Towards a New Russian Constitutional Court

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Introduction

On September 21, 1993, when President Boris Yeltsin issued the Decree

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on Step-by-Step Constitutional Reform in the Russian Federation\(^1\) dismissing the Russian Parliament and calling for new elections, the Supreme Soviet, under the leadership of Speaker Ruslan Khasbulatov, immediately countered with a resolution which declared the powers of the President terminated under Article 121.6 of the Constitution.\(^2\) At the Parliament’s request, Constitutional Court Chairman Valerii Zorkin called an emergency session of the Court, although the President’s decree had “instructed” the Court not to convene any sessions.\(^3\) On the night of September 21, the Constitutional Court decided by a majority of nine to four\(^4\) that the President’s violations of the Constitution provided grounds for his removal from office under either Constitution Article 121.10 (impeachment proceedings) or 121.6 (automatic termination).\(^5\)

As the power struggle continued, the parliamentary leadership, under Speaker Khasbulatov, and Vice-President Aleksandr Rutskoi, who had joined them in their confrontation with President Yeltsin, found themselves on September 28 isolated in the “White House” (the Russian parliament building) by police and army forces loyal to President Yeltsin and his government. On October 3, anti-Yeltsin demonstrators, encouraged by Vice-President Rutskoi, attacked the Moscow mayor’s office and the Ostankino television station. In the course of this raid, sixty-two people were killed.\(^6\) On October 4, Yeltsin’s troops stormed the White House and

\begin{enumerate}
\item Ukaz [hereinafter Presidential Decree] No. 1400, Rossii\u043e\u0447e \u043d\u044e\u043b\u044f\u044e\u0437\u043e\u0432\u043e\u0440\u0435\u043d\u0434\u0435\u0433\u0435\u0430, Sept. 22, 1994, at 1, translated in 45 CURRENT DIG. OF THE POST-SOVIET PRESS No. 38, at 1 (1993).
\item Postanovlenie [hereinafter Congress Res.] No. 5780-I, Rossii\u043e\u0447e \u043d\u044e\u043b\u044f\u044e\u0437\u043e\u0432\u043e\u0440\u0435\u043d\u0434\u0435\u0433\u0435\u0430, Sept. 23, 1993, at 2, translated in 45 CURRENT DIG. OF THE POST-SOVIET PRESS No. 38, at 6 (1993). Article 121.6 read: “The powers of the President may not be used to change the national-state structure of the Russian Federation or to dissolve or suspend any legitimately elected body of state power. If this is done, these powers are terminated immediately.” The italicized sentence was inserted by constitutional amendment on December 9, 1992. Vedomosti RF, Issue No. 2, Item No. 55 (1992), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, RUSSIAN FEDERATION, Release 93-3 (Albert P. Blaustein & Gisbert H. Flanz eds., 1993) [hereinafter Old Const.]. As the result of an agreement with the President, Congress passed a resolution suspending the article until a referendum could be held. Congress Res. No. 4079-I, Vedomosti RF, Issue No. 51, Item No. 3016 (1992), translated in 44 CURRENT DIG. OF THE POST-SOVIET PRESS No. 10, at 10-11 (1993). The referendum was scheduled for April 11, 1993. Id. The article was subsequently “unfrozen” by a resolution declaring the December agreement invalid when the conflict between the President and Parliament escalated. Congress Res. No. 4026-I, Vedomosti RF, Issue No. 12, Item No. 439 (1993), translated in 45 CURRENT DIG. OF THE POST-SOVIET PRESS No. 10, at 10-11 (1993).
\item Presidential Decree No. 1400, supra note 1, item 10.
\item For the text of the Court’s finding, see Rossii\u043e\u0447e \u043d\u044e\u043b\u044f\u044e\u0437\u043e\u0432\u043e\u0440\u0435\u043d\u0434\u0435\u0433\u0435\u0430, Sept. 23, 1993, at 2, translated in 45 CURRENT DIG. OF THE POST-SOVIET PRESS No. 38, at 6 (1993).
\end{enumerate}
arrested Khasbulatov and Rutskoi.7

On October 6, Constitutional Court Chairman Zorkin, under pressure from the President's office,8 resigned his chairmanship but remained a Court member. On October 7, President Yeltsin signed the Decree on the Constitutional Court of the Russian Federation,9 accusing the Court of flagrant violations of its duties and suspending its decisionmaking process until the adoption of the new Constitution.10 However, the President charged the Court, under the leadership of Acting Chairman Nikolai Vitruk, with preparing proposals for submission to the future federal assembly concerning "forms of implementing constitutional justice in the Russian Federation, including the possibility of creating a constitutional collegium within the Supreme Court of the Russian Federation."11

The Court, which can hardly be blamed for undergoing a re-evaluation of political reality and an adjustment that might ensure personal security as well as institutional survival, demurely accepted President Yeltsin's carrot-and-stick approach. In preparing the Draft Constitution, which was published on November 10, 1993,12 and adopted by popular referendum on December 12, 1993,13 President Yeltsin chose not to abolish the Constitutional Court.14 On the basis of Article 125 of this new Constitution,15 the Russian Parliament promulgated the Federal Constitutional Law on the Constitutional Court16 and by February 7, 1995, six additional justices had been appointed.17 Now that the last vacancy has been

7. ECONOMIST, supra note 6, at 55.
10. Id. item 1.
11. Id. item 5.
15. See infra text accompanying note 114.
16. See infra text accompanying note 127.
17. See infra note 231. Article 125 of the Draft Constitution adopted by the Constitutional Assembly on July 12, 1993, provided for 18 judges; President Yeltsin's revision published on November 10 increased this number to 19. July Draft, supra note 14, art. 129.
filled and the Court has thus become operational, one hopes that at least some lessons of the past have been learned and that the new Court will be able to make a more substantial and enduring contribution to legal culture and the rule of law than its predecessor.

Part I of this article, in a necessarily selective fashion, appraises the brief and ultimately unsuccessful tenure of the Zorkin Court. Part II examines the reform legislation concerning constitutional adjudication introduced by President Yeltsin in the new Russian Constitution of December 1993. Part III discusses the Constitutional Law on the Constitutional Court of July 1994. After describing in Part IV the arduous appointment process of new justices up to February 1995, the article, in Part V, evaluates the new structure, functions, and future prospects of the “new” Russian Constitutional Court.


In June 1988, Mikhail Gorbachev persuaded the Communist Party of the Soviet Union (CPSU) that perestroika, to be successful, required the development of a “Socialist state committed to the rule of law.” Among the various measures taken to attain this goal, a Committee of Constitutional Supervision of the USSR was established to review and ensure the observance of constitutionality and legality in the Soviet political system. The member republics of the USSR were authorized to create their own institutions of constitutional review. Rather than following the federal example of setting up a committee with predominantly advisory and suspensive functions that would recognize the supremacy of parliament, the Russian Republic, after its declaration of sovereignty on June 12, 1991, chose to establish a genuine Constitutional Court. The Russian Law on the Con-

18. See infra text accompanying note 234.
19. When I visited the Russian Constitutional Court in April 1993, a Russian colleague introducing me to some of the justices jokingly remarked, “Professor Hausmaninger wrote an article on your predecessor institution, the Soviet Committee of Constitutional Supervision. When the article had been published, the Committee was dissolved. He is now writing about the Russian Constitutional Court!” The justices were not amused.
23. A constitutional amendment (Article 119), enacted on October 27, 1989, provided for a Committee of Constitutional Supervision of the RSFSR. Vedomosti RSFSR, Issue No. 44, Item No. 1303 (1989). However, a subsequent amendment on December
The new Russian Constitutional Court was adopted in July 1991, and Parliament elected the first thirteen Court members in October 1991.24 The constitutional number of justices on the Court was fifteen, but the Parliament could not agree on whom to elect to fill the two remaining vacancies. However, the law permitted the Court to be operative in the presence of ten members.25 The justices elected Professor Valerii D. Zorkin as Chairman and Professor Nikolai V. Vitruk as Vice-Chairman of the Court.26

A. Jurisdiction of the Constitutional Court

Article 165 of the Russian Constitution, as amended on April 21, 1992,27 defined the Constitutional Court as "the highest organ of judicial power in the protection of the constitutional order."28 Under Article 165.1, the Court's jurisdiction encompassed judicial as well as non-judicial functions. Among the former, the two major areas were undoubtedly the adjudication of the constitutionality of legal norms29 at the request of various state organs30 and the adjudication of complaints of individual citizens against violations of their constitutional rights.31

1. Citizens' Complaints

Like the German constitutional complaint,32 after which the Russian instrument was modelled, the adjudication of citizens' complaints was an extraordinary remedy to secure the protection of civil rights. The Russian complaint—as opposed to the German—could not be directed against a statute, but only against the application of the law by courts or administrative organs when all other remedies had been exhausted.33 It was available to persons claiming that their fundamental rights or other constitutionally protected interests had been violated by an established pattern of administrative action or constant adjudicative practice (in par-


24. Vedomosti RSFSR, Issue No. 44, Item No. 1450 (1991). In 1993, biographies of the justices were published in an unnumbered issue of VESTNIK KONSTITUCIONNOGO SUDA ROSSIISKOI FEDERATSI [hereinafter VESTNIK]. Subsequent issues of the journal, in which the decisions of the Court were to be published, have not appeared.

25. Old Law, supra note 23, art. 3, ¶ 4. "The RSFSR Constitutional Court has the right to commence its activities under the condition that at least two-thirds of its membership has been elected." Id.


28. Id.

29. Old Law, supra note 23, art. 57.

30. Id. art. 59.

31. Id. art. 66.

32. GRUNDGESETZ [Constitution] [GG] art. 93(1), items 4a and 4b. Gesetz über das Bundesverfassungsgericht, BGBl IS. 2229, arts. 12(8a) and 90 [hereinafter German Law].

33. Old Law, supra note 25, art. 66, ¶ 1.
ticular such practice as based on "guiding explanations" of the highest courts. As the law empowered the Constitutional Court to examine legal acts even if they were only capable of creating an unconstitutional practice, and also gave it the right to reject a complaint if it considered such examination "inadvisable" (netselesobraznym), the Court enjoyed great latitude in accepting or rejecting individual complaints.

