RSFSR, No. 19, item 621 (1990) [hereinafter Russian Law on the Constitutional Court].
183. Cf. the German *GESETZ ÜBER DAS BUNDESVERFASSUNGSGERICHT* [Law on the Federal Constitutional Court] of March 12, 1951, BGBl. I S.243, as amended. The Russian Law on the Constitutional Court consists of 89 articles grouped in four parts: I. General Provisions (arts. 1-11); II. Status of Judges of the Constitutional Court of the RSFSR (arts. 12-26); III. Procedure of the Constitutional Court of the RSFSR (arts. 27-79); IV. Concluding Provisions (arts. 80-89).
184. Russian Law on the Constitutional Court, supra note 181, art. 50.
185. Id. arts. 49 and 65.
186. Id. art.15(2).
187. See id. arts. 6 and 14-26.
188. Id. arts. 66-73.
191. The Court can begin to function once at least ten members have been elected. Russian Law on the Constitutional Court, supra note 181, art. 3(4).
the next Congress.\textsuperscript{192}

As provided under article three of the Law, the judges\textsuperscript{193} subsequently elected the Chairman\textsuperscript{194} and the Deputy Chairman of the Constitutional Court by secret vote.\textsuperscript{195} On November 22, 1991, the Russian Supreme Soviet adopted a resolution authorizing a secretariat of the Constitutional Court comprising 247 employees, and it ordered the Presidium of the Supreme Soviet to take measures safeguarding the organization and work of the Court.\textsuperscript{196}

B. The First Case Before the Court

On November 1, 1991, the Russian Congress of People's Deputies voted President Yel'tsin special powers to reform Russia's economic and political system. The power delegated included the right to reorganize the supreme bodies of executive power by presidential decree.\textsuperscript{197} President

\begin{enumerate}
\item[193] For their names and prior functions, see Thorson, \textit{supra} note 126, at 15.
\item[194] The Chairman of the Constitutional Court, Professor Valerii Dmitrievich Zor'kin was born in 1943, graduated from law school at Moscow State University in 1964, and immediately began an academic career at the same school. In 1980 he was appointed professor of law (Constitutional Law and Theory of State and Law) at the Academy of the Ministry of Internal Affairs (MVD) of the USSR. In 1986 he became professor at the Correspondence Law School of the MVD. He holds a higher doctorate in law and served as leader of the expert group of the Constitutional Commission.
\item[195] Deputy Chairman Nikolai Vasil'evich Vitruk was born in 1937, graduated from law school in Tomsk in 1959 and subsequently pursued an academic career (Theory of State and Law) at the Kiev State University Law School. He holds a higher doctorate in law. Between 1971 and 1981 he worked as Senior Research Associate in the Institute of State and Law of the Soviet Academy of Sciences in Moscow. From 1981 to 1984, he taught as professor of law (Constitutional Law and Theory of State and Law) at the Academy of the MVD; since 1984 he has headed the Department of State Law of the Correspondence Law School of the MVD.
\item[197] Resolution of Nov. 1, 1991, No. 1830-I, Vedomosti RSFSR, No. 44, item 1455 (1991), \textit{On the Organization of Executive Power During the Period of Radical Economic Reform}. Section 2 states: "That the RSFSR President is to resolve on his own . . . questions concerning the reorganization of the structure of the supreme organs of executive power until the adoption of the RSFSR Law On the RSFSR Council of Ministers." Resolution of Nov. 1, 1991, No. 1831-I, Vedomosti RSFSR, No. 44, item 1456 (1991), \textit{On the Legal Protection of the Economic Reform}. Section 3 states: Draft RSFSR presidential decrees on questions of banking, stock market . . . and the competence, procedure for the formation, and activity of executive organs issued for the purpose of the flexible regulation of the course of the economic reform which contravene existing laws of the RSFSR shall be submitted by the RSFSR president to the RSFSR Supreme Soviet and in the period between sessions to the Supreme Soviet Presidium. If a draft RSFSR
Yel’tsin used this power when he signed on December 19, 1991, the Decree on the Formation of the Ministry of Security and Internal Affairs of the RSFSR, which merged two previously separate institutions and created a police ministry of unprecedented proportions.

