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**CREATING A CONSTITUTIONAL DEMOCRACY IN RUSSIA:
THE SEPARATION OF POWERS AND THE RUSSIAN CONSTITUTIONAL
COURT**

by

BRENDA J. GODDARD, B.A., LL.B.

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements for the degree of

Master of Arts

Department of Central/East European and Russian-Area Studies
(CERAS)

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ABSTRACT

This paper examines the role that the Russian Constitutional Court played in Russia's transition towards the creation of a constitutional democracy between 1991 and 1993. The period was characterized by economic chaos and political struggle, and amid this turmoil the Russian Constitutional Court came into existence and tried to serve the constitution-building process. Unfortunately, the Court became politicized and was suspended in September 1993 when the constitutional crisis reached a deadlock. In an attempt to explain this politicization, this paper explores theoretical issues based in constitutionalism and state-building, the political role of courts, strategic choices, institutionalism and political and legal culture. Although many factors had a part in the Court's politicization, institutional and strategic choice factors were central to the Court's problems.

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To my parents, John and Irene, thank you both for all the love and support you have given to me.

And to my wonderful friends for their moral support and unfailing encouragement, thank you.

Men make their own history, but they do not make it just as they please, they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past.

- Karl Marx

The achievement of justice cannot be disconnected from law, and law cannot be disconnected from judicial institutions.

- Jerold I. Waltman

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INTRODUCTION

In the early 1990s, Russia entered a new era of democratization and constitution-building. The period was characterized by economic chaos and political struggle, and amid this turmoil a newly formed institution, the Russian Constitutional Court, came into existence in order to serve the constitution-building process. Establishing the separation of powers was difficult for all branches of powers, the Court being no exception. By the end of its first term, it was severely criticized for the politicization of its members. This paper will examine the role that the Constitutional Court played in Russia's journey towards the creation of a constitutional democracy and explain why the Court became so politicized.

A. HISTORICAL BACKGROUND

In the late 1980s, the Soviet Union, under Mikhail Gorbachev, General Secretary of the Communist Party of the Soviet Union (hereafter CPSU), embarked on a programme of reform, comprised of the concepts of *perestroika*, *glasnost* and democratization. The democratization program began at the January 1987 Central Committee Plenum and in June 1988, it was endorsed at the 19th Party Congress.¹ At the 19th Party Congress, the Party also pledged itself to the ideal of a "rule-of-law state."²

Philip G. Roeder, *Red Sunset: The Failure of Soviet Politics* (Princeton: Princeton University Press, 1993), 212.

Jane Henderson, "The Soviet Constitutional Reforms of December 1 1988: an Analysis of the Changes from Draft to Law," in *Legal History and Comparative Law: Essays in Honour of Albert Kiralfy*, ed. Richard Plender (London: Frank Cass & Co. Ltd., 1990), 88.

The policy of democratization led to significant political changes within the USSR, which in turn fostered extensive changes in the politics of the Russian Republic (RSFSR). As the CPSU's grip on society relaxed, the discussion of the role that law would play in the reform process became part of the political discourse. Gorbachev maintained that only by changing the constitutional order of the Soviet Union could stagnation be rooted out. Philip Roeder argues that the basis of Gorbachev's reforms was to transform the constitutional structure in order to make "the policy process more hospitable to reform and political institutions more adaptable to social change."⁴

On December 1, 1988, the USSR Constitution of 1977 was amended by the extraordinary 12th Session of the 11th Supreme Soviet.⁵ The major constitutional change was the introduction of the institution of the Congress of People's Deputies at the USSR, at union-republic and autonomous republic levels (arts. 89, 108, 137 and 143). The People's Deputies were to be elected by direct suffrage: 750 deputies from territorial electoral districts, 750 deputies from nationality-territorial electoral districts, and 750 deputies from all-union social organizations.⁶ After the Congress was elected, the Deputies then elected a Supreme Soviet and a Chairman of the Supreme Soviet.⁷

Roeder, 214.

⁴ Henderson, 73.

Art. 109, "Ob izmeneniiakh i dopolneniiakh konstitutsii (osnovnogo zakona) SSSR," *Vedomosti Verkhovnogo Soveta SSSR*, No. 49, st. 727 (7 dekabria 1988 g.) 817.

⁷ See art. 111, *ibid.*, 818.

The constitutional reforms also introduced a change over the control of constitutionality by creating the Committee of Constitutional Supervision.⁷ However, control over constitutionality was not given exclusively to the Committee on Constitutional Supervision, resulting in some overlap of functions. The Presidium of the Supreme Soviet of the USSR retained the right under Art. 119(5) to:

... exercise control over the observance and secure the conformity of the constitutions and laws of the union republics to the USSR Constitution and the laws of the USSR.⁸

In 1989 and 1990, the first competitive elections for the Congress of People's Deputies were held in the Soviet Union. As part of this new process, Boris Yeltsin was elected chairman of the Supreme Soviet of the Russian Soviet Federal Socialist Republic (hereafter RSFSR) and immediately declared the RSFSR to be a sovereign republic in June, 1990. With republic status, the RSFSR was able to set up an internal political structure separate from that of the USSR. By the end of 1990, the Russian Parliament had adopted a number of laws designed to wrest power from the Soviet centre.⁹ These were mainly in the economic field.¹⁰

The legislative structure of the RSFSR consisted of a bifurcated legislature comprised of a large occasionally-meeting Congress of People's Deputies and a much smaller full-time parliament (the Supreme Soviet). The Congress had power to adopt and

Art. 125, *ibid.*, 825.

⁷ Art. 119(5), *ibid.*, 822.

⁸ Stephen White, Graeme Gill and Darrell Slider, *The Politics of Transition: Shaping a Post-Soviet Future* (Cambridge: Cambridge University Press, 1993), 85.

⁹ A law on economic sovereignty claimed Russian ownership of its natural resources and the right to regulate foreign exports of its raw materials; *ibid.*

amend the Constitution, while the Supreme Soviet was empowered to adopt laws. Under this model, the Supreme Soviet was to delegate power to executive organs. The main power base within parliament was invested in an inner body called the presidium, composed of the Chairman of the Supreme Soviet and the chairs of its committees. Thus, the Supreme Soviet was the full-time legislative institution. The Congress met intermittently to decide matters of constitutional significance. The Congress could also instruct the Supreme Soviet to write legislation and present it to the Congress for final approval.¹¹ At the first Congress of People's Deputies (May 16-June 22, 1990), Boris Yeltsin was elected chairman of the Supreme Soviet, making him the effective head of state for the RSFSR.

Other constitutional changes were also occurring during this historical period. First the USSR, and then the RSFSR, amended their respective constitutions in order to establish the post of President.¹² At the Third Congress of People's Deputies of the RSFSR (March 28-April 5, 1991), Yeltsin was able to pass constitutional amendments which defined the powers of the president. At the Fourth Congress (May 21-25, 1991), Yeltsin won approval of a motion to hold Russian presidential elections in June, which he proceeded to win.¹³

¹¹ Remington et al., "Transitional Institutions and Parliamentary Alignments in Russia, 1990-1993," in *Parliaments in Transition: The New Legislative Politics in the Former USSR and Eastern Europe*, ed. Thomas F. Remington (Boulder: Westview Press, 1994), 162-63.

¹² "Ob uchrezhdenii posta Prezidenta SSSR i vnesenii izmenenii i dopolnenii v Konstitutsiiu (Osnovnoi Zakon SSSR)," *Pravda*, 16 March 1990. Mikhail Gorbachev was the first and only President of the USSR.

¹³ Alexander Sobyenin, "Political Cleavages Among the Russian Deputies," in *Parliaments in Transition: The New Legislative Politics in the Former USSR and Eastern Europe*, ed. Thomas F. Remington (Boulder: Westview Press, 1994), 185.

Within months of Yeltsin's election, the legitimacy of the USSR was seriously and irreparably challenged by the Communist hard-liners. On the morning of August 19, 1991, Soviet tanks rolled into Moscow and the GKChP [State Committee on the State of Emergency] announced that it had taken control of the government from Gorbachev. Although this coup attempt was quickly put down by Yeltsin and his supporters, it nevertheless signaled the demise of the USSR. Power shifted to the leaders of the republics and Yeltsin's power, in particular, was boosted by the collapse of the central institutions.¹⁴ Meanwhile, the USSR Congress of People's Deputies held its fifth and final Congress in September 1991. As its final act, one of the two chambers of the Supreme Soviet met on December 26, 1991 and voted to liquidate the USSR.¹⁵

The August coup attempt gave Yeltsin the momentum and support to ask for additional powers to enact his program of radical economic reform. He was granted special powers to enact economic reform measures by decree at the 5th Congress of People's Deputies (October 28-November 4, 1991).¹⁶

Amidst this political turmoil, a newly created constitutional institution was poised to enter the political arena. On July 12, 1991, at the Fourth Congress of People's Deputies of the RSFSR, the Russian Congress of People's Deputies passed the "Law on

¹⁴ White et al., 91.

¹⁵ *Vedomosti Verkhovnogo Soveta SSSR*, 1991, no. 52 (25 dekabria 1991 goda), 2015.

¹⁶ Remington et al., 171.

the RSFSR Constitutional Court"¹⁷ The creation of the Constitutional Court was hailed as the first step toward consolidating the democratic principles of the rule of law and the separation of powers in Russia as the Court was to be the supreme guardian of the Constitution.¹⁸ The Court's main function was proclaimed to be "a counterbalance to the undivided presidential authority or to unconstitutional activities of the Parliament itself."¹⁹

B. THE AIM AND PURPOSE OF THIS RESEARCH

In the Court's infancy, many Western analysts believed that the Court was demonstrating courage and commitment to the rule of law. The Court appeared to be acting in an independent and impartial manner, and the political leadership appeared to be prepared to accept the decisions of the Court. However, despite its promising start, the Court eventually became caught up in the political struggle between the legislative and executive branches of government and was unable to act as an independent arbitrator of conflicts or as a bulwark to authoritarianism. In the fall of 1993, the struggle for power reached its limits, and Yeltsin disbanded the Congress of People's Deputies and the Supreme Soviet. Claiming that he had been unable to work with these institutions,

¹⁷ Andrei Surzhanskii, "Constitutional Court Law Endorsed," (text). Moscow TASS in English (12 July 1991). FBIS Daily Report-Soviet Union, 12 July 1991 (FBIS-SOV-91-134), 87. The original Russian law may be found at "O Konstitutsionnom Sude RSFSR," *Vedomosti RSFSR*, No. 30, st. 1017 (25 iuliia 1991 goda) 1250-1291. For the English translation, see "Law on RSFSR Constitutional Court," (text). Moscow Rossiiskaia gazeta (14 August 1991). FBIS Report-Soviet Union 10 September 1991 (FBIS-URS-91-029), 21-46; hereafter it will be referred to as the "Constitutional Court Act."

¹⁸ Carla Thorson, "RSFSR Forms Constitutional Court," *Report on the USSR* 2, no.50-51 (1991), 13-16; and Julia Wishnevsky, "Russian Constitutional Court: A Third Branch of Government?" *RFE/RL Research Report* 2, no.7 (1993), 1.

¹⁹ Statement made by Sergei Shakhrai, Chairman of the Parliamentary Committee on Legislation, to TASS correspondent Andrei Surzhanskii, "Constitutional Court Law Endorsed."

Yeltsin called for parliamentary elections for December 1993, and a national referendum to ratify a new Constitution. These actions, coupled with the expansion of presidential powers in the new Russian Constitution, indicate a shift toward authoritarian rule. The constitutional crisis that occurred in 1993, and the Court's involvement in it, mark a disruptive politicization of the Court. Three questions arise: (1) Why did the Constitutional Court fail in preventing this shift? (2) Is there something about a constitutional court that makes it inimical to the democratization process? (3) What caused the members of the bench to lose their impartiality?

This paper will examine Russian's early attempts to democratize and establish a constitutional regime. The primary focus will be to assess the value of a judicial institution such as a Constitutional Court to this process and on the particular issue of the role of the Russian Constitutional Court in Russian politics between 1991 and 1993. At the heart of this analysis are questions concerning the role of the judiciary in constitution building, democratization and democratic consolidation.

North American political theorists have long debated the issues of democratic transition and consolidation. Unfortunately, the question of the judiciary's role in the consolidation of a democracy has not been addressed in Western political theory. Literature on the concepts of constitutionalism and judicial review also fails to address this issue. Political and legal theorists have explored the relationship between judicial

review and democracy in states that are already considered to be democracies, but not the question of this relationship in developing democracies.

Part of the reason for this lack of theoretical study on the role of the judiciary in the building of a democratic political system has been the separation of law and politics in scholarly discourse. According to Alec Stone:

... in all European countries, academic discourse on law and courts is the privileged domain of law professors, the vast majority of whom are exercised exclusively by traditional, jurisprudential concerns. In this discourse, there is a fierce resistance to the notion that constitutional courts are political actors at all; a radical dissociation between legal and policy-making processes is propagated; and the impact of courts on macro politics is obscured or altogether ignored.²⁰

Neal Tate also laments the fact that there has been a lack of analytical effort by scholars of comparative politics and of public law concerning the role and significance of judiciaries as political institutions.²¹

This paper will attempt to reconcile the association between law and politics by examining the case study of the Constitutional Court's in the Russian political process. It will explore the issue of why President Yeltsin, the legislature and the members of the Court were unable to support and maintain the concept of the separation of powers, and

²⁰ Alec Stone, "Abstract Constitutional Review and Policy Making in Western Europe," in *Comparative Judicial Review and Public Policy*, eds. D.W. Jackson and C. Neal Tate (Westport, Conn.: Greenwood Press, 1992), 41.

²¹ C. Neal Tate, "Courts and Crisis Regimes: A Theory Sketch with Asian Case Studies," *Political Science Quarterly*, 46, no. 2 (1993), 313.

the issue of whether Western political theory can offer an explanation for what was occurring in the Russian political arena during this period.

Given that theoretical literature, be it political or legal, does not exist on the question of the judiciary's role in a transition to democracy, in this paper I will attempt to extract from the existing body of political theory the main principles concerning the concepts of constitutionalism, democracy and judicial review, the role of elites (strategic choice theory), theories on sequencing, institution building, and political and legal culture. I will examine the question of whether these theories can be used to explain the struggle that erupted between the executive, legislative and judicial branches of the Russian government, as well as the struggles within the Constitutional Court itself. Did the Court play a negative or positive role in the democratization/constitution-building phase in Russia, and what, if any, lessons can be learned from that experience?

I will do this by examining the Court's enabling legislation and the constitutional cases that it dealt with between 1992-1993. Although the Court looked at a number of cases, I will only review those that dealt with separation of powers issues, thus omitting any examination of human rights cases. I will also examine the political power struggle that erupted between Yeltsin and the Russian parliament as well as the Court's increasing involvement in it.

After Court was suspended in 1993, a Committee was formed to draft a new law on the Constitutional Court. This law, which was passed in June 1994 will be reviewed to assess whether it addresses problems that the Russian political and legal elites saw with the previous law on the Court.

This paper does not purport to be an exhaustive examination of every possible theory on the democracy-building process. It will be limited to an examination of American political theorists. The paper will also not question the motives of the Soviet and Russian elite to democratize their political system. As stated by Dankwart Rustow: "In short, democracy, like any collective human action, is likely to stem from a large variety of mixed motives."²² The real reasons behind the collapse of communism and the embrace of democracy is not the issue of this paper. What is of concern is the process that this decided course of political and legal reform followed and the role the Constitutional Court had in it.

²² Dankwart A. Rustow, "Transitions to Democracy: Toward a Dynamic Model," *Comparative Politics* 2 (April 1970), 357.

CHAPTER ONE - LITERATURE REVIEW

Although the topic of this paper necessitates an examination of the transitions to democracy literature, its primary goal is not to determine which of the existing models best applies to Russia. The purpose of reviewing this body of literature is to search for a model which helps to elucidate the role of the judiciary in the consolidation of democracy and constitution building process in a post-communist system political system. This, of course, necessitates an examination of the political events which occurred in Russia during 1991-1993, as these events had a vital impact on the viability of the Court. To help us to understand the political environment that the court was in, an examination of literature of democratic transitions and consolidation will be useful.