In the course of 1992, the Court received no fewer than 1700 citizens' complaints, most of them without merit but a good number seeming to have deserved more attention than the Court was able or willing to devote. Individual complaints were examined by the Registry of the Court, occasionally returned for improvement, but most frequently rejected at this point. Justices did not participate in these decisions. Constitutional questions recognized as such by the Registry staff were submitted to the Chairman, the Vice-Chairman, or the Secretary of the Court, who sent them to one of several specialized divisions of the Secretariat. On the basis of a report prepared by the staff of legal specialists, the Court would then vote whether to accept the case, and if accepted, the Chairman would assign it to a justice as reporter, who was responsible for preparing the case for oral hearing.

2. Court Practice in Civil Rights Cases

Of the six individual complaints heard and decided by the Court in the first sixteen months of its activity (between January 1992 and April 1993), four concerned labor relations, one a dispute about living quarters, and one a deputy's loss of his parliamentary seat upon his appointment as a minister. In the months leading up to the suspension of the Court on October 6, 1993, the justices did little to improve the skimpy record in this area. Instead, they handed down only one opinion based on an individual complaint. Only a minority of the justices were critical of the fact that the Court did not devote sufficient attention to human rights questions. They consistently proposed that the Court curb its political activism and instead give priority to civil rights matters. But the Court majority, led

34. Id. ¶ 3.
35. Id. art. 69, ¶ 14.
36. E.g., labor law, civil law, or criminal law.
37. Interviews with Justice Boris Ebsseev and Senior Consultant Professor Boris Strashun (April 1993).
40. The loss was considered to be in conformity with the Constitution. Vedomosti RF, Issue No. 19, Item No. 702 (1993).
41. The Izvestiia case, decided on May 19, 1993, struck down part of a Supreme Soviet resolution as unconstitutional. RFE/RL News Briefs, May 14-21, 1993, at 5. For commentary on the other eight opinions rendered between May and September 1993, see infra note 52.
42. Interview with Justice Tamara Morshchakova (April 1993).
by Chairman Zorkin, rejected this criticism and insisted that the role of the Court in the ongoing constitutional crisis, produced by the confrontation between the President and the Parliament, should be to focus its attention on arrogation of jurisdiction and unconstitutional enactments by state organs. A "New" Russian Constitutional Court

B. Review of Constitutionality of Legal Enactments

1. Jurisdiction of the Court

The Constitutional Court was originally empowered to examine the constitutionality of the following categories of legal enactments: 1) international treaties of the Russian Federation that had not yet been ratified; 2) statutes and other legal enactments of the Congress of People's Deputies, the Supreme Soviet, or the Presidium of the Supreme Soviet of the Russian Federation; 3) other legal enactments of supreme organs of the Russian Federation, including the President and the Council of Ministers; and 4) statutes and other legal enactments of supreme state organs of the republics.

The Court was subsequently granted the power to decide all jurisdictional conflicts between federal and republic organs. It was also empowered to examine the constitutionality of enactments of subordinate federal, republic, and autonomous administrative organs, as well as the constitutionality of treaties between republics and between all other territorial units. The Court was authorized to examine the constitutionality of political parties and other social organizations, and it ultimately received the right to decide all jurisdictional disputes among all state organs.

2. Judicial Practice in Reviewing Legal Enactments

Through the end of April 1993, the Court handed down eleven opinions on the constitutionality of legal enactments, all of which declared the examined legal enactments (or parts of such) unconstitutional. One of these decisions was directed against a republic (Tatarstan), one against an ordinance of the Council of Ministers, one against a resolution of the Congress of People's Deputies, two against the Supreme Soviet and two against its Presidium, and four against decrees of President Yeltsin. In May, June, and September 1993, the Court added eight more cases to

43. Interview with Chairman Valerii Zorkin (April 1993).
44. Old Law, supra note 22, art. 57.
45. The powers were added by constitutional amendment on April 21, 1992. Old Const., supra note 2, art. 165. The Law on the Constitutional Court was not adapted to reflect this constitutional change, but the Constitution was considered to be immediately applicable.
this list.\textsuperscript{52}

3. The Referendum Case

One of the most interesting and fateful decisions of the Court was undoubtedly its opinion of April 21, 1993,\textsuperscript{53} concerning the constitutionality of the Referendum Resolution passed by the Congress of People's Deputies on March 29.\textsuperscript{54}

In the preceding months, several attempts had been made by President Yeltsin to come to an accord with Parliament concerning a new Constitution or at least a joint procedure for submitting its basic provisions to a popular referendum. After these attempts had failed, the President submitted to the Congress on March 7, 1993, the following questions for a referendum to be held on April 11, 1993:

1. Do you agree that the Russian Federation should be a presidential republic?
2. Do you agree that the supreme legislative body of the Russian Federation should be a bicameral parliament?
3. Do you agree that the new Constitution of the Russian Federation should be adopted by a Constitutional Assembly representing the multi-national people of the Russian Federation?
4. Do you agree that every citizen of the Russian Federation should have the right to own, use, and dispose of land as its owner?\textsuperscript{55}

On March 13, the Congress of People's Deputies rejected the President's proposal and forbade the referendum.\textsuperscript{56} In a radio and television

\begin{footnotesize}
54. Congress Res. No. 4684-I, Vedomosti RF, Issue No. 14, Item No. 501 (1993). I had the opportunity to listen to the day-long oral proceedings in the Constitutional Court, and to talk with representatives of the parties, experts, and judges, including Chairman Zorkin, before, during, and after the hearing. I am still proud of the fact that I was able to predict correctly the Court's opinion on all counts.
\end{footnotesize}
address on March 20, the President announced a referendum for April 25 on the people's confidence in the President and Vice-President, the basic provisions of a new Constitution, a new electoral law, and the election of a new bicameral parliament. Yeltsin announced that until the resolution of the state crisis a "special administrative regime" would be in force, under which all orders of the President would be unchallengeable.

The first reaction of the Congress was an impeachment proceeding against the President on March 28 which failed by a narrow margin. The vote was 617 to 268. A successful impeachment would have required 689 votes, two-thirds of the 1033 total deputies. The Congress then decided to order a referendum with a different set of questions that were clearly designed to hurt the President:

1. Do you trust the President of the Russian Federation?
2. Do you approve of the social-economic policy carried out by the President and government of the Russian Federation since 1992?
3. Do you deem it necessary to hold early presidential elections?
4. Do you deem it necessary to hold early elections for people's deputies?

The Congressional Resolution decreed that a referendum on these questions would be conducted on the basis of the RSFSR Law on the Referendum of October 16, 1990. The resolution went on to state that "decisions ... are considered to have been adopted, if more than one half of the citizens entitled to be registered have voted in favor of them."

On April 8, the constitutionality of this resolution was challenged in a petition to the Constitutional Court by ten deputies belonging to the parliamentary caucus "Democratic Russia," which usually supported the President. They argued that the resolution violated the Referendum Law, which ordinarily required a majority of the citizens who participated in the referendum. Under the Referendum Law, a majority of those registered is required only for questions concerning the adoption or amendment of the Constitution of the Russian Federation. The petitioners claimed that none of the referendum questions concerned a change of the Constitution. Thus, insofar as the resolution deviated from the Law on the Referendum, it violated Article 5 of the Constitution, which required referenda to be held on the basis of the Constitution and the laws of the Russian Federation. It did not provide for regulation by resolution. The resolution also violated Article 4 of the Constitution, which required all state organs (including the Congress) to observe the Constitution and the laws.

57. See infra notes 77-79 and accompanying text.
58. For the Constitutional Court's reaction, see infra text accompanying notes 80-91.
In the Constitutional Court's oral proceedings of April 20, two professors of constitutional law testified as experts and were extensively questioned by the judges. Professor Anatolii Kovler, of the Institute of State and Law of the Russian Academy of Sciences, argued for the petitioners. Professor Boris Lazarev, from the same institution, defended the respondent. A key issue was the hierarchy of sources of the law: Does a resolution of the Congress rank above a statute of the Supreme Soviet, or, in other words, do all legal acts of the Congress enjoy supreme force, regardless of their labels? This view had been undisputed under Soviet constitutional doctrine and practice. Another fundamental issue was whether referendum questions three and four concerning early elections implied a change of the Constitution, as the latter did not envisage a resignation of the President or a dissolution of Parliament before the expiration of their respective terms of office.

In its opinion announced on April 21, the Court affirmed the constitutionality of the Congress' resolution on the vote-counting procedure issue in questions three and four with five of the thirteen justices dissenting (Ametistov, Morshchakova, Kononov, Oleinik, and Vitruk). Concerning questions one and two, the Court unanimously found a violation of Constitutional Articles 4 and 5. Thus the Court for the first time invalidated parts of a normative act of the Congress as unconstitutional. The Court found these violations even though Article 104 of the Constitution refers to the Congress as the supreme organ of state power which may decide any question and may repeal any act of the Supreme Soviet, and even though Article 109 of the Constitution expressly states that laws and resolutions of the Supreme Soviet must not contradict laws and resolutions of the Congress.

This ruling of the Constitutional Court, as one Moscow newspaper wrote, offered the President a lifesaver: Yeltsin could not have won the vote of confidence in the referendum but for the Court's decision concerning the vote count. But the Court's opinion also expressed an important legal doctrine: a statute ranks as superior to other legal enactments. It thus wrote a chapter of constitutional law that moved Russia closer to the West European rule of law model.

The five dissenting justices who denied that referendum questions three and four had constitutional quality, pointed, with good reason, to technical arguments supporting their position. These include the fact that the questions contained no specific proposal for constitutional change and no specific time for early elections. In reaching its decision, the

Court majority probably reflected on the unconstitutional measures a referendum victory of the President might entail, in particular the scheduling of parliamentary elections against the will of Parliament. Such reflections had already guided the Court in its March 23 finding concerning Yeltsin’s March 20 television address.70

C. Nonjudicial Functions of the 1991 Constitutional Court

In a manner unprecedented in Western legal traditions, the Law on the Russian Constitutional Court assigned no fewer than five types of nonjudicial functions to the Court.71 One of these, the finding (zakliuchenie), merits a closer look at this point. Among the several types of findings to be issued by the Court,72 the most important was the one concerning the constitutionality of actions and decisions of the President in the context of an impeachment procedure.73 Surprisingly, the Court could issue such findings on its own initiative74 and thus become an important political player in its own right.