The decree immediately met with strong criticism from the other two branches of government. The Russian Supreme Soviet, on December 26, adopted with only one opposing vote a resolution urging the President to rescind his merger of the regular police ministry with the former KGB. On the same day the Russian Constitutional Court issued a warning to President Yel’tsin in connection with several of his decrees concerning the media, the security service and economic reform. The Court promised that it would “take actions to protect the constitutional system in the country and to preclude the onslaught of dictatorship and arbitrariness—wherever they come from.”

On December 28, V. Zor’kin, Chairman of the Constitutional Court, implementing his Court’s ruling, requested that President Yel’tsin suspend the Decree On the Formation of the RSFSR Ministry of Security and Internal Affairs until the Session of January 11 when the Court would consider a complaint brought against the decree by a group of deputies of the Russian Supreme Soviet. President Yel’tsin did not respond. On January 6, 1992, during a television interview S. M. Shakhrai, Deputy Prime Minister and chief legal adviser to President Yel’tsin, defended the amalgamation of the two ministries and explained that it was a logical step to stop duplication of functions.
On January 14, 1992, after an eight-hour public hearing and two-hour in camera deliberations, the thirteen judges of the Russian Constitutional Court unanimously pronounced President Yel'tsin's decree and all appointments made in its execution null and void. In its public session, the Court heard testimony of witnesses from the Ministry of Security and Internal Affairs as well as from experts on constitutional law. M. Mitiukov, Chairman of the Supreme Soviet Committee for Legislation, argued the constitutional complaint; Deputy Prime Minister Shakhrai, State Councillor for Legal Policy, defended it on behalf of President Yel'tsin. In its orally delivered opinion, the Court considered the President's ukazy unconstitutional "from the point of view of the separation of legislative, executive and judicial powers established in the Russian Federation as well as of the demarcation of competencies between the highest organs of state power and administration of the RSFSR as enshrined in the Constitution of the RSFSR." The Court thus quoted two of the standards expressly formulated in article 58, part two, points five and six of the Law on the Constitutional Court of the USSR.

Six typewritten pages of legal reasoning specifically addressing points of the Russian Constitution, Supreme Soviet legislation, and the November 1 resolutions of the Congress of People's Deputies accompanied the Court's decision. Articles 89 and 90 of the Russian Constitution, the Court reasoned, allow soviets of people's deputies to establish executive organs. Thus, ministries of the RSFSR may be established by the Supreme Soviet (article 109), and by the Congress (article 104, part two), the highest organ of state power. The Constitution does not permit the President to establish ministries (article 121.5).

The Congressional resolutions of November 1 granted special powers to the President, but only for a limited function and a limited time. The resolutions also imposed a parliamentary control mechanism over draft decrees that changed existing legislation, thus observing article 121.8 of the Constitution (ukazy of the President must not contradict the Constitution and laws of the RSFSR) and maintaining the constitutional system of checks and balances. The respective congressional resolutions neither amended the Constitution nor detracted from the constitutional powers of the Congress or the Supreme Soviet. The latter's resolution of December 26 directly expresses the will of the Supreme Soviet to exercise its powers in this sphere.

204. See Izvestia, Jan. 15, 1992, at 1, translated in Court Proceedings Over Yel'tsin Decree Detailed, FBIS-SOV-92-015, Jan. 23, 1992 [hereinafter Court Proceedings]. I am grateful to Professor Herman Schwartz of American University Law School, Washington, D.C., for an advance copy of the Constitutional Court's full opinion (postanovlenie) as well as the appended—substantial but largely identical—concurring opinion (osobo mnenie) of judge E.M. Ametistov. The holding was to be published in the Russian Legal Gazette, Vedomosti RSFSR, No. 6, item 247 (1992), and in all other print media in which the presidential ukazy had appeared. Russian Law on the Constitutional Court, supra note 181, art. 84.