One of the fundamental theoretical obstacles in determining this role is to reconcile the somewhat disparate theories of democracy and constitutionalism.

A. DEMOCRACY, CONSTITUTIONALISM, AND JUDICIAL REVIEW

The definition one gives to the term "democracy" can raise confusion when trying to reconcile it with the idea of constitutionalism. Classical theories of democracy define it as "the will of the people" and the "common good."¹ In its simplest terms, democracy is the rule of the majority. However, this classical definition was criticized by Schumpeter for being imprecise and ambiguous. Schumpeter defined democracy as: "an

¹ Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper, 1947).

institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."² This definition emphasizes institutions, procedure and competition.

The competitive aspect of democracy, with an emphasis on competitive elections, has been used by many scholars as the starting point of a democratic system. Both Lipset and Diamond define democracy as a system of institutionalized competition for power.³ Huntington also uses the competitiveness model of democracy,⁴ while Przeworski defines democracy as "organized uncertainty": "Actors know what is possible, since the possible outcomes are entailed by the institutional framework; they know what is likely to happen, because the probability of particular outcomes is determined jointly by the institutional framework and the resources that the different political forces bring to the competition." What the actor does not know is whether he will win or lose.⁵

However, these and other scholars also realize that there may be more to the definition of democracy than simply a competitive struggle for power. Many subscribe to the point of view that civil liberties are a necessary part of the definition of democracy.

² *Ibid.*, 269.

³ Seymour M. Lipset, *Political Man: The Basis of Politics* (Baltimore: Johns Hopkins University Press, 1981), 27; Larry Diamond, "Beyond Authoritarianism and Totalitarianism: Strategies for Democratization," in *The New Democracies: Global Change and U.S. Policy*, ed. Brad Roberts (Cambridge, MA.: MIT Press, 1990).

⁴ Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991), 6-7.

⁵ Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 1991), 13.

Huntington has claimed that his competitiveness definition "implies the existence of those civil and political freedoms to speak, publish, assemble, and organize that are necessary to political debate and the conduct of electoral campaigns."⁶ Yet, the protection of civil liberties goes beyond the need to safeguard the competitive electoral process. By securing civil liberties, the citizen gains protection against the state and against the will of the majority when and if he wishes to participate in society, if he criticizes and challenges those in authority, and when he transgresses against society's rules of conduct.

If we view civil liberties as part and parcel of the definition of democracy, then the theoretical differences between it and constitutionalism, that is, the idea of limiting the power of the government, are no longer quite so irreconcilable. At the very least, constitutionalism can be viewed as a necessary element of modern day democracies.

Constitutionalism has been defined as "a state of mind - an expectation and a norm - in which politics must be conducted in accordance with standing rules or conventions, written or unwritten, that cannot be easily changed."⁷ A constitution, on the other hand, is that written document that embodies these rules.

A constitution can hold in check the will of the majority and the decision-making power of the elected officials by requiring all decisions to conform to a higher set of pre-

⁶ Huntington, 7.

⁷ Jon Elster, "Constitutionalism in Eastern Europe: An Introduction," *The University of Chicago Law Review* 58, no.2 (1991), 465.

existing rules. A constitution will usually place interpretation outside of the hands of the majority, thus ensuring a system of checks and balances. Normally the process to amend the constitution is complex in order to ensure that the majority will not be able to change the constitution in order to meet its current agenda. In constitutional democracies, the responsibility of ensuring that the government abides by the constitutional norms has been entrusted to an independent and impartial judiciary, which ensures that government legislation and activity complies with the constitution through a mechanism known as judicial review.

Obedience to these fundamental principles is known as the rule of law; that is, the law is applicable to everyone and is above everyone. Constitutionalism embodies the rule of law because it emphasizes the idea that a set of higher laws establishes the framework in which society and government operate. Theoretically, constitutionalism and the rule of law will prevent bureaucratic and legislative arbitrariness, as well as the violation of minority rights by the majority. As stated above, an independent judiciary has come to play a vital part in ensuring that the rule of law is maintained.

Western political and legal theory maintains that an independent court, exercising the power of judicial review, can play an important role in society in the following manner:

(1) In a federal state, the court can act as the arbitrator of conflicts between the centre and the regions (the division of powers):

- (2) the courts can resolve conflicts between the executive and legislative branches and maintain the separation of powers;⁸
- (3) the court can act as a bulwark against authoritarianism;
- (4) the court can protect individual rights and freedoms.⁹

These four functions embody the central idea of judicial review in modern society. Yet, these functions place the judiciary at odds with the legislative and the executive branches of government. Constitutionalism thus embodies the notion of constant tension between the judiciary and the other branches of government, in addition to the tension which already exists between the executive and the legislature.

As stated above, unless the importance of the protection of civil liberties and minority rights is recognized as a valuable component of a stable democracy, it is difficult to reconcile democracy with the concepts of constitutionalism and judicial review. The court's lack of accountability is inherently anti-democratic and could pose significant dangers. Moreover, judicial action in deciding constitutional issues necessarily excludes the citizenry from the political process.¹⁰ Yet, constitutional

⁸ Please note, by 'separation of powers,' I am referring to the allocation of powers between the executive, legislative and judicial branches of government. When referring to the allocation of powers between the central government and the constituent parts of a federal state, I will use the expression 'division of powers.'

⁹ Herman Schwartz, "The New East European Constitutional Courts," *Michigan Journal of International Law* 13 (1992), 742-747; C. Neal Tate, "Courts and Crisis Regimes: A Theory Sketch with Asian Case Studies," *Political Science Quarterly* 46, no.2 (1993), 314-15.

¹⁰ Cass R. Sunstein, "Constitutions and Democracies: an Epilogue," in *Constitutionalism and Democracy*, eds. Jon Elster and Rune Slagstad (Cambridge: Cambridge University Press, 1988), 338.

democracies are important guarantees against authoritarianism and necessary components of the institutional design are the separation of powers and an independent judiciary.¹¹

I. State-Building and Constitutionalism

Scholars point out that in addition to the contradiction between democracy and constitutionalism, there exists an incompatibility between state-building and constitutionalism. Francis Sejersted sees this as an inherent contradiction between the needs of the state and of society. Although state-building is necessary, it represents a threat in that unchecked power may detrimentally affect society's liberty. Because of this threat, the idea of constitutionalism has taken root in many modern societies. The rule of law, as manifested through the idea of constitutionalism, is directed against the positive power of the state, regardless of whether the power is held by one individual or a democratically elected body.¹² Thus, although constitutionalism can impede the state-building process, it is a necessary device to protect the citizenry from authoritarianism and self-interested politicians.

Stephen Holmes takes the opposite position and claims that in order to construct a stable democracy, powers of the elected elites should not be limited. The basis of his

¹¹ Stephen L. Elkin, "Constitutionalism's Successor," in *A New Constitutionalism: Designing Political Institutions for a Good Society*, eds. Stephen L. Elkin and Karol E. Soltan (Chicago: The University of Chicago Press, 1993), 117.

¹² Francis Sejersted, "Democracy and the Rule of Law: Some Historical Experiences of Contradictions in the Striving for Good Government," in *Constitutionalism and Democracy*, eds. Jon Elster and R. Slagstad (Cambridge: Cambridge University Press, 1988), 132-33.

argument is that the political elite will need a relatively free hand to deal with the economic and social upheaval that the transition will bring.¹³

According to Holmes, it is a mistake to create unamendable constitutional provisions and overly prestigious constitutional courts. He supports Linz's explanation that "rigid institutional arrangements can produce more unpredictability and uncertainty than flexible ones under conditions of rapid social change."¹⁴ Flexibility is needed under the current conditions of rapid social change. Politicians must be able to renegotiate the rules of the game while playing the game. Holmes fears that constitutions will be used as political weapons, as instruments to outmanoeuvre political enemies.¹⁵ To Holmes, a powerful Constitutional Court determining the constitutionality of government action will deter necessary flexibility.

Michael McFaul counters this argument by stating that part of Russia's problem during its first two years of independent statehood was that institutions necessary to a democracy, such as a constitution, an independent judiciary, and a elected parliament, were too weak or non-existent.¹⁶ Indeed, Holmes' arguments fly in the face of the recognized importance of constitutionalism and the limitation of powers. To agree with Holmes is to

¹³ Stephen Holmes, "Conceptions of Democracy in the Draft Constitutions of Post-Communist Countries," Working Paper 5.11, Conference on Markets, States and Democracy, University of California at Berkeley Center for German and European Studies (February 11-13, 1993).

¹⁴ *Ibid.*, 8.

¹⁵ *Ibid.*, 5-8.

¹⁶ Michael McFaul, "Russian Centrism and Revolutionary Transitions," *Post-Soviet Affairs* 9, no.3 (1993), 201.

state that economic and political efficiency are more important than the protection of civil freedoms and liberties.

Holmes is also critical of the focus on negative constitutionalism, that is, the limitation of the powers of elected authorities by a judicial body. He believes that Parliament should be the core institution in these states and the over-legitimization of a Constitutional Court diminishes the concept of elected representatives. Primary focus should be on creating governments that can pursue reforms while remaining democratically accountable to the electorate.¹⁷ If government action is paralysed by a constitutional court, the temptation to solve pressing political problems outside the constitutional framework will be great. And, as Holmes predicts, a Constitutional Court would be completely helpless if an authoritarian figure decided to disband Parliament with the aid of the military.¹⁸

Yet, Holmes may be placing the blame on the wrong institution. Other scholars argue that limitations of power not only control the exercise of positive power but, paradoxically, protect it.¹⁹ Constitutionalism leads to predictability, stability and security of persons and property, which in turn promotes the stability of democracy by hopefully preventing the self-destruction of future governments. Obviously, if the democratically elected majority turns into a tyranny, then democracy has failed and electoral accountability becomes a useless concept. As stated by Sunstein, "a central goal of constitutional

¹⁷ *Ibid.*, 9-12.

¹⁸ *Ibid.*, 12-14.

¹⁹ Sejersted, 145.

democracy is to secure a realm for public discussion and collective selection of preferences while guarding against the dangers of factional tyranny and self-interested representation ... There is no inevitable tension between democracy and constitutionalism."²⁰

Undoubtedly, problems will arise when the state requires more power than the constitution allows, which may be especially pronounced during periods of economic crises or war.²¹ There is some validity in the argument that positive constitutionalism, with its emphasis on the need for the construction and reinforcement of electorally accountable institutions, is needed in order to build and stabilize the democratization process in Russia. It is quite evident that during the first term of the Russian Constitutional Court (1991-1993), the country was experiencing profound economic crises and rapid social transformation. During that time period, President Yeltsin confirmed his belief that a strong presidential system was the best means to re-build the state and the economy. The Supreme Soviet was not functioning efficiently and the "war of laws" between Yeltsin and Supreme Soviet Chairman Khasbulatov frustrated the productive functioning of the legislative body. When the Constitutional Court became involved in this power struggle, the results were disastrous.

However, Holmes' arguments may not be the best explanation of what occurred in Russia. Choices made by elites as well as institutional designs have been more determinative of what occurred than the actual limitation of powers that the Court represented.

²⁰ Sunstein, 352.

²¹ Sejersted, 137.

B. DEMOCRATIZATION THEORIES

This leads us to consider whether other political science theories can help to explain the Court's role in Russia's constitution-building process. Various theories within the democratization literatures can be examined in order to determine whether or not there is one which provides a useful model for the role of the judiciary in the post-communist democratization process. The main problem with this literature is its lack of analysis of the role of the judiciary in the democratization process.

i. Modernization Theory

One of the best known early theories on democracy is the modernization theory. Modernization theorists hold that certain social prerequisites, particularly certain levels of economic development, are needed before a stable democracy can be achieved.²² The logic of this argument is that higher levels of literacy, education and urbanization are usually associated with higher levels of economic development, and these factors help provide the necessary support for democratic institutions and practices.²³

Robert Dahl holds that the evidence does not support the proposition that a high level of socio-economic development is either a necessary or a sufficient condition for competitive politics. He believes that the development of a competitive political regime will depend on the extent to which the country's society and economy can:

²² Seymour M. Lipset, "Some Social Requisites of Democracy: Economic Development and Political Legitimacy," *American Political Science Review* 53 (1959), 69-105.

²³ Baohui Zhang, "Corporatism, Totalitarianism, and Transitions to Democracy," *Comparative Political Studies* 27, no.1 (1994), 109.

- (1) provide literacy, education and communication;
- (2) create a pluralistic social order; and
- (3) prevent extreme inequalities.²⁴

The modernization theory has also been criticized as being too deterministic.²⁵

Dankwart Rustow argues that the only prerequisite necessary for a transition to democracy is that of national unity: "the vast majority of citizens in a democracy to be must have no doubt or mental reservations as to which political community they belong to. ... [this] must precede all other phases of democratization but ... otherwise its timing is irrelevant."²⁶ Rustow's model thus leaves open the possibility of democratic transitions in premodern, prenationalist times and at low levels of economic development.²⁷

The modernization theory has been undermined by historical developments; for example, the return to authoritarian rule in some third world countries despite economic developments has invalidated this theory.²⁸ Scholars no longer focus on prerequisites as the causal factor in the establishment of a viable democracy, but rather see it as a product of strategic interactions and arrangements among political elites.²⁹

Indeed, given that the Soviet Union had some of the prerequisites of the modernization theory, such as high levels of education and literacy and high urbanization,

²⁴ Robert A. Dahl, *Polyarchy: Participation and Opposition* (New Haven: Yale University Press, 1971), 70-71.

²⁵ Dankwart Rustow, "Transitions to Democracy: Toward a Dynamic Model," *Comparative Politics* 2 (1970), 337-63.

²⁶ *Ibid.*, 350-51.

²⁷ *Ibid.*, 352.

²⁸ Zhang, 110.

²⁹ Doh Chull Shin, "On the Third Wave of Democratization: A Synthesis and Evaluation of Recent Theory and Research," *World Politics* 47 (1994), 139.

this theory will not be employed to suggest hypotheses for this research. As well, modernization theory focuses on the role of societal masses in the democratization process, and for the purposes of this paper, elite roles will be the primary focus.

ii. Strategic Choice Theory/Elite Behaviour

A leading theory on democratization is contingent\choice theory, which emphasizes the role of political elites.³⁰ This approach is also concerned with the process of democratization and looks beyond the modernization theory. As some will argue, democratic impulses are consequences of modernization, but impulses alone will not ensure democratic transformation.³¹ Proponents of this approach examine the role of actors in the transition process by studying the strategies used by the actors. They have concluded that the strategy most likely to bring about a successful consolidation to democracy is through negotiation, consensus and pact making.³²

This theory holds that the right decisions and choices by elites, both from authoritarian regimes and oppositions, are crucial to the outcomes of democratization. The theory particularly emphasizes the central role of fundamental political pacts between these elites, which explicitly define the rules of the game after a transition.³³

Dankwart Rustow's model also centres on the role of elites in the democratization process, and can best be viewed as a process of struggle followed by compromise. The

³⁰ Guillermo O'Donnell and Philippe C. Schmitter, *Transitions From Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: John Hopkins University Press, 1986).

³¹ Yong-chuan Liu, *Patterns and Results of the Third Democratization Wave* (Lanham, Maryland: University Press of America, 1993), 12.

³² O'Donnell & Schmitter, 39.

³³ Zhang, 110; Przeworski is also unambiguous in arguing that political actors shape outcomes through the choices they make.

dynamic process of democratization is set off by a prolonged political struggle, which results in the emergence of a new elite. Rustow calls this period of struggle the preparatory phase. This phase ends when the political leadership makes a deliberate decision to accept the existence of diversity and institutionalize some crucial aspect of the democratic procedure. This phase is characterized by compromise.³⁴ The final part of the process is the habituation phase in which the elites gradually become accustomed to democracy, with new elites gradually believing in democratic ideals.