Prior to September 21, 1993,75 the Constitutional Court had issued only one finding, which, however, had a spectacular quality and effect. It deeply divided the Court and had a profound impact on the future political development of the country. The finding76 concerning President Yeltsin’s March 20, 1993, television address.77 In that speech the President explained his decision to order a referendum concerning the question of confidence in the President and Vice-President. The main reason for the political crisis in the country, he said, was not a conflict between the Congress and the President, but a conflict between the people and the Bolshevik system. The Congress, Yeltsin claimed, had manipulated the Constitution and blocked the referendum on land ownership and consti-

70. See infra note 76 and accompanying text.
71. See infra notes 247-51 and accompanying text.
72. The Constitutional Court of the Russian Federation: will issue opinions on the inability of a federal official to discharge the duties of his office because of a persistent health problem on the recommendations of a state medical commission; the presence of grounds for the removal of the federal official concerned from office, as well as an official of a republic, kray, oblast, autonomous oblast, or autonomous okrug; the constitutionality of signed international treaties of the Russian Federation prior to their ratification or approval.

Old Const., supra note 2, art. 165.1.
73. The Old Constitution provided that: The President of the Russian Federation may be removed from office if he violates the Constitution of the Russian Federation, the laws of the Russian Federation, and his oath of office. The decision will be made by the Congress of People’s Deputies of the Russian Federation on the basis of an opinion of the Constitutional Court of the Russian Federation . . . .

Old Const., supra note 2, art. 121.10.
74. Old Law, supra note 23, ¶¶ 1-2.
75. See supra note 5 and accompanying text.
tutional principles. Yeltsin argued that as the possibility of agreement with
the conservative majority in Parliament had been exhausted, the President
would assume direct responsibility for the fate of the country. It was his
duty to guarantee the observation of fundamental constitutional prin-
ciples such as popular government, federalism, separation of powers,
human rights, and basic freedoms. Yeltsin continued:

Today I have signed a decree on a special administrative regime until
the resolution of the crisis of power. On the basis of this decree a referen-
dum is ordered for April 25 concerning confidence in the President and
Vice President of the RF. ... The people must decide ... who should rule
the country: the President and Vice President or the Congress of People's
Deputies.

Together with the vote of confidence in the President a vote on the
draft of a new constitution and on the draft of the law on elections to Parlia-
ment will be held. These drafts will be submitted by the President and will
become effective when the people support the President and Vice
President.

Under the Constitution and the new electoral law which you will
approve there will be no elections to Congress but to a new Russian parlia-
ment. Under the new Constitution there will be no Congress. Until new
elections can be held, Congress and the Supreme Soviet will not be dis-
solved, their work will not be suspended. The people's deputies will retain
their mandates. But on the basis of the decree all decisions of organs or
functionaries that aim at abolishing or suspending decrees and orders of
the President or ordinances of the government will be without legal
effect.79

Constitutional Court Chairman Zorkin considered this television
statement an attempted coup d'état.80 The Court, on its own initiative
(which was subsequently endorsed by a request from the Supreme
Soviet),81 examined the television clip in an emergency session. President
Yeltsin refused to attend this session or to submit documents
requested by the Court, including the text of his decree.82

In its nine-to-three opinion of March 23 (Ametistov, Morshchakova,
and Vitruk dissented and Kononov was absent), the Court found seven
violations of the Constitution and the Union Treaty in the President's
address.83 The Court, however, remained silent on the question of
impeachment. Justices Ametistov84 and Morshchakova wrote dissenting

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78. Osobyi poriadok upravleniia.
79. See supra note 77 and accompanying text.
80. See Four Top Officials Oppose Yeltsin in TV Appearance, Reuters, Mar. 21, 1993,
available in LEXIS, News Library, Reuwlid File.
81. See Khasbulatov Clarifies Possible Further Steps by Parliament, TASS, Mar. 22, 1993,
available in LEXIS, News Library, TASS File.
82. See Alexander Krasulin, Zorkin: Constitutional Court Examines President's Appeal,
83. Vedomosti RF, Issue No. 13, Item No. 466 (1993), translated in Constitutional
Court's Ruling on Yeltsin's Action, # SU/1646/C2, Mar. 23, 1993, available in LEXIS, News
Library, BBCSWB File.
84. Cf. Constitutional Court Member Sets Out Criticism of Court's Judgment, # SU/1648/
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opinions\(^{85}\) which considered the speech a mere declaration of political intent that was not subject to legal evaluation.\(^{86}\) In article 1(3), the Law on the Constitutional Court forbids the Court to examine political questions.\(^{87}\) Under article 32(6), the Court does not have the right to review unadopted enforceable enactments.\(^{88}\) Also, under article 74(3), it is forbidden to pass findings on questions which may later be subject to review of an enforceable enactment.\(^{89}\) Justice Ametistov also correctly criticized as illegal the various public statements made by Chairman Zorkin in a press conference, on television, and in the Supreme Soviet prior to the Court's deliberations. Article 20(3) of the Law on the Constitutional Court expressly states that:

A judge on the RSFSR Constitutional Court does not have the right anywhere except at a session of the RSFSR Constitutional Court to voice publicly his opinion on a question under review or accepted for review by the RSFSR Constitutional Court before the adoption of a ruling by it on this question.\(^{90}\)

Further, article 18(1)(4) provides that a judge may be suspended by the Court for this behavior.\(^{91}\)

D. Critique of the Zorkin Court’s Judicial Activity

In the first sixteen months of its activity, from November 1991 to April 1993, the Court issued seventeen decisions. This output represents a modest achievement by any standard, especially in view of the large number of highly qualified legal personnel working for the Court.\(^{92}\) From May to September of 1993, the Court added eight more opinions to its record, thereby barely exceeding the meager record of its predecessor, the Committee of Constitutional Supervision of the USSR.\(^{93}\) A partial explanation of this limited accomplishment may be found in the Court’s rules of procedure. These rules, written into the Law by an inexperienced draftsman, Sergei Pashin, forced the Court to: 1) take all decisions in plenary meetings; 2) decide all cases after extensive trial-type public oral hearings; and

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85. The dissenting opinions were not printed in Vedomosti RF, Issue No. 13, Item No. 466 (1993).
86. President Yeltsin's subsequently published Decree of March 24 makes no reference to a “special administration" and an obvious attempt to avoid all conflict with the Constitution. On the Activity of Executive Bodies Pending the Resolution of the Crisis, Izvestia, Mar. 25, 1993, at 1, translated in 45 CURRENT DIG. OF THE POST-SOVET PRESS No. 12, at 11-12 (1993).
87. Old Law, supra note 23, art. 1, ¶ 3.
88. Id. art. 36, ¶ 6.
89. Id. art. 74, ¶ 3.
90. Id. art. 20, ¶ 3.
91. Id. art. 18, ¶ 1.4.
92. Like its Western counterparts, the Russian Constitutional Court was undoubtedly able to attract some of the brightest young lawyers as well as some very experienced former members and staff of the Committee of Constitutional Supervision. Yet on my visit in April 1993, Professor Strashun, senior consultant to Chairman Zorkin, claimed that a number of staff positions had not been filled for lack of qualified legal personnel.
3) abstain from dealing with other cases as long as an ongoing proceeding was not finished. Thus, these rules blocked the Court from deciding other cases during the hearings and recesses of the Communist Party case between May 25 and November 30, 1992.

Yet perhaps the focus should be less on the number of cases decided than on the vision projected by the Court, its public image, and its power of legal and political persuasion. Given the lack of enforcement of the Court's opinions, the decision to refrain from publishing a great number of ineffectual decisions may have been wise. But one could certainly argue that the Court should have made its legal points more guardedly and selectively, and that it could have built a more impressive record in the field of civil rights protection.

There was certainly legitimate frustration on the part of the Court over the widespread neglect of its decisions. This frustration may help explain Chairman Zorkin's excessive language and public posturing, which included giving apocalyptic speeches in the Supreme Soviet, imposing fines for contempt of court, and threatening impeachment against the highest public officials. However, more restraint might have preserved a higher degree of Court authority.

Initially, the substance of the Court's opinions reflected a fair amount of solid legal work, political sensitivity, and capacity for compromise on the part of the justices. However, since the Communist Party case, the growing politicization of the Court's judicial decisionmaking became increasingly troubling.


97. For example, Zorkin's handling of the Tatarstan case had the unfortunate consequence that other state organs ignored Court decisions. See, e.g., Schwartz, supra note 94, at 768-75; Sharlet, supra note 96, at 33. In the Communist Party case, the Court was unable to force Gorbachev to appear as a witness. As a result, the public image of the Court suffered serious damage. See id. at 33-34; Brzezinski, supra note 94, at 286-87; and Feofanov, supra note 94, at 636.

E. Critical Remarks Concerning the Court's Nonjudicial Activities

There is no doubt that the Court's exercise of nonjudicial functions led to excessive political involvement outside the Court's core function of judicial review. This development certainly did not add to the Constitutional Court's legal authority and prestige.

When the Court began to function in early 1992, I argued that the Court should perform its educational function in the legal and political system primarily through clear, well-crafted opinions.99 The creation of a legal culture among the population should have been left to legal scholars. It was not a task to be accomplished by press conferences and television interviews of Chairman Zorkin.

In the following months, Zorkin increasingly confirmed my fears by developing a kind of political activism that was at times clearly in violation of the law and at least improper for a neutral arbiter of constitutional conflict. But there is also a caveat to be considered in view of the Court's role in an emerging constitutional crisis. Is it really permissible in an extraordinary situation of this type to evaluate the Russian Constitutional Court on the basis of those standards that apply to Western Constitutional Courts in normal times?

Many observers agree that in December 1992 the Chairman of the Constitutional Court justifiably received ample public praise for assuming the role of referee in a dramatic struggle between the legislature and the President and for substantially contributing to the finding of a compromise.100 However, it appears that Zorkin extensively enjoyed the limelight and the power involved in playing this active role. He did not abide by the agreement, formalized in a resolution adopted by the Congress on December 13, 1992.101 As early as January, Zorkin was among the first to join Speaker Khasbulatov in voicing doubts and criticism concerning the constitutional referendum scheduled for April 11, 1993.102

In the eyes of a critical and liberal Russian intelligentsia, this support for Speaker Khasbulatov was an unforgivable betrayal. In their view, Zorkin had clearly aligned himself politically with a reactionary parliament in its struggle against a reform-minded President. A more neutral observer would agree that Zorkin not only assumed a partisan political role inappropriate for the country's highest judge, but also undermined the Court's prestige as signatory to a solemn constitutional agreement.

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99. See Hausmaninger II, supra note 21, at 387.
100. See Sharlet, supra note 96, at 35.
Some Western scholars expressed their criticism in stronger terms. But any censure directed at the Chairman should be mindful of the fact that Zorkin, for most of his activities, enjoyed the support of a solid Court majority.