205. Court Proceedings, supra note 204.
The Constitutional Court further emphasized that the presidential decree of November 19 also affects the constitutional protection of civil and human rights and freedoms, which must not be regulated without participation of the highest organs of state power (article 109, point nine, of the Russian Constitution). The separation of state security and police forces protects constitutional democratic structures and prevents the usurpation of power. According to the Court, the presidential ukaz violated a number of laws that establish checks and balances to safeguard these goals. One such legal provision is point two of the Supreme Soviet resolution of April 18, 1991, No. 1027-I, On Putting into Effect the RSFSR Law on the Police [Miliisia], which divides the police force into smaller units and transfers many functions of the Ministry of the Interior to other organs. The ukaz also violated article eighteen of the Law on the State of Emergency of May 17, which permits the combination of those forces only under the special conditions of a state of emergency imposed by the Supreme Soviet. The ukaz further contradicted the Law on Security of the RSFSR adopted by the Supreme Soviet in a first reading on December 18, 1991, which basically considered the merger of security forces inadmissible.

On January 16, Constitutional Court Chairman Zor'kin addressed the Russian Supreme Soviet and emphasized that the decision of the Constitutional Court repealing the President's decree was definitive and not appealable, having come into force immediately after being proclaimed. He strongly criticized subsequent statements of Deputy Prime Minister Shakhrai to the effect that the decree had not ceased to be effective and that the Constitutional Court had issued a political rather than legal decision. Zor'kin added that in the absence of an official retraction the Court would consider the initiation of impeachment procedures against Shakhrai. Shakhrai immediately rose to defend himself before the Supreme Soviet. He argued that the complexity of the issue permitted different viewpoints, and noting that President Yel'tsin had already endorsed appropriate measures, promised full compliance with the Court decision. He did not withdraw his critical comments.

On January 17, 1992, President Yel'tsin cancelled his decree and restored the two separate Ministries.

Conclusion

Although it seems too early to draw broad conclusions from the first decision of the Russian Constitutional Court, one may observe with satisfaction that this decision exhibited a higher level of legal craftsmanship and substantive legal reasoning than the findings of the CCS. The Rus-


207. Izvestia, Jan. 17, 1992, at 2; Shakhray Threatened, supra note 206.

sian Court made a forceful statement of future intentions insofar as it
clearly demonstrated courage and determination in establishing and
defending a concept of rule of law that many Soviet observers had found
lacking in the work of its forerunner, the Committee of Constitutional
Supervision of the USSR. The Constitutional Court was not afraid to
address a major constitutional and political issue, and it thus may be
expected to confront the legislative and executive powers in the future
in order to affirm the authority of law and constitutional government.

It is hoped that the Court will lead in building a legal culture in the
country by collaborating with legal scholars who are willing and able to
offer advice and constructive criticism to develop constitutional theory.
The Court may be more productive than the former CCS, and it may
ensure more publicity for its decisions and engage in a more fruitful
interaction with the legal community. It should certainly not be a prime
function of the Court to lobby politicians or educate the public at large.
These tasks will have to be assumed by Russian law professors and their
contacts in the media. It would, however, seem entirely appropriate for
judges of the Constitutional Court to write law review articles and make
scholarly contributions to authoritative commentaries on constitutional
law.

Yet the basic vehicle of the Court's constitutional theory should
undoubtedly be individual decisions of the Court in specific cases and
controversies. Carefully crafted opinions and dissents may function as
eminently valuable teaching tools, demonstrating the road to legality by
means of explicit, well-reasoned argument that is not only logically com-
pelling but also persuasively grounded in the substantive values of the
Russian Constitution. The Court would be well advised to avoid the
terse authoritative style of CCS findings, which may, partly because of
this style, have failed to accomplish a most important educational mis-

sion. Brevity and lack of argument may have a place in a highly devel-
oped legal system (like the ancient Roman or the modern French) where
experts write for experts in a kind of legal shorthand that is both under-
standable and acceptable in view of a massive and familiar body of doc-
trine standing behind it. In a developing legal system like the Russian,
however, the supreme guardians of the law must enter into a creative
dialogue with the academic establishment as well as with the legal pro-
fession at large in order to win their respect and support in developing
the sophisticated legal culture of a civilized society.