Przeworski is also a proponent of the focus on elites. The need to improve economic performance is the idea most central to Przeworski's thesis, but it is the elites who must introduce the necessary economic reforms. In terms of the process of democratic consolidation, it is the decision-making process adopted to address the pressing economic needs that matters most.³⁵ Przeworski also stresses that political actors must have "some specific minimum probability" of benefiting from the new democratic framework if they are going to support it.³⁶

Skill and judgment of political leadership can also be of vital importance. Giuseppe Di Palma stresses the significance of human action in making a democratic transition possible. He notes that Spain's successful transition dramatically illustrates the role political actors play in a democratic transition. Innovative political action can

³⁴ Rustow, 353-355.

³⁵ Przeworski, 189.

³⁶ *Ibid.*, 30.

contribute to democratic evolution and a democracy can be made or unmade in the act of the making.³⁷

Di Palma asserts that four aspects of democratization, to which he refers collectively as "political crafting", will ultimately influence the success of the transitions: (1) the quality of the particular democratic rules and institutions that are chosen; (2) the modes of decision-making leading to the selection of rules and institutions (pacts and negotiations versus unilateral action); (3) the type of "craftsmen" involved; and (4) the timing of the stages of the transition.³⁸

Although evidence shows that this theory has strong application to Latin America and Southern Europe (i.e., Spain), some scholars believe that it is a historically constrained possibility only relevant to certain types of authoritarian regimes because of the institutional differences in regime type. For example, Baohui Zhang argues that strategic choice theory is not applicable to the former communist regimes of eastern Europe and the Soviet Union because of the tremendous structural obstacles to democratization created by their totalitarian legacies.³⁹ Zhang thus throws into the theoretical debate the effect of the institutional legacies of the past regime and the need for certain institutional preconditions in order for strategic choice to work. He emphasizes that political institutional differences between authoritarian and totalitarian

³⁷ Giuseppe Di Palma, *To Craft Democracies: An Essay on Democratic Transitions* (Berkeley: University of California Press, 1990), 8.

³⁸ *Ibid.*, 8-9.

³⁹ Zhang, 111-12.

regimes make elite pact making a historically constrained possibility only available to the former. Zhang argues that the existence of strong societal institutions, such as those found in the corporatist regimes of Brazil and Spain, provide the institutional basis for elite pact making. For example, according to Zhang, Brazil was able to democratize due to the fact that the working class through its unions was able to influence the transition process, but their participation was moderated and controlled by both the state and the opposition elites through the corporatist structure.⁴⁰ The post-totalitarian regimes, on the other hand, lack a corporatist regime signifying the lack of strong institutions for both societal representation and control abilities, thus leaving them with a strong populist nature which is inimical to pact making.⁴¹ Zhang finds that in post-communist states, the democratic leaders do not derive their power and influence through control of institutionalized societal organizations, but rather from the dynamics of the movement. Thus, their power base is more tenuous than that of the opposition leaders in a corporatist regime. Populist tendencies make democratization through pact making very difficult.⁴²

Both Zhang and Di Palma raise the institutionalists' argument that institutions matter and play a significant role in the democratic transition and consolidation processes. Di Palma points out the elite choices concerning selection of institutions and rules will affect the success of a transition and Zhang raises the question of institutional legacies and their effect on post-authoritarian/totalitarian institution building. These

⁴⁰ *Ibid.*, 121.

⁴¹ *Ibid.*, 112-13.

⁴² *Ibid.*, 128.

institutional issues are addressed below, but it is important to point out that strategic choice theory is linked somewhat to institutionalism.

Strategic choice theory is relevant to Russia. Although it does not address the question of the role that a judiciary may play in the democratization process, presumably decisions made by judicial elites can have an effect on the constitutional stability of a political system.

Strategic choice theory pertains to Russia's democratization process regarding the constitutional choices made by political elites. As argued by Munck, at the beginning of a transition countries enter into a constitutional moment and at this critical juncture the "constitutional choices" made by elites will "have a lasting effect on setting countries on particular paths."⁴³ He stresses that it is the choice of institutions that may be more or less conducive to democratic consolidation. The decision by political elites to establish the Court, the law on the Court, itself, and the decision to defer the adoption of a new Constitution are clear examples of where strategic choice theory will come into play.

When we look at the early stages of democratization under Gorbachev, we see that elite strategies and choices played a vital part in the establishment of competitive elections and the relaxation of media censorship. With the dissolution of the USSR, power was transferred from the Soviet state and party structures to the Russian Congress

⁴³ Gerardo L. Munck, "Democratic Transitions in Comparative Perspective," *Comparative Politics* 26, no.3 (1994), 370.

of People's Deputies and the elites within that body. The focus of this paper will be on these elites in the Russian government, which was composed of reformers and conservatives, and members of the Constitutional Court

Strategic choice can be relevant in regard to elite negotiation and compromise and on the importance of skill and judgement on the part of elites in making choices and decisions. Could the Russian political leadership have more effectively used negotiation and compromise, or did early compromises jeopardize political stability? Also, did political and judicial elites exercise skill and judgement in some of their actions and choices?

Choices made by political elites are important in regard to the effectiveness of the courts as judicial decisions are not self-enforcing, but depend upon the acquiescence of executives for their effect.⁴⁴ Possibly, elite decisions regarding the enforcement of the Court's decisions played a role in the Court's failure to act effectively as arbitrator and regime-limiter.

iii. Historical Sequencing

Another theory espoused by many democratic scholars is that of the significance of gradualism and sequencing in the development of democracy. Di Palma raises this issue by claiming that the timing imposed on the various tasks and stages of the transition

⁴⁴ Tate, 319.

can influence its success.⁴⁵ Many believe that the expansion of the competition for powers should be gradual because of the risks that it involves for the political elites. With a gradual move to competitive politics, the contending elites can learn to tolerate and work with one another: "to trust that defeat will not mean elimination, that victory will be limited by accountability, and that power will be wielded responsibly - these risks and uncertainties can be diminished, and the prospects for a stable nonviolent democracy increased."⁴⁶

Robert Dahl is of the opinion that the most successful democratization process is a sequence in which political competition develops within a small circle of opposing elites, then gradually expands to include other members of society.⁴⁷ By means of proceeding gradually, the competing elites will have time "to gain experience with the risks and requirements of democratic elections and the responsibilities of democratic governance before the entire state structure is opened to political competition."⁴⁸ Time is needed for parties to develop identities, leadership, and principles, as well as mutual tolerance and trust for each other and respect for the law.⁴⁹

Although theorists who advocate the historical sequencing approach do not refer to the role or effect of judicial participation in the democratization process, it is possible to theorize on how a judicial institution such as a constitutional court with powers of

⁴⁵ Di Palma, 8-9.

⁴⁶ Diamond, 230.

⁴⁷ *Ibid.*, 33-47.

⁴⁸ Diamond, 231.

⁴⁹ *Ibid.*, 231.

constitutional oversight might affect the gradual sequencing envisioned by such theorists. As previously noted, Holmes is one advocate of the importance of sequencing the introduction of various democratic institutions in the transition process. In addition to raising the argument concerning the compatibility of state-building and constitutionalism, Holmes alluded to the question of sequencing: in the democratization process, should specific institutions be empowered at various stages of development? The question then becomes whether the establishment of the constitutional court was premature and out of sequence? Did its very existence during the early stages of the Russian democratization process cause its collapse, or were there other, more vital problems, such as institutional weakness or lack of respect by the president and parliament?

C. INSTITUTION BUILDING AND INSTITUTIONAL TRANSFORMATION

Given the fact that few post-authoritarian/totalitarian regimes have the luxury of a gradual transition to democracy and that sequencing is not a realistic option, some scholars believe that it is vitally important to introduce "institutions of democratic accountability and restraint of power."⁵⁰ Included in this are the rule of law, the separation of powers, and an independent judiciary.

Jon Elster argues that acceptance of the rules is not the result of political or constitutional culture embedded in the people and the institutions, but rather is a result of institutions being structured to reflect individual interests and behaviour.⁵¹ It is possible

⁵⁰ Diamond, 232.

⁵¹ Elster, 447-82.

that instead of political elites shaping institutions, institutions can and will shape the preferences and goals of the actors in the decision-making process and, by distributing power among the elites, help shape the outcomes of the process.⁵² Przeworski argues that democracy is possible when institutions exist which can provide a reasonable guarantee to political elites that their interests will not be adversely affected in the course of democratic competition.⁵³

This question of institution building necessitates an examination of the institutional and legislative structure of the court as well as its location within the external institutional environment of the Russian government and Constitution. In addition to this, the impact of institutional legacies from the Soviet period and their effect on constitution-building must also be examined.

The legitimacy of the institutions may also be a factor. Lipset states that the institutions are only legitimate when there is a belief that they are the most appropriate for the society.⁵⁴ Dahl also supports the view that the greater the belief in the legitimacy of the democratic institutions, the greater the chances of democracy.⁵⁵

⁵² Thomas A. Koelble, "The New Institutionalism in Political Science and Sociology," *Comparative Politics* 27, no.2 (1995), 236.

⁵³ Adam Przeworski, "Democracy as a Contingent Outcome of Conflicts," in *Constitutionalism and Democracy*, eds. J. Elster and R. Slagstad (Cambridge: Cambridge University Press, 1988), 64.

⁵⁴ Seymour Lipset, "Social Conflict, Legitimacy, and Democracy," in *Legitimacy and the State*, ed. William Connolly (New York: New York University Press, 1984), 88.

⁵⁵ Dahl, 128.

In *Rediscovering Institutions*, James G. March and Johan P. Olsen attempt to show that individuals will act according to a set of rules and procedures, and that institutions matter because they can shape human behaviour.⁵⁶ According to March and Olsen:

Political institutions are collections of interrelated rules and routines that define appropriate actions in terms of relations between roles and situations. The process involves determining what the situation is, what role is being fulfilled, and what obligations of that role in that situation are.⁵⁷

Philip Roeder also supports this analysis of institutions and claims that regardless of the formality or informality of the rules, "actors recognize them as constraints on their actions by the costs and benefits they affix to alternative costs of action."⁵⁸ For example, constitutions shape political behaviour by "empowering specific political actors, by shaping the choices available to political actors and by attaching benefits and liabilities to strategies ..."⁵⁹ Institutions reinforce mutual expectations and by doing so, shape individual behaviour. They enable an actor to know what is expected of him and what he can expect of others. The institution is strong when these expectations converge and is weak when expectations diverge.⁶⁰

⁵⁶ James G. March and Johan P. Olsen, *Rediscovering Institutions* (New York: Free Press, 1989), 23-24.

⁵⁷ *Ibid.*, 160.

⁵⁸ Philip G. Roeder, *Red Sunset: The Failure of Soviet Politics* (Princeton: Princeton University Press, 1993), 8.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, 8-9.

Historical institutionalists also support the view that institutions can determine political choices and preferences:

In sum, institutions are not just another variable, and the institutionalist claim is more than just that "institutions matter too." By shaping not just actors' strategies (as in rational choice), but their goals as well, and by mediating their relations of cooperation and conflict, institutions structure political situations and leave their own imprint on political outcomes.⁶¹

Historical institutionalism can be useful in the analysis of institutional development and policy-making because it focuses on "the impact of political struggles on institutional outcomes and the way institutional outcomes in turn shape further rounds of political struggle over policy and institutional rules."⁶²

Institutionalists also argue that preexisting institutions can persist and be very resistant to change. As seen above, Zhang argues that totalitarian institutional legacies create structural obstacles for opposition elites to initiate and implement political pacts with the regime because of the tendency towards populism in post-totalitarian societies.⁶³ Munck adds to this debate by arguing that it is necessary to consider the defining features of the nondemocratic regime from which the transition departs. He argues that context is important in that certain institutional designs work better in certain contexts than in others.⁶⁴

⁶¹ Kathleen Thelen and Sven Steinmo, "Historical Institutionalism in Comparative Politics," in *Structuring Politics: Historical Institutionalism in Comparative Analysis*, eds. Sven Steinmo, Kathleen Thelen, and Frank Longstreth, (Cambridge: Cambridge University Press, 1992), 9.

⁶² Koelble, 242.

⁶³ Zhang, 123.

⁶⁴ Munck, 371.

Roeder argues that institutionalization of Bolshevik constitutional structures led to institutional rigidity and a political order that could not adapt to change.⁶⁵ In exploring the demise of Soviet politics and the reform process, Roeder finds that:

Institutionalization meant that incumbents privileged by the existing order fought change by enforcing sanctions against reformers. Attempts to overwhelm the institutional defences of the existing order elicited increasing resistance and, in the end, enough pressure brought not reform, but collapse of the constitutional order.⁶⁶

Did this institutional rigidity carry over from the Soviet period into Russia's institution-building process?

Using existing institutions to create new ones is a difficult task and is likely more difficult a process than a revolutionary transformation which gets to start with a *tabula rasa*. As argued by Roeder, an old constitution constrains elite strategic choices and as one attempts to transform a constitutional system, extant institutions "must be convinced, tricked or forced into relinquishing responsibilities."⁶⁷

Russia's post-Soviet process of state-building was somewhere between a revolutionary and an evolutionary transition, and because it was peaceful, many of the old Soviet institutions were left intact.⁶⁸ The old RSFSR Constitution, albeit with numerous amendments, was still in place until December 1993, along with the Congress of People's

⁶⁵ Roeder, 210.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, 221.

⁶⁸ McFaul, "Russian Centrism," 201.

Deputies. Although the Constitutional Court was a completely new institution, it had to deal with the Soviet era constitution and legislature, which created many problems.

Remington, Smith, Kiewiet and Haspel argue that the transitional legislative institutions existing in Russia between 1990-1993 became obstacles to radical political and economic reform. In their analysis they find that the crystallization of party-like blocs, the emergence of a separation-of-powers system, and the domination of the legislative and executive institutions by different blocs combined to create a deadlock that could only be broken by extra-constitutional means.⁶⁹

D. THEORIES ON POLITICAL AND LEGAL CULTURE

i. Political Culture and Civil Society

Another theory advanced by some scholars is that a strong civil society and a mass political culture supportive of democratic values and processes are needed in order to transform and consolidate a democracy. It states that "civil society produces resources necessary for social groups and political parties to balance and limit state power, and gives citizens the opportunity to acquire the skills to use these resources."⁷⁰ According to Diamond, "a pluralistic, vigourously organized civil society, featuring a dense network of

⁶⁹ Thomas F. Remington et al., "Transitional Institutions and Parliamentary Alignments in Russia, 1990-1993," in *Parliaments in Transition: The New Legislative Politics in the Former USSR and Eastern Europe*, ed. Thomas F. Remington, (Boulder: Westview Press, 1994), 159-60.

⁷⁰ Liu, 12.

intermediate groups and voluntary associations independent of the state" is of vital importance to a democracy.⁷¹

Closely related to the theory of civil society is that of political culture, which holds that "a certain set of right beliefs and norms shared by a society is essential to the emergence and maintenance of democracy."⁷² Dahl maintains that "it is now rather widely recognized that differences in the political culture of various countries help to account for the differences in the nature of their political systems."⁷³ Jeffrey Hahn also asserts that although political culture is only one variable in the outcome of the democratization process, it is an important one.⁷⁴

In 1963, Gabriel Almond and Sidney Verba identified the "civic culture", which is characterized by a high degree of mutual trust among its members and a willingness to compromise and to tolerate conflicting political interests.⁷⁵ Critics of this theory have pointed out that the "civic culture" found in democracies may be the effect of democracy, and not its cause,⁷⁶ and thus, this theory has been largely discredited. Lucien Pye and Sidney Verba criticized *The Civic Culture* approach because of its focus on mass,

⁷¹ Diamond, 234.

⁷² Zhang, 109.

⁷³ Dahl, 166.

⁷⁴ Jeffrey W. Hahn, "Changes in Contemporary Russian Political Culture," in *Political Culture and Civil Society in Russia and the New States of Eurasia*, ed. Vladimir Tismaneanu (Armonk, NY: M.E. Sharpe, 1995), 112-13.

⁷⁵ Gabriel A. Almond and Sidney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Boston: Little, Brown, 1963), 239-243; Zhang, 109.