In their struggle with Parliament, President Yeltsin and his supporters frequently insisted that without radical economic reform a stable democratic society cannot develop, and that without a democratic society no functioning rule of law can exist. Did this perspective give legitimacy to the President's revolutionary transformation that disregarded the existing Constitution, the elected Parliament, and a lawfully appointed and functioning Constitutional Court?

Although it could be claimed that the President's actions were subsequently endorsed by the popular referendum on his draft of a new Constitution, an impartial observer could give his endorsement only with great reluctance. He would at the same time deplore the lack of political culture and place blame on all three major players in the power struggle: the Parliament, the President, and the Constitutional Court.

1. The Parliament

The Russian Parliament was elected under Gorbachev in 1990 when elections were still open to considerable Communist Party manipulation. At that time, the most progressive Russian politicians competed for seats in the Soviet Parliament, and Russian Republic politics were considered provincial. In contrast, President Yeltsin was elected on June 12, 1991 by a substantial popular majority after Russia had declared sovereignty. The referendum of April 25, 1993 clearly confirmed Yeltsin's mandate.

In 1992 and 1993, the Russian Parliament under Speaker Khasbulatov demonstrated increasing political irresponsibility, ultimately imposing a ruinous hyper-inflationary budget on the government and plotting to remove the President. Yeltsin had to act forcefully and decisively while he still retained the power to do so.

103. One commentator wrote: "... Valery Zorkin, the Court's either ill-fated, ill-advised or evil-minded chairman, who for the past half year had discredited the Court by siding with Rustan Khasbulatov and Aleksandr Rutskoi in conflicts between Boris Yeltsin and the anti-Yeltsin forces in the Supreme Soviet ... " Alexander Blankenagel, The Court Writes Its Own Law, 3 (3/4) E. EUR. CONST. REV., Fall 1994, at 74.

104. Id. at 78.

105. See supra note 12 and accompanying text.


But it should not be overlooked that for a long time this very parliament had acceded to President Yeltsin's every wish and granted him extraordinary powers.\textsuperscript{109} Parliament only withdrew its support and ultimately opposed Yeltsin after the government had committed grave blunders and the President continued to treat Parliament highhandedly instead of trying to seek compromise.

2. The President

President Yeltsin's supporters have argued that the Constitutional Court majority employed legal formalism to aid an illegitimate parliament to the detriment of a reformist executive. There is some truth in this charge. It may be explained in part by the formalist tradition in Soviet jurisprudence, in part by the political preferences of the justices, and also as a reaction to the arrogant behavior of Yeltsin and his team. The brusque and frequently insulting style of the President and his advisers,\textsuperscript{110} the improvisation and shortsightedness of some of Yeltsin's previous political actions, his personal lack of appreciation of law and legality, and the poor legal quality of many of his decrees\textsuperscript{111} increasingly alienated Yeltsin from the Russian legal community, including the justices of the Constitutional Court.

3. The Constitutional Court

The Russian Constitution of 1978 had been amended in some parts, but remained obsolete and contradictory in others. The Constitutional Court's work thus lacked an adequate legal and political foundation. When Parliament refused to finalize a draft constitution which would provide for a viable executive, Yeltsin needed to find a way to adopt a new Constitution without Parliament's participation. Perhaps a more constructive effort on the part of the Constitutional Court would have helped avoid this revolutionary act.

The activity of Zorkin and other members of the Court must be considered in the light of the political crises of 1992-93. These crises demonstrate reforms in Russia will not be successful without a fundamental change in the mindset of political leaders and the general population. In particular, politicians must be willing to learn the ground rules of a democracy based upon separation of powers and a system of checks and balances. The government must work towards increasing public political consciousness and building support among the people over time. Any evaluation of the reform process should take into account the fact that, by necessity, there will be an extended period of trial and error.


\textsuperscript{110} In March 1992, President Yeltsin stated that he had lost trust in the Court and would therefore no longer submit petitions to it. In the following summer he took away Zorkin's dacha. See Zorkin Given Until 13th Sept. to Vacate his Dacha, BBC Report No. SU/1791/B, Sept. 11, 1993, available in LEXIS, News Library, BBCSWB File.

\textsuperscript{111} For a general criticism voiced in the Constitutional Court opinion of February 12, 1993, see Vedomosti RF, Issue No. 9, Item No. 344 (1993).
Through December 1992, the Russian Court generally maintained respectability as a defender of the constitutional order. However, during 1993 the Court's partisanship may have prevented a political compromise between the legislature and the executive which the President unsuccessfully had sought to obtain.

Zorkin and his Court ultimately were unable to chart and safeguard a legal road to political change. It is unclear whether the Court deserves credit for a constructive contribution to the political reform process in Russia. The Court's fundamental decision to support Khasbulatov's parliament over President Yeltsin forced the President to delay his coup and find a stronger base of legitimacy for his transitional dictatorship. The President ultimately benefitted from this challenge much the way he capitalized on the political blunders of his enemies in Parliament after September 21, 1993, by consolidating his power and strengthening his mandate. October 1993 marked a new political beginning, with new opportunities to be seized or missed, and a new succession of crises, which may well prove to be the "normal" pattern of Russian politics, just as "muddling through" has been and will be in the future the more or less successful recipe for dealing with them.

The current trend, unfortunately, seems to de-emphasize constitutionality and the rule of law, but these principles will no doubt eventually see a renaissance. Reflecting upon this period of history, future generations may well conclude that any Constitutional Court would have faced a "mission impossible." Thus, a future assessment of the Zorkin Court may well accord it a respectable place in the development of a Russian legal culture.

II. The Constitutional Court in the New Constitution

The Russian Constitution (the New Constitution), adopted by popular referendum on December 12, 1993, contains new provisions in Article 125 concerning the Constitutional Court. Unlike Articles 126 and 127 which define the Supreme Court as "the highest organ for civil, criminal, administrative jurisdiction" and the Supreme Court of Arbitration as "the highest judicial organ for the resolution of economic disputes," Article 125 refrains from labeling the Constitutional Court as the "highest judicial organ regarding the protection of the constitutional system," as its role was described in Article 165 of the previous Russian Constitution.

112. But see supra notes 94 and 98 (commentary expressing reservations with regard to the handling of the Communist Party and National Front cases).

113. During my stay in Moscow in April 1993, I asked justices as well as legal scholars whether they thought that perhaps the Constitutional Court had been prematurely established in an underdeveloped Russian political system. The question was not understood.

114. See New Const., supra note 12, art. 125.

115. Article 125 of the New Constitution begins without defining the scope of the Constitutional Court's jurisdiction: "1. The Constitutional Court of the RF consists of 19 judges . . . ." Id. But article 1 of the new Constitutional Law on the Constitutional Court of the Russian Federation of July 21, 1994 seems to make up at least in part for
The New Constitution increases the number of justices from fifteen, only thirteen of whom were actually appointed, to nineteen.\footnote{116} It also enumerates the state organs and persons that have access to the Court,\footnote{117} and lists the competencies of the Court.\footnote{118} The language of Article 125 is more concise than that of the Old Constitution, and it restricts the powers of the Court in several instances.\footnote{119} However, it also provides a foundation for new avenues of access and a broader civil rights jurisdiction for the Constitutional Court.\footnote{120}

According to Article 128 of the New Constitution, justices of the Constitutional Court are nominated by the President and appointed by the upper house of Parliament, the Council of the Federation.\footnote{121} Under the provisions of this article, a federal constitutional law is to define the powers and to prescribe procedures for the formation and activity of the Court.\footnote{122} Under Item 2 of Article 108, a federal constitutional law
requires the approval of three-fourths of the deputies in the Council of the Federation and two-thirds in the State Duma, the lower house of Parliament.\textsuperscript{123} The law then must be signed and promulgated by the President within fourteen days.\textsuperscript{124}

Part II of the Constitution, Concluding and Transitional Provisions, invalidates all preconstitutional legislation to the extent that it contradicts the New Constitution.\textsuperscript{125} However, it confirms the office terms of all previously elected judges, including the thirteen justices serving on the Constitutional Court.\textsuperscript{126}

III. The Constitutional Law On the Constitutional Court of the Russian Federation

On February 1, 1994, responding to the President's request as well as exercising its constitutional right of legislative initiative,\textsuperscript{127} the Constitutional Court submitted the Draft Law on the Constitutional Court to the State Duma (Draft Law).\textsuperscript{128} The Draft Law subsequently was modified by a working group composed of representatives of the Court, the President's Administration, and the Duma. The group, which also consulted with Russian and foreign experts,\textsuperscript{129} presented the product of its deliberations on March 24.\textsuperscript{130} On April 11, the Duma in its first reading rejected the Draft Law. It did so because the Draft Law did not provide for input by the Duma in the selection of justices. However, after striking a political bargain with the President which granted the Duma the right to propose a number of justices, the Duma approved the Draft Law in its second reading on May 11\textsuperscript{131} and ultimately adopted the new Federal Constitutional Law on the Constitutional Court of the Russian Federation (New Law) in its third reading on June 24.\textsuperscript{132} The Council of the Federation approved the New Law on July 12,\textsuperscript{133} and President Yeltsin signed it on July 21. The New Law became effective on the day of its official publication.\textsuperscript{134}

\begin{itemize}
  \item \textsuperscript{123} New Const., \textit{supra} note 12, art. 108(2). This quorum is the same as the one required to amend chapters 3 to 8 of the Constitution itself. \textit{Id.} art. 136.
  \item \textsuperscript{124} \textit{Id.} art. 108(2).
  \item \textsuperscript{125} \textit{Id.} part II, item 2.
  \item \textsuperscript{126} \textit{Id.} item 5.
  \item \textsuperscript{127} \textit{Id.} art. 104(1).
  \item \textsuperscript{128} The Draft, with cover letter by Acting Chairman Vitruk and ten pages of Explanatory Remarks, is on file with the author [hereinafter Draft Law].
  \item \textsuperscript{129} Blankenagel, \textit{supra} note 103, at 75.
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} \textit{Duma Adopts Law on Constitutional Court}, RFE/RL News Briefs, June 27-July 1, 1994, at 1.
  \item \textsuperscript{133} \textit{Council of Federation Approves Law on Constitutional Court}, RFE/RL News Briefs, July 11-15, 1994, at 3.
  \item \textsuperscript{134} \textit{See Art. 6, Federal Law on the Procedure of Publication and Going into Effect of Federal Constitutional Laws, SZ RF Issue No. 8, Item No. 801 (1994). The New Constitutional Law on the Constitutional Court was first officially published in \textit{Rossiiskaia Gazeta}, July 23, 1994, at 4-7. \textit{See also} New Law, \textit{supra} note 115, part VI, ¶ 1. Note that part 6, paragraph 2 of the New Law repeals the previous Law on the Constitutional Court of the RSFSR. \textit{Id.} part VI, ¶ 2.
\end{itemize}
Fears of the legal community that the politically fragmented Parliament elected in December 1993 would be unable to muster the majorities required to pass a constitutional law were unfounded. Both chambers voted swiftly and almost unanimously on the New Law, which the Parliament considered a potentially useful check on the overwhelming constitutional powers possessed by the President.135

The New Law contains six parts, subdivided into fifteen Chapters, containing 115 Articles: I. Organization of the Court and Status of the Justices (Ch. I-III, arts. 1-28); II. General Procedural Provisions (Ch. IV-VIII, arts. 29-83); III. Special Procedures for Different Categories of Cases (Ch. IX-XV, arts. 84-110); IV. Final Provisions (arts. 111-115); V. Transitional Provisions (paras. 1 to 5); VI. Entry into Force (paras. 1 and 2).136

A. Court Structure and Status of Justices

Chapter I of the New Law contains general provisions, including a list of no fewer than twelve competencies of the Court.137 The Court needs a quorum of three-quarters, i.e., fifteen justices, in order to function.138 Five fundamental principles should guide the Court's activities: independence, collegiality, glasnost, adversarial procedure, and equality of the parties.139 Article 7 emphasizes the organizational and financial independence of the Court from all other state organs.140

Chapter II contains provisions concerning the status of justices. Article 8 increases the minimum age from thirty-five to forty141 and raises the required previous legal work experience from ten to fifteen years.142

137. New Law, supra note 115, art. 3.
138. The Draft Law suggested a quorum of two-thirds, i.e., 13 justices. This provision would have enabled the existing Court to function even before the election of new members. Draft Law, supra note 128, art. 5, ¶ 1. Under the formula adopted by the parliament, at least two more justices had to be elected. New Law, supra note 115, art. 4.
139. New Law, supra note 115, art. 5. Adversarial procedure and equality of the parties are new principles and apparently reflect the Court's self-image as a trial court. Article 5 of the previous law had listed legality, independence, collegiality, and glasnost. Old Law, supra note 23, art. 5.
140. Although the Court is separately funded from the federal budget, it handles its funds independently. The funds may not be reduced from one year to the next. Were it not for inflation, these new provisions would considerably strengthen the independence of the Court.
141. This is the requirement of article 3 of the German Law on the Federal Constitutional Court. See German Law, supra note 32, art. 3.
According to article 9, the Council of the Federation must examine the candidates nominated by the President within fourteen days. They are elected by simple majority in a secret ballot. When a vacancy occurs, the President must nominate a candidate within one month. Justices serve single twelve-year terms of office and must retire at age seventy. This provision has obviously been inspired by the German model, except that justices on the German Constitutional Court must retire at age sixty-eight. Under the previous Russian law, the justices were appointed to serve until age sixty-five; the Draft Law submitted by the Court proposed appointment until age seventy, with no term restriction. This would have corresponded to the Austrian model, but the German solution seems to be the better one, for a variety of reasons. Part II, Item 5, of the New Constitution provides for continuity in all judicial organs. All justices retain their powers for the terms for which they were elected. Only vacancies are to be filled under the provisions of the New Constitution. This implies that all thirteen justices of the old Constitutional Court may continue to serve until age sixty-five, whereas six new appointees will serve for non-renewable twelve-year terms under the New Law (unless

143. New Law, supra note 115, art. 9. The article also specifically lists persons and organizations that may propose candidates to the President for nomination, e.g., members of either house of parliament, regional and municipal legislatures of the Russian Federation, supreme courts, the All-Russian Bar Association, and law schools. Id. The Draft submitted by the Court did not contain this clause. It was inserted after the Duma had rejected the Draft on April 11 and had entered into negotiations with the President concerning the future influence of the Duma on the nomination process. Whatever political concessions may have been made are not reflected in the text of article 9: the President is under no legal obligation to consider the proposals of the Duma or any other body. See also Blankenagel, supra note 103, at 75.

144. The Draft Law had suggested two months. A one-month period, provided for by the German Law, supra note 92, art. 5, ¶ 3, and adopted under the Russian statute, would appear to be very short if a serious examination of the legal and moral background of candidates were intended. Cf. Draft Law, supra note 128, art. 9, ¶ 4.

145. New Law, supra note 115, art. 12.

146. German Law, supra note 92, art. 4.

147. Old Law, supra note 23, art. 15.


150. The average age of the 13 Russian justices when they were elected in 1991 was 50. Thus, on average they would have served for 15 years. More rapid turnover in the Court's membership is not only likely to make it more responsive to social and political development, but also to prevent legal petrification at a time when all sitting justices received their training under the Communist system. From this perspective, raising the minimum age to 40 may not have been a wise decision.


152. See also New Law, supra note 115, part V, ¶ 4.

153. The six were to be elected no later than 30 days after the Constitutional Law went into effect. Id. part V, ¶ 2.
one should reach the retirement age of seventy during his term. Article 11 of the New Law addresses the problem of incompatibility, and articles 13 to 19 deal with questions of independence, protection from dismissal, immunity, suspension, removal, and resignation of justices.

Chapter III of the New Law is devoted to the structure and organization of the Court. Whereas the old Constitutional Court, like most other Constitutional Courts, worked as a single body, the new Court functions either in plenary session or in panels. Similar to the German Bundesverfassungsgericht (Federal Constitutional Court), which consists of two permanent panels of eight justices each, the Russian Court is subdivided into two panels of nine and ten justices respectively. The Chairman and Deputy-Chairman belong to different panels while the other justices are assigned by lot. The panels may not remain

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154. Id. art. 12. Unlike one commentator, this author fails to see "an awkward discrepancy" in this. But see Blankenagel, supra note 103, at 75.
155. Article 11 forbids justices to be deputies to representative organs or to hold other public office; they must refrain from any other paid activity except teaching or other academic functions that do not interfere with their work on the Court. Justices may not belong to political parties or movements or engage in any political activities. Before the Court delivers its decision, justices may not publicly state their views on matters that could become cases, or are subject to judicial examination. New Law, supra note 115, art. 11.
156. Article 13 of the New Constitutional Law expressly mentions "material guarantees" of independence such as pay, annual leave, housing, social and consumer services, and health insurance. Id. art. 13. Whereas the Draft Law submitted by the Court proposed elaborate special provisions concerning the material and social security of the justices, the New Law puts Constitutional Court justices on the same footing as other top federal judges. Compare Draft Law, supra note 128, part IV, with New Law, supra note 115, art. 13.
157. The New Law, however, permits termination or suspension under certain conditions. New Law, supra note 115, art. 14.
158. Except for arrest at the scene of a crime, justices are not subject to detention, arrest, investigation, administrative or criminal proceedings without the consent of the Constitutional Court. Id. art. 15.
159. The Court may suspend a justice when it consents to an arrest or criminal prosecution, or when the justice is temporarily unable to carry out duties because of health reasons. Suspension from office does not entail suspension of salary. Id. art. 17.
160. Article 18 lists 12 reasons for removal ranging from procedural error in the justice's appointment (Item 1) to the justice's death (Item 12). Other reasons include voluntary resignation, criminal conviction, declaration of incapacity by a final court ruling, "the commission . . . of an act that brings the honor and dignity of justices into disrepute" (Item 6), "the continuation by the justice, despite warnings from the Russian Federation Constitutional Court, of occupations or actions incompatible with his position" (Item 7), and "failure . . . to take part in . . . sessions, or failure to vote more than twice in succession without a valid reason" (Item 8). As an afterthought to this list, article 18 adds termination on account of disability for health reasons lasting for more than 10 consecutive months. The Council of the Federation may terminate a justice's tenure under Items 1 and 6 on the basis of a recommendation by the Court. In other cases the Court itself may adopt the appropriate decision by simple majority. Id. art. 18, Items 1-12.
161. Article 19 provides for generous retirement benefits. Id. art. 19.
162. Id. art. 20.
163. German Law, supra note 22, art. 2.
164. New Law, supra note 115, art. 20.
unchanged for more than three years, and the members are to take turns as presiding justices.  

Article 21 specifically lists the competencies of the Russian Court that are to be exercised exclusively in plenary meetings. Panels may decide all other cases unless the Court wishes to treat them in plenary session. This differs from the German model insofar as in Germany all cases are decided by the panels, each of which speaks as the Constitutional Court.

The Plenum of the Russian Constitutional Court exclusively: a) rules upon the constitutionality of republic constitutions and charters of other members of the Russian Federation; b) gives authentic interpretations of the Constitution; c) determines whether the procedure for impeaching the President has been observed; and d) exercises legislative initiative on issues within its jurisdiction. In addition, the Plenum elects the Chairman, Deputy-Chairman, and Secretary of the Court by secret ballot for three-year terms with the right to be re-elected. It assigns personnel and cases to the panels, schedules the work of the Plenary meetings, adopts Rules of Procedure, and may suspend or dismiss a justice or remove the Chairman, Deputy-Chairman, or Secretary from their functions. The previous law had not provided for a limitation of terms of the Chairman and the other Court officers. The present provisions are

165. This rule contrasts with the German Law under which the membership of the two panels cannot be changed. Every German justice is elected to a specific panel. German Law, supra note 32, art. 2, ¶ 2. Under German Law, if one panel lacks a quorum, it may be replenished by temporary assignment of justices from the other panel. Id. art. 15, ¶ 2. One panel is chaired by the President, the other by the Vice-President of the Court. Id. art. 15, ¶ 1. The Russian Draft had suggested provisions (subsequently not adopted) by which justices may be assigned to a panel that lacks a quorum (art. 19, ¶ 3), and which would allow a change in the composition of the panels on an annual basis (art. 19, ¶ 5). Draft Law, supra note 128, art. 19, ¶¶ 3, 5.

166. Blankenagel, supra note 103, at 77 ("... leaving to the plenum resolution of (1) more serious cases or (2) any case when three justices demand it").

167. The Plenum only functions to equalize the caseload and to decide a legal question in which one panel wishes to deviate from the legal opinion expressed in a decision of the other panel. Plenary meetings are very rare. German Law, supra note 32, art. 14, ¶ 4, and art. 16.