⁷⁶ Zhang, 110.

national cultures and in *Political Culture and Political Development*, contributors analyzed elite subcultures.⁷⁷

Verba defined political culture as "the system of empirical beliefs, expressive symbols and values which defines the situation in which political action takes place. It provides the subjective orientation to politics."⁷⁸ In 1992, Ruth Lane reviewed the history of political culture theory and posed the question of whether it was a residual category or a general theory. Some things to consider when using political culture as an analytic concept are:

- 1) a single political culture, covering an entire nation, is inappropriate;
- 2) political culture must be contextualized;
- 3) political culture is particularly relevant regarding elite behaviour; and
- 4) political culture is influenced by politics and institutions.⁷⁹

Lane states that the various political culture models appear to have a methodological significance in that they can contribute to a general theory of political behaviour.⁸⁰ She asserts that a nation's politics will vary according to the political culture of the elites: elites within the government, elite groups outside the government, opposition elites and persons seeking access to elite positions.⁸¹

⁷⁷ Lucien W. Pye and Sidney Verba, eds., *Political Culture and Political Development* (Princeton: Princeton University Press, 1965).

⁷⁸ Sidney Verba, "Comparative Political Culture," *ibid.*, 513.

⁷⁹ Ruth Lane, "Political Culture: Residual Category or General Theory?" *Comparative Political Studies* 25, no.3 (October 1992), note 3, 381-82.

⁸⁰ *Ibid.*, 374.

⁸¹ *Ibid.*, 375.

Although the emergence of civil society and the entrenchment of a democratic political culture among the masses are important aspects of the democratization process and could well play a part in demands for legality and political accountability, these issues are beyond the scope of my research and will not be addressed in the course of this paper.⁸² The role that a court may play in the consolidation of democracy and constitution-building is primarily a question of elite activity and attitudes. In this paper, only the political culture of the elites within the judicial, executive and legislative branches of government will be examined.

Scholars have argued that the authoritarian tendencies of political elites threaten the consolidation of democracy in Russia.⁸³ Zhang argues that a lack of civil society and

⁸² Scholars have asserted that the mass public in Russia continue to prefer authoritarian leaders, although a lack of empirical evidence to this effect makes this a speculative assertion. Surveys conducted in the late 1980s and early 1990s did indeed show strong support for certain democratic ideals and institutions. However, given that these surveys occurred before the harsh realities of democratization had set in, the results were criticized as ephemeral and non-indicative of deeply rooted democratic beliefs. Later surveys found that although Russians supported some democratic ideals, such as an independent and pluralistic media, there was not a deeply rooted support for other democratic institutions, such as competitive elections. Moreover, support for societal order was roughly equal to support for individual liberty, but tolerance for political enemies was exceedingly low; see James L. Gibson, "The Resilience of Mass Support for Democratic Institutions and Processes in the Nascent Russian and Ukrainian Democracies," in *Political Culture and Civil Society in Russia and the New States of Eurasia*, ed. Vladimir Tismaneanu (Armonk, NY: M.E. Sharpe, 1995). Frederic J. Florn advises that we must exercise caution regarding studies on Russian support for democracy because of the lack of experience with democratic institutions there. The democratic ideal may be supported, but not the consequences of democracy; "Post-Soviet Political Culture in Russia: An Assessment of Recent Empirical Investigations," *Europe-Asia Studies* 48, no.2 (1996) 234-35.

⁸³ See Gibson, 53; see also Stephen White, who states that the dominant tendency in political-cultural analysis of Soviet politics has been to emphasize its autocratic and authoritarian character; "Political Culture in Communist States: Some Problems of Theory and Method," *Comparative Politics* 16, no.3 (1984) 352.

the absence of institutionalized societal oppositions and independent organizations will create barriers for elite pact making.⁸⁴ Bruce Smith believes that the lack of democratic spirit and civility "makes political compromise and day to day cooperation difficult."⁸⁵ Vera Tolz further claims that Russian political culture does not favour compromise and, in fact, compromise has historically had a "negative connotation among Russians."⁸⁶

Obviously, a strong commitment to democratic ideals on behalf of the political leadership will greatly facilitate a transition to democracy. If the leadership is firmly committed to the process and is firmly in control of the regime, then a well-timed and realistic program of reform is more likely to endure the transition process.⁸⁷ It is possible that elite behaviour and attitudes played a decisive part in the Constitutional Court's demise in Russia in 1993. Elites may have been unwilling to accept the Court's role in limiting their powers because of a lack of experience with this concept. Actions and decisions made by political elites are important in regard to the courts because judicial decisions are not self-enforcing, but depend on the acquiescence of political elites for their effect.⁸⁸

However, the establishment of democratic institutions may be a more decisive factor in the development of democracy than the actual "mindset" of the elites, that is,

⁸⁴ Zhang, 124.

⁸⁵ Bruce R. Smith, "Constitutionalism in the New Russia," in *Law and Democracy in the New Russia*, eds. Bruce R. Smith and Gennady M. Danilenko (Washington: The Brookings Institution, 1993), 4.

⁸⁶ Vera Tolz, "The Moscow Crisis and the Future of Democracy in Russia," *RFE/RL Research Report* 2, no.42 (1993), 9.

⁸⁷ Diamond, 237.

⁸⁸ Tate, 319.

elite values and behaviour. It may well be that democratic institutions create democrats instead of the reverse. Sufficient research has not yet been conducted on elite beliefs and values to determine whether they are truly reformist or not.⁸⁹ However, this paper will attempt to examine the behaviour and attitudes towards constitutionalism and the Constitutional Court in order to ascertain whether such attitudes played a factor in the politicization of the Court.

ii. Legal Culture

The concept of legal culture is closely related to that of political culture and will be applied to this paper in much the same way as described above. Legal culture has been defined as a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of the legal system, and about the way law is or should be made, applied, studied, perfected and taught.⁹⁰ Legal culture can also be defined as "a set of supportive attitudes, beliefs, and sentiments ... vis-à-vis the law as a means of peacefully mediating and reconciling political, economic and social disputes and conflicts."⁹¹

For the same reasons as cited above, only the legal culture of the political and legal elite will be examined. A review of the mass perception of the nature of law and the general expectations that citizens have of the law is beyond the scope of this paper.

⁸⁹ Fleron, 250-51.

⁹⁰ John H. Merryman, *The Civil Law Tradition* (Stanford: Stanford University Press, 1969), 2.

⁹¹ Robert Sharlet, *Soviet Constitutional Crisis: From De-Stalinization to Disintegration* (Armonk, NY: M.E. Sharpe, Inc., 1992), 7.

Many Western scholars have stated that Russian elites lack the necessary legal culture to support constitutionalism and the rule of law because of the historical role law has played in the USSR. According to such scholars, the legacy of seventy years of communism has had an adverse effect on the political and legal culture of Russian society.⁹² Disregard for the rule of law, manipulation of legal symbols to legitimize the regime, and lip service to the Constitution characterize the Soviet period. William Kitchin poses the following questions: "Can such a 70-year history and its consequent political and legal culture be deliberately and systematically transformed into its opposite - a law-governed state? Can this be accomplished at all? Can it be accomplished before the Soviet Union, or its successor, under the pressure of the collapsed economy, and a disintegrated federal system, reverts to its more familiar pattern of arbitrary rule incompatible with the rule of law?"⁹³

Events surrounding the demise of the Constitutional Court, especially the personal activities of members of the government and the judiciary, raise the question of whether the lack of a constitutional tradition played a part in what occurred. It is quite possible that the political and legal elite were unwilling to abide by constitutional norms in the face of

⁹² Eugene Huskey, "From Legal Nihilism to *Pravovoe Gosudarstvo*: Soviet Legal Development, 1917-1990," in *Toward the "Rule of Law" in Russia?: Political and Legal Reform in the Transition Period*, ed. Donald D. Barry (Armonk, N.Y.: M.E. Sharpe, Inc., 1992), 23-42; Harold J. Berman, "The Rule of Law and the Law-Based State (*Rechtsstaat*): With Special Reference to the Soviet Union," *ibid.*, 43-60; and Louise I. Shelley, "Legal Consciousness and the *Pravovoe Gosudarstvo*," *ibid.*, 63-76.

⁹³ William Kitchin, "Establishing and Exercising Judicial Review in the Soviet Union: The Beginnings," in *Comparative Judicial Review and Public Policy*, eds. Donald W. Jackson and C. Neal Tate (Westport, Conn.: Greenwood Press, 1992), 70.

adverse political conditions because they did not have the political or legal culture to enable them to respect the rule of law.

THE POLITICAL ROLE OF COURTS

One final theoretical area that will be examined in relation to this research is the role that courts have played in political systems in other countries. Are there patterns of behaviour that explain the role of a court in modern political systems or in systems that are undergoing political or social upheaval?

An intrusion by the courts into the political arena may create tension between the branches of power. As will be discussed in Chapter Two, the Court's enabling legislation prohibited the examination by the Court of political questions, but granted it the power of abstract review of the constitutionality of actions and decisions of the president and legislature. Abstract review allows a court to review legislation and government actions before they are put into practice. An actual right does not have to be violated in order to invoke the jurisdiction of the courts. As stated by Donald Kommers, the sole purpose of abstract review "is to declare what the Constitution means."⁹⁴

Abstract review is more likely to bring a court into the political arena, call into question the court's legitimacy and create tension between it and the other branches of government. Kommers states that abstract review becomes politically sensitive when other

⁹⁴ Donald P. Kommers, "The Federal Constitutional Court in the German Political System," *Comparative Political Studies* 26, no.4 (1994), 474.

political actors use the court to transpose a political conflict into a constitutional one, and comments that it has become a common weapon in Germany's political arsenal.⁹⁵ However, in Western Europe abstract review occurs infrequently, and cases involving individual rights are the most common and are given top priority. Such a policy contributes to regime stability.⁹⁶

Given that abstract review can be quite political, a court can choose to take a narrow or broad approach to judicial review in terms of the cases it chooses to resolve and the manner in which this is done. Stone holds that the review activity of Western European Constitutional Courts "is tolerated by politicians largely because it works to protect individual rights ..."⁹⁷ Preoccupation with the protection of individual rights is less likely to be viewed as an interference in politics as are questions involving the separation of powers or constitutional restrictions on the state-building process.

Former Chief Justice Yokota of the Japanese Supreme Court illustrates that particular court's narrow view of judicial review in the following quotation:

To declare a statute unconstitutional is the gravest and most delicate duty of the courts. In the light of the principle of the separation of powers, the judiciary must pay decent respect to the legislative branch and presume every statute as constitutional. In view of this, it is urged that all judges of our country would realize and approve rule of the clear case; that is to say, a statute can be declared unconstitutional only in a clear case. If every

⁹⁵ *Ibid.*, 474-75.

⁹⁶ Alec Stone, "Abstract Constitutional Review and Policy Making in Western Europe," in *Comparative Judicial Review and Public Policy*, eds. Donald W. Jackson and C. Neal Tate (Westport, Conn.: Greenwood Press, 1992), 46.

⁹⁷ *Ibid.*, 44.

judge of our country handles a case with such understanding, any hasty decisions of unconstitutionality would be avoided.⁹⁸

Obviously, a court displaying this degree of deference to the legislative and executive branches is more likely to be tolerated and supported by those branches of power, than is the court which interferes in those spheres. As will be seen below, the Russian Constitutional Court engaged in a broad interpretation of judicial review, which led to their involvement in the political arena. The issue becomes whether the politicization of the court can be explained by the institutional problems in the Constitutional Court Act, by strategic choices of political and judicial elites pertaining to which cases came before the court and the manner in which they were decided, or by political and legal culture?

Researchers have also studied other aspects of the role of courts in a political system. Neal Tate has explored theoretical questions concerning the interaction between courts and crisis regimes. Tate defines "crisis regime" as "a political system which is initiated by the sudden seizure of new or drastically expanded executive powers by a political leader for the purpose of coping with the demands of a leader-proclaimed extraordinary crisis."⁹⁹

⁹⁸ K. Ishimine, "A Comparative Study of Judicial Review Under the American and Japanese Constitutional Law," J.S.D. Dissertation, Cornell University, (1974), 142; quoted in David J. Danelski, "Documenting the Establishment of Judicial Review: Japan and the United States," in *Comparative Judicial Review and Public Policy*, eds. Donald W. Jackson and C. Neal Tate (Westport, Connecticut: Greenwood Press, 1992), 25-26.

⁹⁹ Tate cites definition described by Juan Linz, "Totalitarian and Authoritarian Regimes," in *Handbook of Political Science*, vol. 3, eds. Fred I. Greenstein and Nelson W. Polsby (Reading, MA.: Addison-Wesley, 1975), 186-87.

By conducting case studies of the Philippine, Indian, and Pakistan Supreme Courts in the 1970s, Tate suggests that regimes in periods of crisis will typically restrict the scope and depth of the court's independence and impartiality and that the judiciary will back down "when faced with opportunities to assert its authority by challenging the legitimacy of the crisis regime ..."¹⁰⁰ Tate observed that political and military leaders in these three countries made major changes to all national political institutions except the bureaucracy and the judiciary. He claims that the judiciary was initially left untouched because the regimes needed to maintain "an appearance of respect for constitutionality."¹⁰¹ Utility is also a factor in that the judiciary is needed to process routine problems.¹⁰² But although courts are left structurally intact, the regime will seek other ways to emasculate judicial power without abolishing or directly attacking the judiciary. The regime may try to restrict the court's independence and impartiality, or more likely, will try to bring the judiciary under control by restricting the scope and depth of its decision making, or by stacking the court with regime sympathizers.

If the judiciary does not stay in its place, Tate argues that the most desirable route for the regime is to alter constitutionally the independence, scope or depth of the judiciary's decision making.

¹⁰⁰ Tate, 311.

¹⁰¹ *Ibid.*, 317.

¹⁰² *Ibid.*, 318.

If parallels can be drawn from Tate's model to the events which happened in Russia in 1993, then this could possibly refute a political/legal culture explanation of the Constitutional Court's role in Russia's transition to democracy process. That is, all three regimes in Tate's study found it politically expedient to limit the power of their Supreme Courts in a crisis situation. None of these regimes wanted their powers curbed by an independent judiciary. This may suggest a hypothesis that emphasizes the importance of political environment over political culture.

Yet, political culture may still be part of the explanation. As stated above, courts must rely on other political institutions and actors to enforce and implement their decisions. Are decisions enforced because they do not hinder the regime during a crisis situation, or are they enforced because the political and legal culture of a given nation support such obedience to the courts? Some researchers argue that it is not the issue before the courts that entirely determines deference, but rather that stability of the political culture and the manifestation of it in key political actors also plays a part.¹⁰³

Undoubtedly, both environmental factors and political culture play a role in the degree of deference accorded to a court by other political actors and institutions.

Possibly, one is more important than the other, and possibly, political culture has been a catch-all, simplistic rationale mistakenly used to explain elite responses to courts in the political system.

¹⁰³ Anthony R. Brunello and Kenneth F. Lehrman, "Comparative Judicial Politics: Case Studies of the Federal Republic of Germany and the Republic of India," *Comparative Political Studies* 24, no.3 (1991), 295.

CONCLUSION

This chapter has tried to elucidate various political theories which aid in the examination of the role the Russian Constitutional Court played in the Russian political process between 1991 and 1993. Hopefully, these theories will help to explain the problems the Court faced and why it ultimately became such a politicized entity that lost the ability to mediate between the president and the legislature.

Some of the issues raised by this chapter emphasize the debates over the importance of the economy versus politics, and of the significance of historical structures (institutions) versus recent political events and political environment. The chapter also raises the question of whether elites shape institutions or do institutions shape elite choices? And does political and legal culture have a role in these choices?

Theories on state-building and constitutionalism raise the issue of whether a Constitutional Court is incompatible with the state-building process. These theories are linked with the idea of historical sequencing in that they pertain to the issue of whether the Constitutional Court was prematurely established.

Strategic choice theories accentuate the need to examine the behaviour of elites and ask whether they exercised skill and judgement in their decision-making processes. This suggests that decisions made by political and judicial elites played a role in the

problems the Constitutional Court experienced. Strategic choice also emphasizes the need for elite compromise and pact-making. This may be relevant in examining Yeltsin's relationship with the legislature.