168. New Law, supra note 115, art. 21. The Court's Draft had envisioned broader exclusive powers of the Plenum, including the examination of questions of constitutionality of federal laws (with the exception of citizens' complaints and judicial referrals), of normative acts of the President, and of international treaties that have not yet entered into force. The Draft also provided the Court with the power to decide jurisdictional conflicts among federal organs of state power in plenary session and gave the Court the right to issue messages (poslanija). Draft Law, supra note 128, art. 20. It remains to be seen to what extent the justices will make use of their power of assuming plenum jurisdiction in matters primarily assigned to the panels.

169. New Law, supra note 115, art. 23.

170. The Court has retained complete flexibility in assigning cases to either panel, whereas the German model provides for a fundamental distinction between a Grundrechtssenat (civil rights panel) and a Staatsrechtssenat (panel for constitutional law questions) plus provisions to equalize the workload, i.e. assigning a fair number of civil rights issues to the other panel. German Law, supra note 32, art. 14.

171. Any suspension or removal requires a showing that the justice violated a duty and may be requested by five justices. The New Law requires a two-thirds vote to impose such punishment. The Draft of the Constitutional Court had proposed a three-
obviously a reaction to Chairman Zorkin's much criticized political activism.172

The jurisdiction of panels includes all competencies of the Court that have not been expressly assigned to or assumed by the Plenum.173 Specifically, these include: a) ruling upon the constitutionality of federal statutes; normative acts of the President, the Council of the Federation, the State Duma, and the Government; statutes and other normative acts of members of the Russian Federation affecting matters of federal or joint jurisdiction; treaties between organs of state power of the Russian Federation and organs of state power of members of the Russian Federation; treaties among members of the Russian Federation; and international treaties that have not yet entered into force; b) settling jurisdictional disputes between federal organs of state power; between organs of state power of the Federation and organs of state power of its members; or among the highest state organs of members of the Federation; c) examining the constitutionality of laws applied or to be applied to specific cases on the basis of citizens' complaints alleging the violation of constitutional rights and freedoms and at the request of the courts.174

B. General Procedural Provisions

The general rules of procedure provide for trial-type oral hearings in open session and explanations by parties as well as testimony from experts and witnesses.175 Sessions in each case are to be held without interruption. The New Law surprisingly retains the provision of the previous constitutional law that the Constitutional Court may not decide other questions...
while the pending case remains unresolved. The Court is merely allowed to work concurrently in panels and in plenary session.

The New Law permits the Secretariat of the Court summarily to reject petitions that clearly fall outside the jurisdiction of the Court or are submitted by unauthorized state organs or persons; the petitioner may demand a respective decision by the Court. The Chairman of the Court assigns all cases to one or several justices for preliminary study to be completed within two months from the time the appeal is registered. The justice(s) then report to the plenary session. The Plenum is to decide on the adoption of the case for examination within one month from the completion of the preliminary study.

One or several justices prepare a case for hearing, compose a draft decision, and present materials at the hearing. The reporting justice and the Chairman decide on the range of witnesses and experts to be summoned or invited to the hearing. The petitioner and the respondent (e.g., the official who signed the contested act) may be represented by counsel and enjoy equal procedural rights.

A hearing begins with an opening statement of the reporting justice. The Court then hears the parties' proposals and decides on a procedure for the examination of the case. The parties are then asked to substantiate their positions with legal argument. After presenting experts and witnesses, the parties deliver their closing statements. The justices then discuss and vote on the issue in closed conference.

Decisions of the Court taken in plenary session or by the panels fall into three categories: (1) a decision on the merits of the case is referred to as a "decree" (postanovlenie); (2) an opinion in the course of an impeachment proceeding against the President is called a "finding" (zak-
liuchenie); (3) all other decisions are referred to as “rulings” (opredeleniya). In reaching a decision the Court is limited to the subject-matter of the petitioner's request and the article of the act which has been challenged. It is not bound by the arguments advanced by the petitioner, and it is not restricted to a literal interpretation of the Constitution. The Court may consider current “official and other” interpretations and administrative practices, as well as the position of the law “within the system of legal acts.”

The Bulletin of the Constitutional Court is to publish dissenting and concurring opinions of individual justices alongside the majority decision. Decisions are also to be published in other official publications of the state organs concerned. They become effective when announced by the Court; unconstitutional acts become immediately invalid. If this nullification creates a gap in legal regulation, the Constitution applies directly. Article 80 does, however, leave the door open for the Court to set a later date for its decision to take effect.

C. Special Procedures

In Part III, Chapters IX to XV (articles 84-109), the New Law sets out special procedures for seven special types of cases: normative acts of organs of state power and treaties between them (ch. IX); international treaties that have not yet entered into force (ch. X); disputes about competence (ch. XI); citizens' complaints (ch. XII); referrals by courts (ch. XIII); interpretation of the Constitution (ch. XIV); and impeachment of the President of the Russian Federation (ch. XV). With respect to each of these categories, the Law addresses four issues: standing, admissibility of the request, limits of examination, and final ruling.

Thus, for instance, the constitutionality of normative acts of organs of state power or treaties between them may be examined at the request of a number of high state organs: the President, one-fifth of the members of the Council of the Federation or the Duma, the Government of the Russian Federation, the Supreme Court or the Supreme Court of Arbitration, and the organs of legislative or executive power of the members of the

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188. New Law, supra note 115, art. 71.
189. Id. art. 74.
190. Id.
191. Id. art. 76 (providing for publication in the Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii).
192. Id. art. 78.
193. Id. art. 79.
194. Id. art. 80. The Austrian Constitutional Court may set a time limit of up to 18 months in the case of statutes, and 12 months in the case of statutory regulations. B-VG, supra note 149, arts. 139(5) and 140(5) (as revised). This approach seems to be more satisfactory than the German options of considering a law “unconstitutional and void,” or “unconstitutional but not void,” or “barely constitutional.” See KLAUS SCHLAICH, DAS BUNDESVERFASSUNGSGERICHT 219-60 (3d ed. 1994).
195. New Law, supra note 115, ch. IX-XV.
The same state organs may ask the Constitutional Court to determine the constitutionality of an international treaty that has not yet entered into force but is subject to ratification by the State Duma or the approval of another federal organ of state power. The review of constitutionality may be "abstract," i.e., the challenge may be brought without a specific case or controversy having arisen. This is typical of the Austrian (and West European) model of constitutional review.

A dispute about competence may be brought to the Court only if a written complaint of the petitioner to his opponent has remained unsatisfied for more than one month or if prior conciliation procedures have failed.

Citizens or their organizations may lodge complaints concerning the violation of their constitutional rights and freedoms. If the Constitutional Court accepts the complaint for examination, it has to notify the state organ concerned, but this notification does not automatically suspend pending proceedings. If the Court considers the contested act or provision unconstitutional, the organs concerned are to decide the pending case accordingly.

At first sight, these provisions appear to broaden considerably access to the Court, in so far as they do not require citizens to exhaust all possibilities of appeal or even await a decision of the trial court. Whereas the previous law granted the Constitutional Court discretion to reject a petition if it considered a review "inadvisable," the New Law appears to allow an appeal as of right with no discretion of the Court and no screen-

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196. Id. art. 84.
197. Id. art. 88.
199. New Law, supra note 115, art. 93, ¶ 5-6.
200. The New Constitution allows for such provisions:

The President of the RF may use conciliation procedures to resolve disagreements between organs of state power of the RF and organs of state power of subjects of the RF, and also between organs of state power of subjects of the RF. In the event of failure to reach an agreed solution he may refer the resolution of the dispute for examination by the appropriate court.

New Const., supra note 12, art. 85(1).
201. Id. art. 97. These complaints are in response to a law that has been applied or is due to be applied by a court or other state organ to a specific case.
202. New Law, supra note 115, art. 98. However, the organ concerned may itself decide to suspend proceedings. Id.
203. Id. art. 100. According to the Court's Explanatory Remarks accompanying its Draft Law, this approach was designed in order to prevent the Constitutional Court from interfering with the jurisdiction of the regular courts. Draft Law, supra note 128, at 8.
204. Article 66 of the Old Law not only required the petitioner to have received a final ruling that had entered into legal force, but also to demonstrate a practice of applying the unconstitutional law—at least potentially—beyond the case in point. Old Law, supra note 23, art. 66.
205. Id. art. 69, ¶ 14.
ing standards whatsoever.206 A careful reading of the Constitution, however, shows that this chapter is not self-executing. It requires enabling legislation to become effective. At least that is how Russian legal scholars understand the qualifying clause in Article 125 of the New Constitution which reads: "The Constitutional Court . . . shall review the constitutionality . . . in accordance with procedures established by federal law."207 This federal law has not been passed as of this writing.

When a court determines that a law to be applied to a case before it is unconstitutional, it shall suspend proceedings and submit the question to the Constitutional Court.208 This provision reflects the German model of richter vorlage (judicial referral)209 and this process may serve as an important teaching device for raising the constitution-consciousness of the ordinary courts. Because this new access to the Court210 also depends upon enabling legislation, it is as yet unclear whether it will apply to all courts (as in Germany),211 only to courts of appeal (Austria),212 or be restricted to courts of last resort (Austria prior to 1975).213

Authoritative interpretations of the Constitution by the Court may be requested by the President, by either house of Parliament, by the Government of the Russian Federation, or by legislative organs of members of the Federation.214 The interpretations are binding on everyone.215

Concerning the problem of impeachment by a hostile parliament, a situation which President Yeltsin confronted more than once, Article 93 of the New Constitution curtails the powers of both the legislature and the Constitutional Court. The State Duma may, with a two-thirds majority of its total membership, indict the President for treason or other serious crimes. The Supreme Court must then determine whether any such crime has indeed been committed. The Constitutional Court is restricted to issuing a finding that the proper constitutional procedure has been observed.216 The Council of the Federation may then remove the President from office, provided that two-thirds of its total membership agree to do so within three months from the date the charge was brought by the

206. New Law, supra note 115, ch. XII.
207. New Const., supra note 12, art. 125(4) (emphasis added).
208. New Law, supra note 115, art. 101. Regular court proceedings shall be resumed after the decision of the Constitutional Court. Id. art. 103.
209. GG, supra note 32, art. 100(1).
210. The final wording of article 125 in the New Constitution suggests that this instrument was agreed upon by the working group revising the Draft Constitution between July 12 and November 10, 1993.
211. GG, supra note 32, art. 100(1).
212. B-VG, supra note 149, art. 140(1).
213. Id. art. 140(1) (before revision).
215. Id. art. 106.
216. Id. arts. 107-11. The Old Law had authorized the Constitutional Court to issue a finding on the substance of the charge; the Supreme Court was not involved in the procedure. Impeachment could be brought for any violation of the Constitution. Old Law, supra note 23, art. 74, ¶ 1. The Constitutional Court could even take the initiative in sending a finding to Parliament. Id. ¶ 2.
IV. Forming the “New” Constitutional Court

In Part Five (Transitional Provisions), the New Law somewhat optimistically (one might also say naively) declares “[t]he full membership of the Russian Federation Constitutional Court must be formed no later than thirty days after the entry into force of this federal constitutional law.” The New Law went into effect on July 23, 1994.