The impact of institutions and institutional structures highlights the need to examine the Court's institutional organization as well as Russia's constitutional system. Possibly, defects in these institutions caused difficulties for the Court and the political actors. Institutionalism and strategic choice are linked by the fact that elite decisions regarding the establishment of rules and institutions can have an important impact on how the institution operates. In addition to examining new institutions, one must consider the impact of existing institutions on the political process and on elite decision-making.

Finally, theories on political and legal culture suggest that subjective factors should be considered when explaining why elites made certain decisions and performed certain actions. Did a lack of experience with democracy, the separation of powers and judicial review affect elite behaviour and cause the politicization of the members of the Constitutional Court? Or can this be negated by observing similarities of other Courts that have been caught up in crisis situations?

CHAPTER TWO: THE COURT'S FIRST YEAR

A. CONSTITUTIONALISM AND THE RULE OF LAW IN THE USSR

The concepts of constitutionalism and the separation of powers had no place in Soviet law. The principle of the rule of law was considered to be a bourgeois capitalist doctrine that defended the interests of the privileged class and was, therefore, incompatible with the Soviet socialist system. Despite the fact that a Soviet Constitution had existed since 1918, it was little more than a political tool. Robert Sharlet argues that the Soviet political elite used the law and the constitution as an instrument of social engineering and a means to perfect political change. When faced with an economic or political crisis, constitutional reform was initiated to stabilize or promote the reform process.¹ True political power lay with the Communist Party of the Soviet Union and no law was above the ruling elite. This political and social dominance of the CPSU was officially enshrined in Article 6 of the 1977 Soviet Constitution: "The Communist Party of the Soviet Union shall be the guiding and directing force of Soviet society and the nucleus of its political system and state and social organizations."² Given this supremacy of the CPSU, the rule of law, that is, the concept of all persons and institutions being accountable to the law, did not have a place in the Soviet legal or political system.

¹ This is Sharlet's central thesis; Robert Sharlet, *Soviet Constitutional Crisis: From De-Stalinization to Disintegration* (Armonk, NY: M.E. Sharpe, Inc., 1992).

² Art. 6, *Constitution (Basic Law) of the Union of Soviet Socialist Republics, 1977, amended June 24, 1981*, in *Basic Documents on the Soviet Legal System*, ed. W.E. Butler (New York: Oceana Publications Inc., 1983), 5.

Soviet legal reform in its historical context depicts a tradition of circumstances shaping policy.³ After the Civil War, the Bolsheviks advocated a policy of legal nihilism as law was seen as an impediment to rapid social transformation. However, by the 1930's, the leadership came to recognize the use of law as an instrument of political change and as a means to establish central control. Eugene Huskey holds that as early as the 1930's, the Soviet Union had turned to familiar Western legal structures and ideas while simultaneously claiming that socialist law was superior to capitalist law. However, Huskey states that it is only with Mikhail Gorbachev that we see a break with seven decades of Soviet political and legal tradition.⁴

At the nineteenth Party Congress in 1988, Mikhail Gorbachev, then General Secretary of the Communist Party, introduced the concept of a *pravovoe gosudarstvo* (a law-based state)⁵ into Soviet political and legal discourse.

³ Eugene Huskey, "From Legal Nihilism to 'Pravovoe Gosudarstvo': Soviet Legal Development, 1917-1990," in *Toward the Rule of Law in Russia? Political and Legal Reform in the Transitional Period*, ed. Donald D. Barry (Armonk, NY: M.E. Sharpe, 1992), 24-33.

⁴ *Ibid.*, 33.

⁵ When the term *pravovoe gosudarstvo* was introduced into Soviet discourse there was some discussion among British and American legal scholars as to the meaning behind the phrase. It can be translated as either "the rule of law" or the "law-based state", i.e. the *Rechtsstaat*. William Butler translated the term as the "rule of law state" because it implied a broader and more fundamental concept of law. He based this on the distinction between the two Russian words for law: *zakon* and *pravo*. *Zakon* means statutory law, i.e. the law that the state has made.

Pravo, on the other hand, carries with it a connotation of rights, justice and moral principles which cannot be transgressed by state or citizen; W.E. Butler, "The Rule of Law and the Legal System," in *Developments in Soviet and Post-Soviet Politics*, eds. S. White, A. Pravda and Zorkin. Gitelman London: MacMillan Press Ltd., 1992), 108. The concept of a higher, moral law is known as the theory of natural law. Natural law theory is generally posited against positive law theory. Positive law theory holds that the state is the highest source of law and it is only bound by the laws which it creates. The *Rechtsstaat* is based in positive legal theory.

Scholars in the late 1980s were not optimistic about the establishment of a true "rule of law" state because of an insufficiently developed legal culture and a lack of legal consciousness among the Soviet people.⁶ Western scholars noted the absence of an elite legal culture and low levels of professionalism and technical competence would impede the creation of a *pravovoe gosudarstvo*.⁷

The ideas of the division of powers and of constitutional supervision were first introduced into the Soviet political system with the constitutional amendments of 1988. These amendments provided for the creation of a Committee of Constitutional Supervision (hereinafter CCS).⁸ A committee of People's Deputies of the USSR was formed and under this committee a working group of experts was created, which prepared two draft laws on the CCS.⁹ In 1990 the status of the CCS was determined. It was to be composed of a

Harold Berman, on the other hand, translated *pravovoe gosudarstvo* as the law-based state and postulated that the Soviets were describing something similar to the *Rechtsstaat*, which Berman describes as a concept more closely aligned with the rule by law, than the rule of law; Harold J. Berman, "The Rule of Law and the Law-Based State with Special Reference to the Soviet Union," in *Toward the Rule of Law in Russia? Political and Legal Reform in the Transitional Period*, ed. Donald D. Barry (Armonk, NY: M.E. Sharpe, 1992), 48.

⁶ Berman, 58; Louise Shelley, "Legal Consciousness and the *Pravovoe Gosudarstvo*," in *Toward the Rule of Law in Russia? Political and Legal Reform in the Transition Period*, ed. Donald D. Barry (Armonk, NY: M.E. Sharpe, Inc., 1992), 74-75. Shelley haphazardly alludes to a definition of "legal consciousness" which includes an awareness that the law is a means to press for enhanced rights, that law should come from below, that there should be judicial independence and that there should be equality before the law; *ibid.*, 64-65.

⁷ Huskey, 38-39.

⁸ Art. 125, *Vedomosti S"ezda narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR*, 1988, No.49, st.727.

⁹ D.A. Kerimov and A.I. Ekimov, "Konstitutsionnyi nadzor v SSSR," *Sovetskaia gosudarstvo i pravo* No. 9 (1990), 5.

Chairman, Vice Chairman and 25 members, and would act as an advisory body to the Congress of Peoples' Deputies and the Supreme Soviet.

The creation of the CCS was not a true representation of the division of powers in the USSR because it was to be an advisory body and not an independent constitutional court. Only decisions concerning the violation of human rights and freedoms would be final.¹⁰ The Committee was given the power to determine whether the following comply with the Constitution of the USSR: acts of the highest bodies of state power and government, or other bodies formed or chosen by the Congress of Peoples' Deputies and the Supreme Soviet of the USSR.¹¹ However, the final decision on the constitutionality of legislation remained with the Congress of Peoples' Deputies. The Congress could overturn the Committee's decision by a vote of at least two thirds of its members.¹²

The CCS was never transformed into a Constitutional Court as it disappeared in December 1992 with the disintegration of the USSR.

Prior to the establishment of the CCS, there was no true separation of power in the Soviet political system.¹³ The Constitution allocated the task of constitutional interpretation to the Presidium of the Supreme Soviet of the USSR in Article 119(5). Although the judiciary was guaranteed independence under both the 1936 and 1977 Soviet Constitutions,

¹⁰ *Ibid.*, 10.

¹¹ *Ibid.*, 9.

¹² B.M. Lazarev, "Komitet Konstitutsionnogo Nadzora SSSR," *Gosudarstvo i pravo*, no.9 (1992), 23.

¹³ *Ibid.*, 22.

(Articles 112 and 155 respectively), the courts were compromised because of the complete hegemony of the Communist Party: the Party maintained a professional apparatus that interfered with the day-to-day operation of the courts.¹⁴ Revelations about "telephone law" clarified that Soviet judges were only a phone call away from political figures who could dictate case outcomes.¹⁵ Thus, although courts existed throughout the Soviet period, they were not held in high esteem by the people.¹⁶

B. ESTABLISHMENT OF THE RUSSIAN CONSTITUTIONAL COURT

The first Russian Constitutional Court came into existence in a time of political turmoil, which is quite befitting, as it also saw its demise during a political debacle. The Constitutional Court Act was passed when the Soviet Union still existed, therefore power was still in the hands of the All-Union authorities. The judges themselves were selected after the August coup attempt, which was at a time when power was beginning to shift from the Soviet Union to Russia, and the Court only began to hear cases in January 1992, after the Soviet Union was disbanded and the Russian Federation was born.

¹⁴ Huskey, 35; see also Hiroshi Oda, "Recent Developments in Party Control Over the Courts and Procuracy," in *The Emancipation of Soviet Law*, ed. F.J.M. Feldbrugge (Dordrecht: Martinus Nijhoff Publishers, 1992), 240; and for a Russian perspective, see Valery Savitsky, "Will There Be a New Judicial Power in the New Russia," *Review of Central and East European Law* 19, no.6 (1993), 639-40.

¹⁵ Donald D. Barry, "'The Quest for Judicial Independence: Soviet Courts in a Pravovoe Gosudarstvo,'" in *Toward the Rule of Law in Russia: Political and Legal Reform in the Transitional Period*, ed. Donald D. Barry (Armonk, NY: M.E. Sharpe, Inc., 1992), 258.

¹⁶ *Ibid.*, 258-59; see also Savitsky, 643.

The main function of the Court was proclaimed to be "a counterbalance to the undivided presidential authority or to unconstitutional activities of the Parliament itself."¹⁷ The legislation encompassed provisions on the status of judges of the Constitutional Court as well as the procedures which it was to follow. The concept of judicial review was established by the Act, in that sole power was given to the Court to determine whether the acts of the legislative and executive bodies complied with the constitution. It could also review complaints regarding the practices of judicial and administrative agencies. Complaints could be brought by private individuals or by State authorities.¹⁸ The Court's mandate was limited to ruling on questions of constitutionality and the law expressly stated that the Court could only rule on questions of law and was prohibited from considering political questions.¹⁹ However, the term "political questions" was not defined, an oversight which was to prove troublesome for the Court.

Interestingly, this desire to keep the Court outside the political arena by prohibiting it from considering "political questions" is made all the more curious by Art. 9, which gives the Court the right of legislative initiative at the Congress of People's Deputies and in the Supreme Soviet. Art. 9(2) states that if the Court ascertains that observance of certain provisions of the Constitution is impeded by the absence of a particular law, the Court can

¹⁷ Statement made by Sergei Shakhrai, Chairman of the Parliamentary Committee on Legislation, to TASS correspondent, Andrei Surzhanskii, (text), Moscow TASS in English (12 July 1991). *FBIS Daily Report-Soviet Union*, 12 July 1991 (FBIS-SOV-91-134), 87.

¹⁸ Articles 1, 2, 66, 67; M.F. Brzezinski, "Toward 'Constitutionalism' in Russia: The Russian Constitutional Court," *International and Comparative Law Quarterly* 42 (1993), 768-79.

¹⁹ Art. 1(3) of the Constitutional Court Act.

act to rectify the situation. This seems like a blatant violation of the separation of powers concept. It is difficult to say what the drafters had in mind with this type of provision, although it seems to indicate that there was considerable trust and hope placed in this institution.

In terms of the Court's mandate, although it had the power to review the constitutionality of international treaties, of law-applying practices (*pravoprimenitelnye praktiki*), and of the actions and decisions taken by the President, the Congress of People's Deputies and the Supreme Soviet, the right to interpret the Constitution was not delineated in the Act. This may have been an oversight, given the fact that a ruling on whether an law or treaty was unconstitutional necessitates some interpretation of the Constitution. Yet, technically, despite the fact that the Court was given the power to defend the Constitution through the means of constitutional oversight (*konstitutsionnyi kontrol'*), the power to interpret the laws of the Russian Federation remained with the Supreme Soviet.²⁰ The specific power to interpret the Constitution was not laid out in the Act.

All opinions of the Court were to be final, and a ruling of the unconstitutionality of a piece of legislation would mean its immediate revocation.²¹ Thus the Court was recognized as the guardian of the Constitution, and had the means to make the Constitution judicially enforceable. Actual practical enforcement was limited to a provision enabling the

²⁰ Art. 109 (8) Constitution of the Russian Federation, amended on December 19, 1992.

²¹ Articles 49, 50 and 65 of the Constitutional Court Act.

Court to impose a fine between 100 and 500 rubles.²² Fines could be imposed on officials and citizens guilty of disrespect for the Court. Various forms of disrespect were listed in Art. 56.1, including a failure to review the submissions of the Court, the failure to appear, and violations of procedures in a session of the Court.

The setting out of the amount of the fine in the law could be a problem, given the devaluation of the ruble which occurred between 1991 and 1993. Fixing a fee for a violation of a law is better placed in a regulation under the law, as it is more easily amendable.

The necessity of ensuring judicial independence was recognized by various articles of the legislation. Article 6(1) states that: "The RSFSR Constitutional Court and its judges in their activities are independent, autonomous and subordinate solely to the RSFSR Constitution." Article 15(2) guaranteed the tenure of the judge until the age of sixty-five. Other provisions held that a judge was removable only in the event of a reduction in the size of the Court. Powers of a judge, on the other hand, could be suspended by a ruling of the Court under certain conditions, which included, the finding by the Court of criminal liability of a judge, a finding that the judge had engaged in activities incompatible with his position, the judge was unable to work due to his health, or for setting out his opinion in the

²² Art. 56.

mass media concerning a question under study prior to the taking of a decision by the Court on that question.²³

The need for judicial independence was also recognized in the provisions which extended privileges and immunities to the judges. Judges could not be held criminally responsible for their decisions, nor could they be held criminally liable, arrested, brought to court for questioning or subjected to administrative measures without the agreement of the Constitutional Court.²⁴ On 14 November 1991, the Supreme Soviet decreed equal pay for the top positions of the three branches of government - the Chairman of the Supreme Soviet, the President of the RSFSR, and the Chairman of the Constitutional Court. A limit of twenty-one times the legal minimum wage was imposed.²⁵ This allocation of top pay indicates that the government was prepared to ensure the financial security of the bench. Financial security is considered to be a means to ensure that the judge is not preoccupied with financial matters and to make the judge less susceptible to corruption.

By the end of November 1991, the Supreme Soviet had passed a decision on protecting the work of judges and the Russian Constitutional Court. Members of the Constitutional Court were to be given the right of access to enterprises, establishments and organizations situated in Russian and the right to free transportation. As well, members of the Constitutional Court were to be given diplomatic status and were not to be liable to

²³ On the removal of judges, see Art. 16, and on reasons for suspension of powers, see Art. 18.

²⁴ Art. 17.

²⁵ *Vedomosti RSFSR*, No. 47, st. 1591 (1991).

personal examination.²⁶ Thus, some attempts were also being made to guarantee the personal security of the judges.

Candidates for the positions were to be nominated by the President and then elected by the Congress of People's Deputies. The law required that the candidate be a person who possesses extensive knowledge in the field of law, and has a minimum of ten years experience in the legal field as a prosecutor, judge or lawyer.²⁷ Legal academics were exempt from the ten years experience requirement, and as it turned out, the first bench consisted of eleven professors of law and two former judges.

On October 30, 1991, at the Fifth (extraordinary) Congress of People's Deputies of the RSFSR, the membership of the Constitutional Court of the Russian Federation was elected in accordance with Art. 119 of the Constitution (Basic Law) of the RSFSR²⁸ and Art. 3 of the Law on the Constitutional Court of the RSFSR.²⁹ On the following day, the

²⁶ "Decision on Protecting Judges, Courts Adopted," (text). Moscow Radio Rossiia Network (25 November 1991). *FBIS Daily Report-Soviet Union*, 26 November 1991 (FBIS-SOV-91-228), 54.