On October 6, 1994, President Yeltsin submitted to the Council of the Federation a list of six candidates for appointment to the Constitutional Court. On October 24, voting by secret ballot, the Council elected only three justices from Yeltsin’s list: Professor Olga S. Khokhryakova (fifty-five years old and an expert in labor law at the Institute of Legislation and Comparative Legal Studies associated with the Government of the Russian Federation), Professor Vladimir A. Tumanov (sixty-eight years old, a leading specialist in legal theory as well as comparative and constitutional law at the Institute of State and Law of the Russian Academy of Sciences, and also a deputy to the Duma from Sergei Shakhrai’s Party of Regional Unity and Accord), and Vladimir G. Yaroslavtsev (forty-two years old, and a judge in the Leningrad City Court). The three other candidates failed to win the required ninety votes: Mikhail Mityukov, First Vice-Chairman of the Duma; Professor Valerii Savitsky, a prominent specialist in criminal procedure; and Associate Professor Mikhail Krasnov, a consultant to Yuri Baturin, President Yeltsin’s national security adviser.

On November 15, 1994, the Council of the Federation voted on a list of five candidates for the remaining three openings on the Court. In the first round of voting, the Council of the Federation eliminated Raif Biktagirov, legal correspondent for the newspaper Izvestiia Tatarstana, and Yurii Kalmykov, Minister of Justice and a prominent specialist in constitutional law. In the final round, professors Valerii Savitskii and Mikhail Krasnov, unsuccessful candidates on October 24 but renominated by the President, again failed to receive the required majority. Only one of the five candidates, Yurii M. Danilov (forty-two years old, former Chairman of the Voronezh Oblast Court, later Deputy Minister of Justice, and at the time of his nomination Deputy Chairman of the State Committee on

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217. New Const., supra note 12, art. 93(2)-(3).
218. He drew his choices from a list of almost 50 names submitted by various institutions and organizations, among them the All-Russian Congress of Judges, the Ministry of Justice, and caucuses of members of Parliament. The President’s personnel policy council screened each candidate. See Yuriii Feofanov, Who Will Staff the Constitutional Court?, Izvestiia, Oct. 11, 1994, at 2.
Antimonopoly Policy), passed scrutiny and brought the membership of the Court to seventeen.221

On December 1, 1994, President Yeltsin nominated two more candidates to fill the remaining vacancies on the Court. On December 6, the Council of the Federation elected Vladimir Strekozov (fifty-four years old, Doctor of Law, Deputy Head of the Military Academy of Economics, Finance and Law, and a major general) with a comfortable majority of 100 votes.222 President Yeltsin’s other candidate, Sergei Vitsin (Doctor of Law, Department Head at the Moscow Higher Police Academy, and also a major general), received only seventy-eight votes and thus was not elected.223

For the last remaining vacancy on the Court, President Yeltsin nominated Robert Tsivilev, who was a legal aide to his Chief of Staff Sergei Filatov. On December 16, 1994, the Council of the Federation cast eighty-six votes (of the required ninety) in favor and forty-five against him, falling short of appointment by merely four votes.224

Assuming he had mustered the necessary votes, President Yeltsin again presented Robert Tsivilev to the Council of the Federation on January 13, 1995. On January 17, Tsivilev was defeated for the second time, garnering only sixty-one votes.225 One reason for this defeat may have been President Yeltsin’s refusal to nominate Issa Kostoev,226 chairman of the Federation Council Committee for Constitutional Legislation, Judicial and Legal Matters, and a popular choice among Council Members.

The unfortunate effect of this political maneuvering between the President and the Council of the Federation was that more than one year after the adoption of the new Constitution the Constitutional Court was still inoperative. This delay was due to the Transitional Provisions of the New Constitutional Law which required the election of the Chairman and other officers of the Court as well as the formation of the two chambers to take place “following the formation of [the Court’s] full membership.”227

223. SZ RF, Issue No. 33, Item No. 3411 (1994).
227. New Law, supra note 115, part V, ¶ 3. “The Russian Federation Constitutional Court, following the formation of its full membership, elects a chairman, deputy-chairman, and justice-secretary, and forms the membership of the panels of the Russian Federation Constitutional Court.” Id. According to a statement by Acting Chairman Nikolai Vitruk on December 30, 1994, the Court would not work until the last vacancy
Meanwhile, Court members grew restive because so many important issues awaited resolution. On December 30, 1994, Acting Court Chairman Niko-
lai Vitruk openly aired his disappointment, pointing out more than sixty open cases on which the Court would have to act.228 Justice Ernest
Ametistov even accused the Council of the Federation of “sabotage” and suggested that the Court resume its work without waiting for the last mem-
ber to be elected.229

On February 2, 1995, President Yeltsin presented to the Council two law professors as candidates for the last vacant seat on the Constitutional Court: Anatoli Vengerov, a prominent specialist in legal theory and con-
stitutional law, and Marat Baglai, an expert in constitutional and labor law.230 On February 7, the Council elected Marat Baglai (sixty-four years old, and First Pro-Rector of the Academy of Labor and Social Relations) by a vote of 101 to thirty.231

On February 13, 1995, the Constitutional Court elected Professor Vladimir Tumanov as Chairman by a vote of eleven to eight,232 and Profes-
sor Tamara Morshchakova as Vice-Chairman, while reelecting Yurii Rudkin as Secretary of the Court.233 On February 15, the Court formed two panels of nine and ten justices, respectively.234 After more than sixteen months of suspension, there was again a functional Constitutional Court ready to assume an active role in the Russian legal and political system.

V. Evaluation of the New Legislation on the Constitutional Court

An analysis of the provisions of the new Constitution and the new Consti-
tutional Law on the Constitutional Court yields a number of surprising obser-
vations. First, the Constitutional Court survived its serious political con-
frontation with the President virtually unscathed. Second, the New Law does not profoundly reflect the lessons that should have been learned from flaws in the previous law and from the Court’s own mistakes in applying that law. Third, the Court and other constitutional law specialists were

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not able to make better use of time-tested foreign models in drafting the New Law.

A. Continuity of Personnel and Functions
After Valerii Zorkin's reluctant resignation as Chairman on October 6, 1993, the Court, under Acting Chairman Nikolai Vitruk, kept a low profile and apparently came to terms with the President in such a way as to emerge relatively unharmed in the revised (November 10, 1993) Draft of the Constitution. Threats and fears that the Court might be dissolved, and that some of its major functions would be abolished or transferred proved to be unfounded.

All thirteen justices from the Old Court retained their "life tenure" (until age sixty-five) and benefits. These thirteen had been nominated by the Chairman of the Supreme Soviet (Ruslan Khasbulatov) and appointed by secret election in the Congress of People's Deputies on October 29, 1991. At that time, six of the justices were members of Parliament. The nominations were largely part of a package deal adopted by all parliamentary caucuses, including the Communists. The agreement was reached before the unsuccessful August 1991 coup against Gorbachev and was not affected by the latter. With one exception (Tamara Morshchakova), all thirteen justices had been members of the CPSU.

Given the fact that nine of these justices consistently opposed President Yeltsin in the past, the constitutional provision for the election of six additional justices by the Council of the Federation can hardly be considered a court-packing bill. It does not automatically assure the President of a solid majority on the Court, although the right of nomination would appear to enable him to alter the balance in his favor. Surprisingly, in the course of constitutional reform the President did not demand the right to nominate the Chairman and Deputy-Chairman of the Court. The absence of this nomination right seems to further reduce the influence of the President and enhance the independence of the Court.

The professional backgrounds and qualifications of the new appointees show no dramatic departure from past appointments. Seven of the original thirteen justices—the Parliament was incapable of filling the remaining two openings—possess the highest academic qualification in law (the doctor iuridicheskikh nauk degree). One of the justices is female (Morshchakova) and two justices are members of ethnic minorities (Gadshiev from Dagestan and Ebseev from Saratov).

Of the six new appointees, four possess the highest academic qualification (the doctorate of law), and two are former judges. Some observers

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235. New Const., supra note 12, art. 125.
236. New Const., supra note 12, part II, item 5.
237. Hausmaninger II, supra note 21, at 332.
238. In Austria, they are nominated by the government and appointed by the Federal President; in Germany they are elected by parliament. B-VG, supra note 149, art. 147(2); German Law, supra note 32, art. 5.
239. VESTNIK, supra note 24, at 13 (Morshchakova), 10 (Gadshiev), and 17 (Ebseev).
may consider these appointments a correction of a weakness of the old Court.\textsuperscript{240} One of the six new appointees is a woman and none represent an ethnic minority, while at least two (the two former judges) come from cities other than Moscow. Their average age is fifty-four, very close to that of the original justices. However, Chairman Tumanov will reach age seventy in less than two years, at which time he must leave the Court. An appointment of such limited duration would never happen in Germany or Austria, but the Russian situation is unusual, and Professor Tumanov may yet play a valuable role in directing the new Court during his brief tenure. Perhaps President Yeltsin planned to put a trusted person on the Court other than Tumanov, who could have been elected Chairman, but the Council of the Federation thwarted his ambition. It is also possible that several candidates refused to enter the contest unless they were assured of the Chairmanship. Whereas the election of Valerii Zorkin was predicted by many political insiders in 1991,\textsuperscript{241} the current situation was less clear.