²⁷ Art. 12 of the Constitutional Court Act.

²⁸ Article 119 states: The Constitutional Court of the Russian Federation is elected by the Congress of People's Deputies of the Russian Federation.

The manner of election and functioning of the Constitutional Court of the Russian Federation is defined by the Law of the Russian Federation on the Constitutional Court of the Russian Federation, to be confirmed by the Congress of People's Deputies of the Russian Federation; Constitution (Fundamental Law) of the Russian Federation-Russia [as amended on 10 December 1992], trans. and published in F.J.M. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law*, (Dordrecht: Martinus Nijhoff Publishers, 1993), 424.

²⁹ Art. 3(1) states: The RSFSR Constitutional Court is elected with a membership of 15 judges by the Congress of People's Deputies upon the submission of the Chairman of the RSFSR Supreme Soviet by secret balloting.

Resolution of the Congress, naming the 13 elected judges, was published in *Rossiyskaya gazeta*.³⁰ At this session, only thirteen judges were elected by secret vote out of twenty-one possible candidates.³¹ This event turned out to be quite controversial, however, as the deputies were given only a few minutes to question each candidate before casting their votes. Some deputies felt that important background information was concealed, while others felt that some of the candidates lacked professional competence or impartiality.³² Moreover, the candidates were nominated by various factions in the Russian parliament. The later politicization of the Court would be blamed in part on this initial selection process.³³

"Postanovlenie S"ezda Narodnykh Deputatov" *Rossiyskaya gazeta*, 31 October 1991, 1; see Appendix A for a description of the 13 elected judges.

T. Zamyatina, "Russian Constitutional Court Judges Sworn In," (text), Moscow TASS in English (30 October 1991). *FBIS Daily Report Soviet Union* 31 October 1991 (FBIS-SOV-91-211), 50; and Hausmaninger, "From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court," *Cornell International Law Journal* 25:2 (1992), 332. The Law on the Constitutional Court calls for a bench of fifteen members, however, Art. 3(4) states that the Court can function once ten members are elected. It appears that the Congress could not decide on the additional two candidates and therefore decided to postpone the election until the next Congress. However, the election of the final two judges was postponed indefinitely once the political situation began to heat up in 1992.

Brzezinski, 676-77; and Thorson, "RSFSR Forms Constitutional Court," *Report on the USSR* 3, no.50-51 (1991), 14-15; J. Wisniewsky "Russian Constitutional Court: A Third Branch of Government," *RFE/RL Research Report* 2, no.7 (1993), 2.

"Ametistov was nominated by the pro Yeltsin democratic bloc; Morshchakova by the Nonparty Deputies' Faction (deputies who had never been members of the CPSU); Luchin, Tymov and Vedernikov were nominated by either the procommunist or pronationalist factions. Vitrak, the deputy chairman of the Court, was nominated by the centrist New Generation-New Policy faction (subsequently part of the Civic Union), and Zorkin was proposed by the Communists for Democracy faction, a group of reformers led by Alexandr Rutskoi. The remaining judges were nominated by parliamentary committees or constituencies within the Russian Federation; W. Slater, "Head of Russian Constitutional Court Under Fire," *RFE/RL Research Report* 2, no. 26 (1993), 2.

On November 2, 1991 it was announced at the Congress of People's Deputies of the RSFSR that Valerii Zorkin had been elected chairman of the Constitutional Court.³⁴

C. THE OPERATIONS OF THE CONSTITUTIONAL COURT

The judges appeared to be taking their duties and responsibilities seriously in the beginning and by the end of 1991 were expressing concern about the activities of the legislative and executive bodies. Members of the Court stated that although reforms were inevitable, they had to be carried out within the framework of laws.³⁵ A report released by the Constitutional Court press service stated that the Court intended to take "steps to protect the constitutional regime in the country and to prevent dictatorship and arbitrary [sic] wherever they may come from."³⁶ In an interview, Valerii Zorkin expressed his alarm over Yeltsin's decree to merge the Ministry of Internal Affairs with that of Security. Zorkin also expressed some concern over the "legal nihilism" of the current leaders and his fear of the possibility of the emergence of a "neo-authoritarian regime."³⁷

³⁴ "Zorkin Elected Constitutional Court Chairman," (Excerpts). Moscow Radio Rossii Network in Russian (2 November 1991). FBIS Daily Report-Soviet Union, 4 November 1991 (FBIS-SOV-91-213), 60.

³⁵ "Constitutional Court Hold Session 26 Dec," (text). Moscow Sovetskaia Rossiia (27 December 1991). FBIS Daily Report-Central Eurasia 8 January 1992 (FBIS-SOV-92-005), 42.

³⁶ "Rule of Law Concerns Constitutional Court," (text). Moscow INTERFAX in English (26 December 1991). FBIS Daily Report-Soviet Union, 27 December 1991 (FBIS-SOV-91-249), 39.

³⁷ Vladimir Orlov, "Chairman Interviewed," (text). Moscow Moskovskie novosti in Russian (5 January 1992). FBIS Daily-Report-Central Eurasia 8 January 1992 (FBIS-SOV-92-005), 43.

i) The Merger of the Ministries of Security and Internal Affairs Case

The first case to go before the Court raised hopes for the viability of judicial review of government actions. On 19 December 1991, Yeltsin signed a decree merging the Ministries of Security and Internal Affairs. Yeltsin claimed to have the power to do this because of special powers given to him by the Congress of People's Deputies on 1 November 1991.³⁸ On 11 January 1992, five parliamentary committees brought a complaint against Yeltsin's decree to the Court.³⁹ The Court issued a unanimous decision on 14 January 1992 declaring that Yeltsin's decree was unconstitutional and thus null and void as it violated the separation of powers provisions of the RSFSR Constitution.⁴⁰ The Court appeared to base its decision on well-reasoned legal analysis of the Constitution, Supreme Soviet legislation and the Congress of People's Deputies' resolution granting Yeltsin special powers: for example, the main basis for declaring the Edict unconstitutional was that

In accordance with Articles 89 and 90 of the Constitution of the RSFSR, the right to create executive bodies is vested in the soviets of people's deputies. Such a right belongs to the Congress of People's Deputies of the RSFSR . . . The Constitution of the RSFSR (Article 121-5) does not provide to the President the right to establish ministries.⁴¹

The Court also concluded that the combination of these two powerful organizations could create a real threat to civilian rights and freedoms.⁴²

³⁸ See Hausmaninger, 333; Yeltsin was granted the power to rule by decree in order to reform Russia's economic and political system.

³⁹ "Constitutional Court to View Security Decree," *Gloxi*, Moscow INTERFAX in English (2 January 1992). *FBIS Daily Report Central Eurasia* 3 January 1992 (FBIS-SOV-92-002), 36.

⁴⁰ "In the Case of the Verification of the Constitutionality of Edict No. 289 of the President of the RSFSR of 19 December 1991 'On the Establishment of the Ministry of Security and Internal Affairs of the RSFSR'," in *Statutes & Decisions: The Laws of the USSR and Its Successor States* 30, no. 3 (May-June 1994), 9-19.

⁴¹ *Ibid.*, 10-11.

⁴² Savitsky, 653.

Yeltsin's government did not seem pleased with the Court's decision, and immediately questioned its validity. Deputy Chairman of the government of Russia, Sergei Shakhrai, stated that the Court's decision was political and not juridical as required by law.⁴³ Without delay, Valerii Zorkin, Chairman of the Constitutional Court, addressed the Supreme Soviet and demanded a retraction of Shakhrai's statements. He stated that if an official rebuttal did not appear in the media, the Court would institute impeachment proceedings.⁴⁴ In reply, Shakhrai addressed the Supreme Soviet with the following comments:

Unfortunately, political and ideological motives have had [a] more decisive influence on the court's final decision than a legal evaluation of the enactment under study, their conformity with the constitution. ... The task facing the Constitutional Court was a complex one, not just because of certain historical aspects of the problem dealt with in the decree, but also because of imperfections in the existing constitution, which makes it possible to interpret constitutional principles in different ways, depending on your political viewpoint. Therefore, in order to improve the legal foundations for the work of supreme legislative, judicial and executive authorities, it is essential to speed up the adoption of the Russian Federation's new constitution.⁴⁵

In an interview on 17 January 1992, Chairman Zorkin stated that if the Court's decision was not obeyed, a sanction would be applied - from a fine of 500 rubles to impeachment.⁴⁶ This

⁴³ Yuri Soltys, "Security, Internal Ministry Decree Nullified," (text). Moscow TASS International Service in Russian (14 January 1992). *FBIS Daily Report-Central Eurasia* 15 January 1992 (FBIS-SOV-92-010), 25.

⁴⁴ "Shakhrai Threatened With Impeachment: Defends His Position," Russian Television (16 January 1992). *BBC Summary of World Broadcasts*, Part 1, USSR (18 January 1992), SU/1281/C2/4.

⁴⁵ *Ibid.*

⁴⁶ "Court Stands Firm Against Shakhrai Decision," (text), Moscow *INTERFAX* in English (15 January 1992). *FBIS Daily Report-Central Eurasia* 17 January 1992 (FBIS-SOV-92-012), p. 37

statement would indicate that in the beginning, the Court was confident of the role that it would play in Russia's constitutional development. However, Shakhrai's address to the Supreme Soviet raised the question of the lack of a new Russian Constitution and the effect that its absence had on the recognition of the Court's decision.

On 20 January 1992, *Rossiiskaia gazeta* published an announcement from the Office of the Russian Federation State Counsellor on Legal Policy in regard to the Constitutional Court's January decision. The Office, acting on behalf of the president, stated that the president would take steps to implement the Court's decision. However, the statement emphasized that political and ideological motives had influenced the Court's decision, more so than legal analysis. The Office took the opportunity to stress the President's desire to achieve democracy, yet stated that attempts to enter into opposition with the president was a greater danger to democracy. Finally, the statement issued a caveat regarding the imperfect nature of the existing constitution, which made it possible for the Court "to choose different interpretations of what the Constitution prescribes, depending on political expediency."⁴⁷

This raises the issue that the Constitution itself was a factor in creating this initial friction between the judicial and executive branches of government. The Brezhnev Constitution of 1977 was still in existence, albeit with numerous amendments. The debate

⁴⁷ "State Counselor Accepts Court Ruling on Decree," (text) Moscow *Rossiiskaia gazeta* (20 January 1992). *FBIS Daily Report-Central Eurasia* 23 January 1992 (FBIS-SOV-92-015), pp. 44-45.

on the validity of the Constitution and the ability of the Court to properly interpret it, would continue throughout the existence of the first Constitutional Court. The fact that this argument was being raised suggests that institutional problems existed: the legacy of Soviet institutions was already haunting the Court, and the question of institutional legitimacy surrounded the Constitution.

Although it seemed that Yeltsin was not especially pleased with the Court's decision, he was prepared to accept the outcome and he did in fact obey the Court's order. Yet, the statement from the Counsellor on Legal Policy indicates that Yeltsin may not have been expecting the Court to erect stumbling blocks for his reforms. The decision was also likely a surprise to many politicians as an earlier poll among the delegates to the Congress of People's Deputies showed that the majority regarded the Constitutional Court as "purely symbolic."⁴⁸ These observations suggest that theories on elite political and legal culture may be able to explain some of the initial reactions to the Court's decisions. If Russian elites have an authoritarian legal culture, which is coupled with a history of disrespect for judicial institutions, then the idea of a true separation of powers may have been a difficult reality to accept.

Nevertheless, after this decision, Western analysts were quite hopeful that the Court would be instrumental in building a legal culture in Russia and saw this decision as a

⁴⁸ A. Malysheva, "Chairman Cited on Constitutional Court's Role," (text). Moscow *Komsomolskaia pravda* in Russian (15 January 1992). *FBIS Daily Report-Central Eurasia* 17 January 1992 (FBIS-SOV-92-012), 37-38.

demonstration of courage and determination in establishing and defending the rule of law.⁴⁹ Indeed, the Court was considered a success during the first year of its existence by both Westerners and Russians.⁵⁰ It appeared to be counterbalancing executive and legislative powers, and President Yeltsin was willing to abide by its decisions. Popular opinion was high the first year and the emergence of the Constitutional Court was described as the most important political event of 1992.⁵¹ However, these preliminary opinions were much too optimistic and in a sense naive.⁵²

Yeltsin's willingness to abide by the Court's decisions would not last. Nor would the judges' ability to remain apolitical and impartial. It was evident within the first year that the Court was being pulled into highly sensitive political issues and it began to be accused by some politicians and jurists of putting political considerations before the law.⁵³

⁴⁹ Hausmaninger, 337; Brzezinski, 683, 687, 690.

See Wishnevsky, 2. She states that "during its slightly more than a year existence, the Constitutional Court has emerged as a major political authority that enjoys the respect of a comfortable majority of Russian opinion-makers, most of them in the center of Russia's political spectrum."; see also Savitsky for a Russian opinion. He states: "In the relatively short time since the Constitutional Court began functioning, there is considerable evidence testifying convincingly to the fact that Russian statehood has at last acquired an institution that has the capacity to become a counterweight to legislative power . . .", Savitsky, 652.

⁵⁰ *Ibid.*, Wishnevsky, 1.

⁵¹ For an example of optimism and naiveté, see Brzezinski, who states that "the effort to create a genuine constitutional democracy in Russia . . . is rooted in a deeply institutional commitment to the practice of constitutionalism."; 689.

⁵² Wishnevsky, 2.

ii) The Tatarstan Ruling

The ruling by the Court on the Tatarstan referendum question indicated that the Court was motivated by political considerations and was not maintaining proper impartial legal analysis.⁵⁴ Members of the bench regarded separatism as a threat to the Russian Federation, and made no attempt to appear impartial in this matter.⁵⁵

This case involved the decision by the Tatarstan parliament on February 21, 1992 to hold a referendum on the status of the republic. The Russian parliament, fearing that a "yes" vote could lead to the disintegration of the Russian Federation and interethnic strife in Tatarstan, brought a petition before the Constitutional Court to rule on the constitutionality of the Tatarstan parliament's decision.⁵⁶ On March 13, 1992, the Court released its decision in which it stated that a yes vote would amount to a unilateral change in the national structure of the Russian Federation, which was a violation of the Constitution.⁵⁷ On March 18, 1992 Zorkin appeared before the Russian Supreme Soviet where he called on the Tatarstan parliament to enforce the Court's ruling.⁵⁸ Zorkin also accused the

⁵⁴ *Ibid.*, 3.

⁵⁵ *Ibid.*, 3-4.

⁵⁶ Ann Sheehy, "Tatarstan Asserts Its Sovereignty," *RFE/RL Research Report* 1, no. 14 (1992), 2-3.

⁵⁷ "In the Case of the Verification of the Constitutionality of the Declaration of State Sovereignty of the Republic of Tatarstan of 30 August 1990, the Law of the Republic of Tatarstan of 18 April 1991 'On Amendments and Additions to the Constitution (Fundamental Law) of the Republic of Tatarstan,' the Law of the Republic of Tatarstan of 29 November 1991 'On the Referendum of the Republic of Tatarstan,' and the Decree of the Supreme Soviet of the Republic of Tatarstan of 21 February 1992 'On the Conduct of a Referendum of the Republic of Tatarstan on the Question of the State Status of the Republic of Tatarstan,'" in *Statutes & Decisions: The Laws of the USSR and Its Successor States* 30, no. 3 (May-June 1994), 32-44.

⁵⁸ "Court Chairman Zorkin on Tatarstan Referendum," (text). Moscow Teleradiokompaniia Ostankino Television First Program Network in Russian

representatives of the Supreme Soviet of Tatarstan of showing disrespect for the Court by failing to attend.⁵⁹

Despite the Court's ruling, Tatarstan held a referendum on March 21, 1992, in which the electorate voted in favour of the republic's independence.⁶⁰ The Tatar leadership claimed that this was not a vote for secession, but rather a determination of the republic's sovereignty.⁶¹

Analysing this decision and the reaction by the Tatar leadership is difficult in that it includes the question of federal-republic relations within the RSFSR. Tatarstan President Shaimiev appeared to believe that the republic had a right to hold the referendum and that any future federal treaty between Russia and Tatarstan should be based on an agreement between equals.⁶² Regardless of the federal nature of this problem, the issue raises the hypothesis regarding constitutionalism and state-building and the sequencing of institutions. Obviously, federal relations had not been worked out at the political level among central and republic elites, and the Court may have been pulled into a no-win situation that damaged its prestige by trying to decide legally an issue that belonged on the political negotiation table.

(18 March 1992). *FBIS Daily Report-Central Eurasia* 19 March 1992 (FBIS SOV-92-054), 53-56.

⁵⁹ "Constitutional Court Chairman on Tatarstan," (text) *Moscow Russian Television Network* in Russian (13 March 1992). *FBIS Daily Report Central Eurasia* 16 March 1992 (FBIS-SOV-92-051), 63.

⁶⁰ Sheehy, 1.

⁶¹ *Ibid.*

⁶² *Ibid.*

Another matter which came before the Court in 1992 also illuminated some of the problems in establishing the necessary premises for judicial review. The manner in which the Court dealt with certain issues which arose during the CPSU hearings called into question the legal culture of the elites and the extent of judicial independence in Russia.

iii) The Communist Party Case

In the aftermath of the August 1991 putsch, President Yeltsin issued three edicts concerning the status of the Communist Party of the Soviet Union and the Communist Party of the RSFSR. Edict No.79, issued on August 23, 1991, suspended the activity of the CP RSFSR and Edict No. 90, issued on August 25, 1991, confiscated the Party's property. In November 1991, Yeltsin issued a further edict, No. 169, "On the activity of the CPSU and the CP RSFSR." This edict formally banned the CPSU and the CP RSFSR and nationalized the parties' buildings and bank accounts.⁶³

On December 27, 1991, a formal legal petition challenging the constitutionality of Yeltsin's November decree was submitted to the Constitutional Court. The petition was signed by 36 Russian People's Deputies, led by Deputy Vladimir Ivashko, Deputy General Secretary of the banned CPSU, and Deputy Kuptsov, secretary of the CP

⁶³ See "O Priostanovlenii deiatelnosti Kommunisticheskoi partii RSFSR," (On the Suspension of the Activity of the Communist Party of the RSFSR), *Vedomosti RSFSR*, No. 35, st. 1149 (August 29 1991); "Ob imushchestve KPSS i Kommunisticheskoi partii RSFSR," (On the Property of the CPSU and the Communist Party of the RSFSR), *Vedomosti RSFSR*, No. 35, st. 1164 (August 29, 1991); and "O deiatelnosti KPSS i KP RSFSR," (On the activity of the CPSU and the CP RSFSR), *Vedomosti RSFSR*, No. 45, st. 1537 (November 7, 1991).

RSFSR. The petition asserted that the "contents of the decrees contradict the separation of powers established in the Russian Federation and the division of competence under the Constitution between supreme bodies of state authorities and Russian authorities."⁶⁴ It was also alleged that the edicts "interfere in the area of legislative and judiciary authorities."

On May 12, 1992, Deputy Oleg Rumiantsev, filed a counterpetition with the Court asserting the constitutionality of Yeltsin's decrees and submitting that the CPSU should be outlawed. On May 25, another counterpetition was filed on behalf of a group of People's Deputies including Rumiantsev.

The first meeting of the Constitutional Court in regard to the CPSU case occurred on May 26, 1992. At that time, Zorkin announced that the Court had decided to combine the CPSU petition with the counterpetition by Rumiantsev due to their similarities. Zorkin told the petitioners that it was "impossible to discuss the first inquiry [as to the constitutionality of the CPSU] without checking the lawfulness of the two parties."⁶⁵

The CPSU team was taken by surprise by the decision to merge the petitions, having not been briefed of the counterpetitions in advance. The joinder of the petitions

⁶⁴ Liudmila Yermakova, "Legality of Communist Party Ban to be Reviewed," (text). Moscow *ITAR-TASS in English* (7 May 1992). *FBIS Daily Report - Central Eurasia* 13 May 1992 (FBIS-SOV-92-093), 13.

⁶⁵ "Hearing on CPSU Ban Adjourns Until 7 Jun," (text). Moscow *INTERFAX in English* (26 May 1992). *FBIS Daily Report - Central Eurasia* 26 May 1992 (FBIS-SOV-92-101), 24.

also had the effect of shifting the burden of proof onto the CPSU as it became the defendant in the counterpetition.⁶⁶ The Court recessed for six weeks until July 7 in order to allow both sides to review their cases.

During the intervening period the Supreme Soviet passed a law amending the Constitution of the RSFSR. The sections on the Judicial System were amended to extend the Constitutional Court's jurisdiction to determining the constitutionality of political parties and public associations.⁶⁷ This was an obvious move by the government to give the Court the constitutional authority to hear the counterpetition regarding the constitutionality of the CPSU.

The CPSU supporters were quick to complain about the Constitutional Court's competence to hear the counterpetition and also questioned its decision regarding the merger of the petitions. V. Zorkaltsev, a spokesperson for the group of deputies who filed the original petition challenging the constitutionality of Yeltsin's decree, filed an appeal with the Court protesting the Court's decision to hear Rumiantsev's appeal in

⁶⁶ See, for example, Oleg Rumiantsev who stated that: "Uniting both petitions into one case enabled us to turn the Communist Parties from plaintiffs into both plaintiffs and defendants," cited in A. Krasulin and V. Shevel, "Rumyantsev on Communist Threat to Russia," (text). Moscow *ITAR-TASS* in English (27 May 1992). *FBIS Daily Report-Central Eurasia* 28 May 1992 (FBIS-SOV-92-103), 35; and Andrey Pershin et al, "Prospects for Trial of Ex-CPSU Leaders Viewed," (text). Moscow *INTERFAX* in English. *FBIS Daily Report-Central Eurasia* 28 May 1992 (FBIS-SOV-92-103), 36.

⁶⁷ See "Ob izmeneniiakh i dopolneniiakh Konstitutsii (Ocnovnogo Zakona) Rossiiskoi Sovetskoi Federativnoi Sotsialisticheskoi Respubliki, 21 apreliia 1992 goda, (On changes and amendments to the Constitution (Basic Law) of the Russian Soviet Federated Socialist Republic, 21 April 1992)," *Vedomosti RSFSR*, No. 20, st. 1084 (21 maia 1992 goda); The addition regarding the Court was Art. 165-1. These amendments came into force on May 16, 1992.

conjunction with the original petition. In their appeal, the group of deputies alleged that the Court was violating its own rules of procedure by hearing the case. According to Zorkaltsev, the Constitution of the Russian Federation was only amended on May 16, 1992, in order to give the Court the power to decide the constitutionality of a political party. Thus, since the CPSU had ceased to exist before the amendment, the Court did not have the competence to determine the constitutionality of the CPSU.⁶⁸

Zorkaltsev also accused the Court of acting for a political purpose in deciding to merge the petitions and alleged that the merger was an attempt by the Court to avoid the question of the constitutionality of Yeltsin's decrees concerning the CPSU and its property.⁶⁹

In response, the Constitutional Court Press Service issued a statement on June 25 reaffirming its legal right to combine petitions. The Press Service also denied the rumours that the upcoming hearing would be a "political trial" or a "criminal investigation."⁷⁰

⁶⁸ Zorkaltsev alleges that the amendment was not retroactive on the basis of general legal principles; V. Zorkaltsev, "Deputies Appeal to Constitutional Court" (text). Moscow *Selskaya zhizn* in Russia (29 May 1992). FBIS Report-Central Eurasia 17 June 1992 (FBIS-URS-92-073), 14.

⁶⁹ *Ibid.*, 15.

⁷⁰ "Court Issues Statement on CPSU Case" (text). Moscow *Izvestiia* in Russia (26 June 1992). FBIS Daily Report Supp-Central Eurasia, 10 July 1992 (FBIS-SOV-92-133-S), 1; for an example of how the case was being treated by the press, see Otto Latsis, who wrote that "The hearing will not be a purely legal event, irrespective of whoever would like it to be that way. It has already become a political event before it has begun, and this is preordained by the very role which the CPSU played in our society. In legal terms, of course, it would be wrong to confuse the hearing as a legal process with what is generally termed the judgment of history,"; "Consequences From CPSU Ban Hearings Examined," (text)

From the start, this case was politically charged and was deemed by the press to be "the trial of the century."⁷¹ On its opening day it was clear that the trial would become a political forum for both sides of the issue.⁷² The CPSU case exposed the Party and the history of the USSR to judicial and public scrutiny alike. It also was emotionally charged and was marked by passionate and fiery testimony by the former Party cadres.⁷³ Proponents of the CPSU invoked the rhetoric of the fate of democracy, the Constitution, and the third branch of power, and equated this case to "[a] test for the role of a guarantor of democracy, legality, and the Constitution."⁷⁴

The defenders of Yeltsin's edicts, on the other hand, based their submissions on two main theses: (1) The CPSU was not a political party either *de facto* or *de jure*, and (2) the decision on the fate of the party was within the President's competence.⁷⁵ Speaking

Moscow *Izvestiia* in Russian (23 May 1992). *FBIS Daily Report-Central Eurasia* 27 May 1992 (FBIS-SOV-92-102), 34.

⁷¹ See, for example, Viktor Dyunin, "Commentary on Constitutionality of Ban of CP," (text). Moscow *Rabochaia tribuna* in Russian (29 May 1992). *FBIS Report-Central Eurasia* 17 June 1992 (FBIS-URS-92-073), 15.

⁷² Deputy Dmitrii Stepanov, testifying on behalf of the CPSU, apparently became very excited and "For 50 minutes he passionately denounced the Russian authorities, totally forgetting the point at issue. Finally, [he] openly called for the overthrow of the present government. His speech was so shocking that the Constitutional Court adjourned its session and withdrew for a 10-minute consultation." Andrei Krasnov, "Stepanov Draws Warning from Court's Zorkin," (text). Moscow *Radio Rossii Network* in Russian (7 July 1992). *FBIS Daily Report Supp-Central Eurasia*, 10 July 1992 (FBIS-SOV-92-133-S), 6.

⁷³ See, for example, Inna Muravyeva, "Highlights From 8 Jul Session Reported," (text). Moscow *Rossiiskaia gazeta* in Russian (9 July 1992), and "Zorkaltsev, Others Address Court Hearings," (text). Moscow *Sovetskaia Rossiia* in Russian (9 July 1992). *FBIS Daily Report Supp-Central Eurasia*, 17 July 1992 (FBIS-SOV-92-138-S), 3-7.

⁷⁴ "Zorkaltsev" *ibid.*, 6.

⁷⁵ Liudmila Yermakova and Aleksandr Krasulin, "Secret Files Submitted to Court" (text). Moscow *ITAR-TASS* in English (3 July 1992). *FBIS Daily Report Supp-Central Eurasia*, 10 July 1992 (FBIS-SOV-92-133-S), 1.

for Yeltsin's team, Sergei Shakhrai, deputy premier and presidential legal advisor, stated at a press conference held on July 3, 1992 that "The president of the Russian Federation was obliged to ensure that the main constitutional principle in any state, actually functioned. The only source of authority is the people, and only bodies and official elected by the people may govern the state."⁷⁶ Moreover, according to Shakhrai, given that the CPSU was not a party but rather the state structure, its property belongs to the state.⁷⁷

A major incident which was to draw the world's attention to the CPSU hearing was Gorbachev's refusal to testify and the ensuing reaction of the Court and the Russian government. In the beginning, one could not label Gorbachev's refusal as a matter of concern in that he was only "invited" to attend and Chairman Zorkin noted that Gorbachev was not breaching the Law on the Constitutional Court by refusing to attend.⁷⁸

In an interview with *Literaturnaiia gazeta*, Gorbachev stated that he met with Chairman Valerii Zorkin and told him that he would not be taking part in the trial. Gorbachev expressed the view that although the Court had displayed great competence, the CPSU trial "may turn out to be compromising for the Constitutional Court, rather than giving it the opportunity to study the future of the rule-of-law state." According to Gorbachev, the

⁷⁶ "Shakhrai Gives Statement on Legal Aspects" (text), Moscow Mayak Radio Network in Russian (3 July 1992), FBIS Daily Report Supp Central Eurasia, 10 July 1992 (FBIS-SOV-92-133 S), 2-3.

⁷⁷ Liudmila Yermakova and Aleksandr Krasulin, "Secret Files Submitted to Court" (text), Moscow ITAR-TASS in English (3 July 1992), FBIS Daily Report Supp-Central Eurasia, 10 July 1992 (FBIS SOV 92-133 S), 1-2.

⁷⁸ See "Lawyers Comments on Court Proceedings," (text), Moscow INTERFAX in English (7 July 1992) and "Communists Demand Yeltsin Attend Court Hearing," (text), Moscow ITAR-TASS in English (7 July 1992), FBIS Daily Report Supp-Central Eurasia, 10 July 1992 (FBIS SOV-92-133 S), 7-8.

trial was putting "70 years of history in the dock," and that in the end, "both sides will come out losers in this court because what is going on will lead to splits and arguments in society."⁷⁹

After a few weeks of testimony, some members of the bench expressed the desirability of calling Gorbachev as a witness. However, again the Court did not summon Gorbachev to appear, but decided to hear all the slated witnesses and decide whether or not Gorbachev was necessary at a later date.⁸⁰ After this group of witnesses was heard, the Court decided that it would not need to summon Gorbachev.⁸¹ However, this point of view changed and in late September 1992, Gorbachev received an official summons to appear at the CPSU trial.

At a press conference, Gorbachev stated that he would not participate in the trial under any circumstances.⁸² In an open letter to the Court, published in *Komsomolskaia pravda* on September 29, Gorbachev outlined his reasons for refusing to obey the summons. While noting that the Constitutional Court was an important democratic

⁷⁹ "Further on Interview," (text). Moscow ITAR-TASS in Russian (8 July 1992). FBIS Daily Report Supp-Central Eurasia, 17 July 1992 (FBIS-SOV-92-138-S), 16.

⁸⁰ Andrei Krasnov, "Judge Urges Gorbachev to Appear in Court," (text). Moscow Radio Rossii Network in Russian (1400 GMT 23 July 1992). FBIS Daily Report Supp-Central Eurasia 31 July 1992 (FBIS-SOV-92-148-S), 8.

⁸¹ Liudmila Yermakova et al., "Says Yeltsin, Gorbachev Not to Attend," (text). Moscow ITAR-TASS in English (1359 GMT 6 August 1992). FBIS Daily Report Supp-Central Eurasia, 13 August 1992 (FBIS-SOV-92-157-S), 8.

⁸² "Gorbachev Refuses to Appear Before Court," (text). Moscow INTERFAX in English (29 September 1992). FBIS Daily Report-Central Eurasia 7 October 1992 (FBIS-SOV-92-195-S), 9.

institution in Russia, Gorbachev stated that the Court had made a mistake in agreeing to conduct this case:

By agreeing to examine the case the Constitutional Court has become embroiled in activity which is not properly its own, becoming a hostage of political confrontation, which is prejudicial to its authority and at the same time helps exacerbate the sociopolitical situation in the country. Therefore, no matter how professionally - from the standpoint of legal proceedings - this trial is conducted, it is bound to bear the stamp of a political trial.⁸³

Although Gorbachev claimed to respect the Court, his actions portrayed an unwillingness to follow a set of legal norms, or a mistrust of the actual capabilities of the Court. In support of Gorbachev, a number of lawyers questioned "... the court's adherence to the law and the constitution."⁸⁴

Predictably, the Court was displeased with Gorbachev for giving the letter to the press and was insulted by his statements regarding the political nature of the trial. Moreover, both sides were unanimous in their derision of Gorbachev's refusal to attend: "Gorbachev is not respecting the obligations of a Russian citizen, is provoking a political scandal, and is demonstrating his lack of respect for the court; the Constitutional Court must insist on its demand and see that it is obeyed."⁸⁵

⁸³ Mikhail Gorbachev, "Text of Letter Explaining Nonattendance," (Text in Moscow *Komsomolskaia pravda* in Russian (29 September 1992)). *FBIS Daily Report-Central Eurasia* 7 October 1992 (FBIS-SOV-92-195 S.), 9.