Russian Constitutional Court justices are products of the Communist \textit{nomenklatura} system. They would not have reached their positions without the political loyalty and adaptability required by that system. Some of them may have retained more conservative political beliefs, while others may have developed progressive views. As long as it appeared possible, or even likely, that the Parliament would emerge victorious from its struggle with the President, the conservatives on the Court could well afford to challenge the President in the name of "constitutional legality." Once the President had consolidated his power, political opposition became self-destructive. In a system that continues to be based on quasi-feudal alliances and opportunism, it will not be surprising to find a more cooperative attitude on the part of the President's former opponents on the Court as long as the President appears to have firm control of the vast powers allocated to his office under the new Constitution. In light of his first appointments, President Yeltsin seemed reasonably certain that the future Court would respond to his political needs. However, the subsequent brutal and incredibly clumsy handling of the Chechnya situation has raised grave doubts about the course of Russian politics in the minds of many Russians, including President Yeltsin's most loyal supporters.\textsuperscript{242} A political crisis of enormous magnitude may again engulf all Russian institutions, including the Constitutional Court. From this perspective, much will depend on the signals which the Court sends in its first decisions.

\textsuperscript{240} See Blankenagel, \textit{supra} note 103, at 76. It may be true in a very limited sense that former judges are more accustomed than law professors to the procedural fetters imposed on the work of the Court. However, academic lawyers are more likely to bring about a much-needed change in legal perspective than are career judges reared in the Soviet tradition. Unfortunately, nobody thought of appointing a successful defense attorney to the Court.

\textsuperscript{241} This was the impression I received in Moscow in the summer of 1991. \textit{But see Zorkin Aspired to the Presidency}, \textit{Izvestia}, Nov. 20, 1993, at 4, \textit{translated} in 45 \textit{Current Dig. of the Post-Soviet Press} No. 47, at 10 (1993) (Acting Chairman Vitruk stated that the outcome of the election was neither predetermined nor certain).

\textsuperscript{242} See Chechen War Meets Mounting Opposition in Russia, 46 \textit{Current Dig. of the Post-Soviet Press} No. 52, at 9-12 (1995).
B. Learning from the Past

The New Law unquestionably intends to correct technical shortcomings of the Old Law and to redefine and strengthen the Court’s role in an emerging legal system characterized by separation of powers and the rule of law. It makes several promising attempts to reinforce the independence of the justices and to depoliticize the activities of the Court. The most obvious step in the direction of depoliticization is the elimination of the Court’s right to take the initiative in impeachment proceedings. A similar depoliticization will result from the Court’s new standing requirements for presenting the Court with a constitutional question. Previously, the Court granted standing to any deputy. The New Law, however, requires at least one-fifth of the total membership of either house of Parliament to present a constitutional question. It also abolishes standing for social associations in matters of abstract review. Despite these restrictions, the standing requirements are still extremely vague and undifferentiated; they provide little safeguard against the Court’s involuntary involvement in political conflicts.

The Old Law assigned no fewer than five nonjudicial functions to the Court: the finding (zakliuchenie), the representation (predstavlenie), the participation in sessions of other state organs, the legislative initiative, and the message (poslanie). Some of these were clearly remnants of the Communist past and were eliminated in the New Law for good reason. Justices of the Constitutional Court certainly should not participate actively in sessions of other government bodies. There is no need for the Court to point out violations of the law to other state organs through separate representations, and there is no justification for a requirement that the Court report annually to the legislature.

Although the Court generally did not have the right to issue findings on its own initiative, it did have this right when determining the constitutionality of actions and decisions by the President and other high state officials which could justify the initiation of impeachment proceedings. Old Law, supra note 23, art. 32, ¶ 2. While it seems appropriate to eliminate this blatantly political authority, it is hard to understand why the New Law also abolished a more sensible provision of the Old Law which allowed the Court to go ex-officio beyond the submitted request in order to examine a constitutional question. Id. art 32, ¶ 3. This principle of ex-officio review, present in certain European models of constitutional adjudication, is rejected in article 74 of the New Law: “The . . . Court adopts decrees and produces conclusions solely on the subject indicated in the appeal and only in respect of the section of the act or the competence of the organ whose constitutionality is questioned in the appeal.” New Law, supra note 115, art. 74.

Admonitions may, of course, be contained in regular opinions of the Court. The Court should, however, take steps to ensure that other state organs and the public are periodically informed of its activities and observations. See Constitutional
nonjudicial functions remaining in the New Law are the legislative initiative and the finding. The former was redefined, but the need for this function is questionable. The right to issue findings is now confined to technical aspects of the impeachment process, and there is also little justification for retaining this function.

Unfortunately, the Russian legal and political establishment retained a major obstacle to efficient constitutional review: the obligatory public hearing, which involves elaborate and immensely time-consuming adversarial fact finding and pleading procedures, from which the Law contains no escape clause. No potential argument turning on "glasnost" or "legitimacy" justifies the incredible waste of time and energy which these procedures require, and the resulting inability to deal swiftly and effectively with the many serious issues confronting the Court. The inexplicable retention of the provision that prohibits the Court from treating other, potentially urgent, cases before resolving pending cases aggravates this situation.

C. Learning from Foreign Experience

During the past four years, the Court and supporters of a more efficient constitutional review process in Russia have had ample time and opportunity to study successful models of constitutional adjudication—European and American—in numerous meetings with foreign colleagues, scholars, and advisers. The result of this intellectual exposure has been modest, at best.

Arguably, the introduction of twelve-year terms and two panels, as in Germany, may enhance quality and speed in the Court's work. However, the reservation of important functions to a nineteen-member plenum—including the adoption and assignment of every individual case for examination—shows that profound political distrust overwhelms considerations of professional efficiency. Despite this manifest distrust, reformers could have adopted safeguards to secure the jurisdiction of the full court while also utilizing the positive experiences of the countries (e.g., Germany and Austria) with smaller screening panels and screening standards. A

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254. New Law, supra note 115, art. 3, ¶ 6 ("[t]akes legislative initiatives on questions within its own purview . . . ").
255. Id. arts. 107-10.
256. See Blankenagel, supra note 103, at 77-78 (criticizing "[t]his very Russian approach . . . ").
257. Sergei Pashin, who had drafted the previous law while serving on the staff of the Supreme Soviet and now heads the Department of Court Reform in the President's State Legal Administration (GPU), has indirectly criticized the delay this provision may impose. One wonders why Pashin, who actively participated in the drafting process, was unable to assist in the development of a more efficient Court. See Sergei Pashin, A Second Edition of the Constitutional Court, E. EUR. CONST. REV., Fall 1994, at 82, 83.
258. Smaller screening panels will be necessary for the adjudication of citizens' civil rights complaints if and when this dormant procedure becomes operative under future enabling legislation. See supra note 174 and accompanying text.
positive development may be seen in the authorization of the Court to extend the life of legislative acts judged unconstitutional so as to avoid regulatory vacuums (as is the case in Austria). In addition, an especially noteworthy feature of the new Russian legislation is to obligate judges in the ordinary court system to certify constitutional questions to the Constitutional Court. This judicial referral is an important part of the German and Austrian systems of constitutional adjudication, and raises the constitution-consciousness of the ordinary judiciary. Unfortunately, the same provision in the Constitution that declares the right to bring a citizen's complaint to the Constitutional Court as non-self-executing also applies to judicial referral. It will be practically impossible to implement this process without concurrent structural and procedural reform, which would profoundly affect the work of the Court. Such change would include the development of screening panels with clear standards and expedited procedures designed to avoid unacceptable delays.

A negative development is that the Court no longer has the right to examine the constitutionality of political parties. It is with good reason that the German Constitution assigns this politically sensitive task to the Constitutional Court rather than the regular court system. The same observation applies to electoral disputes.

Conclusion

I have attempted a first—and necessarily selective—evaluation of the technical aspects of the new Russian Constitutional Court such as structure, functions, and procedures. The real test will be the quality of opinions rendered by the Court and the acceptance and enforcement of these opinions by the other branches of government, particularly the President and his government. The Constitutional Court has a new, although this time more limited, opportunity to promote the establishment of the rule

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259. The Draft Law provided that the Court could refuse to examine a complaint that was "clearly unfounded." The New Law does not contain this clause. Draft Law, supra note 128, art. 96.

260. This period must not exceed six months or one year for unconstitutional ordinances (depending on the character of the ordinance), 18 months for unconstitutional statutes, and one or two years for unconstitutional treaties, depending upon the character of the treaty. B-VG, supra note 149, arts. 139(5), 140(5), and 140a(1).

261. This provision was not contained in the July Draft of the New Constitution.

262. GG, supra note 32, art. 100(1).

263. B-VG, supra note 149, art. 139(1).

264. But see Pashin, supra note 257, at 83 ("[This procedure] impedes the development of their understanding of the Constitution and, in the long run, will prevent the direct application of the Constitution in ordinary cases."). Experience in Western Europe has demonstrated that the opposite is true.


266. GG, supra note 32, art. 21, ¶ 2.

267. I fail to appreciate Blankenagel's view of "the really vital question": After the storming of Parliament and its own suspension, the Court has never given any sign that it can stand against Yeltsin's free and autocratic disposition over the future of the Court. To an outside observer, the law looks like a deal that could be formulated as "no bad feelings or revenge for the past and feel
of law. To achieve this end, patient persuasion may be more helpful than overt confrontation. The Court must refrain from political involvement, and individual justices must avoid public posturing if the Court hopes to affect and protect an emerging Russian legal culture. Since its suspension on October 7, 1993, the Constitutional Court has had ample time to ponder past mistakes and reflect on a future course of action. It may have concluded that it should both signal and practice judicial restraint as its guiding principle until by solid legal work it will have earned that level of respect and legitimacy which will enable it to move forward to the sort of legal activism exhibited by other constitutional courts in other political systems. The Russian Court has yet to learn the skills and become aware of the responsibilities of a judicial activism practiced in the public interest, as well as the art of interacting with other governmental organs in a functioning democratic society. Given the level of political culture in Russian legislative and executive bodies, one may assume that these bodies will have to undergo even more profound learning processes. While Russia’s road to a flourishing democratic society under the rule of law will be long and arduous, there is clearly no alternative.

free to regulate our future." But, in compromising in this way, the Court and the justices may have lost their identity, pride and dignity.

Blankenagel, supra note 103, at 79.

268. I do not share Pashin’s gloomy vision of two equally unproductive developmental alternatives:

It is unlikely that under present circumstances constitutional control in Russia will prove very effective. On the one hand, since it is not legally responsible for its decisions, the Constitutional Court may attempt a power play to repair its damaged reputation. On the other, a meek Court, preoccupied with self-preservation and obediently approving unlawful but “reasonable” acts, will pose an equal danger to Russia today.

Pashin, supra note 257, at 85.