⁸⁴ Wishnevsky, "Russian Constitutional Court," 4.

⁸⁵ Remarks made by Valentin Kuptsov (representing the CPSU) and Mikhail Fedotov (representing the president) at the session of the Constitutional Court in "Court Reacts to Gorbachev Statement," (Text in Moscow *INTERFAX* in English (29 September 1992)). *FBIS Daily Report-Central Eurasia* 7 October 1992 (FBIS-SOV-92-195 S.), 19.

In response, the Constitutional Court issued a formal demand to Gorbachev on October 1, 1992, to attend the hearing. The Russian Foreign and Security Ministries announced the following day that Gorbachev would not be allowed to leave Russia unless he testified.⁸⁶ The Court fined Gorbachev 100 rubles for his refusal to appear.⁸⁷ For a second time the Court formally summoned Gorbachev to appear on October 7, 1992, and again, Gorbachev failed to show up at Court.⁸⁸

On October 8, 1992, entry to the buildings used by the Gorbachev Foundation were barred to Gorbachev and his employees under the authority of a decree issued by Yeltsin on the previous day. According to Yeltsin's decree, the buildings used by the Gorbachev Foundation were transferred to the Financial Academy of the Russian Government, which in turn could lease part of the premises to the Foundation.⁸⁹

At a news conference following this event, Gorbachev reaffirmed his decision not to appear as a witness before the Constitutional Court, and referred to the proceedings as

" See "Demands Gorbachev Testimony," (text), Moscow INTERFAX in English (1 October 1992), and "Ministries Bar Gorbachev From Travel Until Testimony Given," (text), Moscow ITAR-TASS in English (2 October 1992). FBIS Daily Report-Central Eurasia 7 October 1992 (FBIS-SOV-92-195-S), 11.

" "Court Fines Gorbachev; Hears Ligachev Testimony," (text), Moscow INTERFAX in English (5 October 1992). FBIS Daily Report-Central Eurasia 7 October 1992 (FBIS-SOV-92-195-S), 14.

" A. Krasulin and S. Podyapolskiy, "Gorbachev Fails to Appear After Summons," (text), Moscow ITAR-TASS World Service in Russian (7 October 1992). FBIS Daily Report-Central Eurasia 23 October 1992 (FBIS-SOV-92-206-S), 17.

" See "Yeltsin Orders Takeover of Gorbachev Foundation, Dacha," (text), Moscow INTERFAX in English (7 October 1992); and "Gorbachev, Staff Refused Entry," (text), Moscow INTERFAX in English (8 October 1992). FBIS Daily Report-Central Eurasia 23 October 1992 (FBIS-SOV-92-206-S), 18.

a "political show trial." He described Yeltsin's decree as an "act of political revenge" and "evidence of the Russian President's weakness and authoritarian attitudes."⁹⁰

In response, the Court issued a statement on Gorbachev's refusal to testify in which it accused Gorbachev of violating Articles 8 and 39 of the Law on the Constitutional Court. By his actions, the Court stated that Gorbachev was discrediting the Court with unwarranted and unbiased opinions. The Court also confirmed that Gorbachev's rights had not been infringed in regard to the withholding of his exit visa:

According to Point 25 of the 22 September 1970 statute on entry into the USSR and exit from the USSR, which operates on the territory of the Russian Federation, "a USSR citizen is not allowed to leave the USSR on private business ... a) if he has unfulfilled commitments to the state ... which are associated with ... the legal interests of state and public organizations, until these commitments are fulfilled..."⁹¹

During this debacle, the situation regarding Gorbachev's exit visa was exacerbated by the death of Willy Brandt, former German Chancellor. Gorbachev intended to attend Brandt's funeral, which was scheduled for October 16, 1992. The refusal to allow Gorbachev to leave the country was fast becoming an international concern.⁹² In the

⁹⁰ "Gorbachev Calls Hearings 'Show Trial': Protests Yeltsin Decision," (text). Moscow INTERFAX in English (8 October 1992). *FBIS Daily Report-Central Eurasia* 23 October 1992 (FBIS-SOV 92-206-S), 19-20.

⁹¹ "Court Issues Statement on Gorbachev Refusal to Testify," (text). Moscow *Komsomolskaia pravda* in Russian (16 October 1992). *FBIS Daily Report-Central Eurasia* 23 October 1992 (FBIS-SOV 92-206-S), 20.

⁹² Andrei Kozyrev spoke with John Major and Douglas Hurd about the Gorbachev incident; see "Kozyrev Urges Gorbachev to Testify," (text). Moscow *ITAR-TASS World Service* in Russian (13 October 1992). *FBIS Daily Report-Central Eurasia* 23 October 1992 (FBIS-SOV 92-206-S), 21. See also rumours in press that Germany and Italy were setting up "Gorbachev defense committees," in "Gorbachev, Zorkin Review Dispute," (text). Moscow *Kuranty* in Russian (15 October 1992). *FBIS Daily Report-Central Eurasia* 23 October 1992 (FBIS-SOV 92-206-S), 23.

end, Gorbachev was allowed to attend the funeral after speaking with Zorkin and agreeing to meet with him after his return from Germany.⁹³ However, the Court was still extremely displeased with Gorbachev's apparent lack of respect for the rule of law and for his endless remarks to the press concerning the "political" aspect of the trial. In regard to Gorbachev's wish to hold a private conversation with the Court instead of appearing in an open session, Zorkin stated in an interview with a *Kuranty* journalist:

Why can't he appear before a session? Why is he striking a pose and attempting to be a judge above the court? No citizen is entitled to dictate terms to the court. He may have his own opinion about the court, but that does not release him from his civic duties. The point about a citizen of a state is that he had both rights and duties. Otherwise society simply falls apart. By his actions he is illustrating how society can fall apart. You can imagine what would become of the Constitutional Court with a few hundred people like Gorbachev.⁹⁴

Finally, the tension regarding Gorbachev's testimony abated somewhat when Zorkin commented to TASS on October 15, 1992, in which he stated that although "the Constitutional Court has enough powers to make Mikhail Gorbachev appear in Court ... I believe that both the sides and the court will reject him as something worthless as he will not only help clear up the truth, but tries to deceive the court."⁹⁵

⁹³ "Gorbachev to Meet with Chief Justice After Germany, Italy Trips," (text). Moscow ITAR-TASS in English (13 October 1992). *FBIS Daily Report-Central Eurasia* 23 October 1992 (FBIS-SOV-92-206-S), 23.

⁹⁴ "Gorbachev, Zorkin Review Dispute," (text). Moscow *Kuranty* in Russian (15 October 1992). *FBIS Daily Report-Central Eurasia* 23 October 1992 (FBIS-SOV-92-206-S), 26.

⁹⁵ A. Krasulin, "Chief Justice Says Court May Stop Summoning Gorbachev," (text). Moscow ITAR-TASS in English (15 October 1992). *FBIS Daily Report-Central Eurasia* 23 October 1992 (FBIS-SOV-92-206-S), 27.

This interview with the press was not the first, nor the last, time that Zorkin made public statements to the media regarding the Court's decisions as well as the general political situation in Russia. During the course of the CPSU hearing, Chairman Zorkin had a number of interviews with the press. Before the trial even began, he commented extrajudicially by expressing his reservations about Yeltsin's November decree.⁹⁶ Later he refused to comment on the trial *per se*, but admitted to feeling pressured by the press.⁹⁷

As well, when the tension around the Gorbachev affair heightened, Zorkin gave many interviews to the press. At the end of this incident, once the Court decided in October that it would not force Gorbachev to testify, Zorkin suggested that Gorbachev's political career was over as a result of his refusing to obey the court's summons to appear.⁹⁸

Gorbachev, in response, sent a letter to Oleg Poptsov, the chairman of the Russian State Radio and Television Company, claiming that Zorkin's remarks in themselves represent "... not only a blatant violation of the ethics of legal proceedings, but also [testify] to political excess, [bear] the imprint of political pressure, and thereby [place] the objectivity and independence of the chairman of the Constitutional Court under doubt."⁹⁹

⁹⁶ Robert Sharlet, "The Russian Constitutional Court: The First Term," *Post Soviet Affairs* 9, no.1 (1993), 18.

⁹⁷ Boris Slavin, "Expectations From Trial Deliberations Viewed," (text), Moscow *Pravda* in Russia (9 July 1992). *FBIS Daily Report Supp. Central Eurasia*, 17 July 1992 (FBIS-SOV-92-138-S), 19.

⁹⁸ "Court Chairman Says Gorbachev's Political Career Over," (text), Moscow *INTERFAX* in English (19 October 1992). *FBIS Daily Report Central Eurasia* 23 October 1992 (FBIS SOV 92 206 S), 28.

⁹⁹ "Gorbachev Wants to Reply to Zorkin on Television," (text), Moscow *INTERFAX* in English (20 October 1992). *FBIS Daily Report Central Eurasia* 23 October 1992 (FBIS-SOV-92 206-S), 29.

After weeks of testimony and recesses by the Court,¹⁰⁰ a decision was reached on November 30, 1992. The Constitutional Court found that the decree confiscating the property of the CPSU and the CP RSFSR was constitutional only as applied to the portion of property that belonged to the State. All remaining property belonged to the CPSU. The Court found that Yeltsin's edict of November 6, 1991, which disbanded the CPSU and the CP RSFSR was constitutional only to the extent of banning the leading organizational structures of the Party. Its application to the local organizations was deemed to be unconstitutional. The Court dismissed Rumyantsev's petition to declare the CPSU and the CP RSFSR to be unconstitutional as a moot point given that the Court had held Yeltsin's decree disbanding the leading organizational structures of the party to be constitutional and therefore, these two structures no longer existed.¹⁰¹

Thus, the Court reached a compromise that neither fully satisfied or displeased either side of the dispute. The ruling on the property of the CPSU necessitated a further action before the Arbitration Court to determine which items of property belonged to the State and which to the CPSU. The ruling also allowed the Communist Party to begin reorganizing itself.

¹⁰⁰ During the length of the trial the Court heard the testimony of 62 witnesses and experts over the course of 52 sessions; Sharlet, "Russian Constitutional Court," 18-19.

¹⁰¹ "In the Case of the Verification of the Constitutionality of Edicts of the President of the Russian Federation No. 79 of 23 August 1991 "On the Suspension of the Activity of the Communist Party of the RSFSR," No 90 of 25 August 1991 "On the Property of the CPSU and the Communist Party of the RSFSR," and No. 169 of 6 November 1991 "On the Activity of the CPSU and the CP RSFSR," as well as the Verification of the Constitutionality of the CPSU and the CP RSFSR; in *Statutes & Decisions: The Laws of the USSR and Its Successor States* 30, no.4 (1994), 8-43.

Some analysts believe that the Court made an error in deciding to hear this case and should have refused it as a "political question" under Art.1(3) of the Law on the Constitutional Court.¹⁰² Others hold that the Court issued a carefully crafted decision on the legal issues before it.¹⁰³ Undoubtedly, it would have been difficult to find a constitutional reason for disallowing a political party to organize and carry out activity.

This case highlights many of the problems that beset the Constitutional Court in its first year. First of all, it emphasized some of the institutional problems the Court was facing. In an article appearing in *Rossiiskaia gazeta*, Moscow Juridical Institute Professor Ekaterina Kozlova discussed the CPSU case from a legal standpoint. She found that one of the problems in determining the issue of the former property of the CPSU was that the Russian legal system was imperfect and was still lacking in laws. According to her: "It would be expedient to "fill the legal gaps instead of being drawn into prolonged, extremely costly procedure demanding a large number of specialists [in the Constitutional Court]."¹⁰⁴ She noted that the RSFSR Law on Property allowed for confiscation of property by the State, but that certain parts of the law conflict with the Constitution and that it is not clear which government organ has the authority to confiscate property; different statutes claim that it is the decision of the Court; others state

¹⁰² Sharlet, "Russian Constitutional Court," 17.

¹⁰³ Sarah Reynolds, "Editor's Introduction," *Statutes & Decisions: The Laws of the USSR and Its Successor States* 39, no. 4 (July-August 1994), 6.

¹⁰⁴ Liudmila Yermakova, "Legal Aspects of Decree of Property," *Prava*, Moscow *Rossiiskaia gazeta* in Russian 8 July 1992. *FBI's Daily Report Supp-Central Eurasia*, 17 July 1992 (FBI's *CEE* 9, 138-9).

it is the executive. In addition to this, the Supreme Soviet has jurisdiction over social organizations, but the question remains whether the CPSU could be classified as a true social organization.

These problems emphasize the fact that institutional legacies were haunting the Court and placing obstacles before it. Other institutional problems highlighted by the CPSU case concerned the Law on the Constitutional Court itself.

The Russian Procurator General Valentin Stepankov also noted flaws in the Law on the Constitutional Court. In an interview during the CPSU case, Stepankov stated:

We ourselves [lawyers] - and I happen to be a legislator too - see certain deficiencies in the Law on the Constitutional Court. We sense how difficult it is for the judges, trapped as they are within the confines of this law, to perform their functions. I think that once the Constitutional Court has heard a number of cases, legislators will be able to make certain amendments so the parties can be better protected and more satisfied, so the investigative machinery itself is understood by everybody.¹⁰⁵

In addition to existing institutional problems, the case also raised the question of the independence of the judiciary. The Gorbachev incident is an example of this. When Zorkin announced that the Court had finally lifted the travel restrictions to allow Gorbachev to attend Brandt's funeral, he added that Yeltsin had telephoned him and requested that the travel restriction be lifted.¹⁰⁶ Journalists were quick to allege the revival of "telephone

¹⁰⁵ "Procurator General on Court Hearings," (text). Moscow Russian Television Network in Russian (1020 GMT 3 August 1992). *FBIS Daily Report Supp-Central Eurasia*, 13 August 1992 (FBIS-SOV-92-157-S), 6.

¹⁰⁶ Wishnevsky, 5.

justice."¹⁰⁷ however Zorkin quickly met with the press and asserted that it was only after the Court had made the decision to allow Gorbachev to attend the funeral that there had been a telephone conversation with Yeltsin.¹⁰⁸ Obviously, if Yeltsin influenced the Court's decision in lifting the travel restriction, the Court's independence can clearly be called into question. However, even if the call was made after the Court had reached a decision, one wonders about the degree of the Court's independence. The very fact that the Court telephoned the President in regard to a case before it is quite a serious matter. However, Zorkin seemed to think that as long as the Court's decision was previously made, there was no problem in discussing it with the president. Indeed, the many conversations between Zorkin and Gorbachev himself regarding his failure to testify raises the question about proper legal culture and the independence of the judiciary.¹⁰⁹ To the Westerner, this is completely unacceptable and initially points to a lack of "legal culture" in Russia as the West understands it. In the Canadian and American legal systems any contact between a politician and a judge concerning a case before the court is strongly disapproved of and is seen as something which brings the administration of justice into disrepute. In Canada, for

¹⁰⁷ The term "telephone law" refers to the lack of independence of the judiciary during the Communist era. Decisions were normally made according to the desires of the Communist Party, and therefore there was constant communication, via telephone, between the judges and the Party.

¹⁰⁸ "Explains Decision on Gorbachev Trip," (text), Moscow ITAR-TASS in English (19 October 1992). *FBIS Daily Report Central Eurasia* 23 October 1992 (FBIS-SOV-92-206-S), 28.

¹⁰⁹ See "Text of Letter Explaining Nonattendance," (text), Moscow *Komsomolskaya pravda* in Russian (29 September 1992). *FBIS Daily Report Central Eurasia* 7 October 1992 (FBIS-SOV-92-195-S), 9-10, and Y. Katanyan and A. Nadzharov, "Gorbachev, Zorkin Review Dispute," (text), Moscow *Kuranty* in Russian (15 October 1992). *FBIS Daily Report Central Eurasia* 23 October 1992 (FBIS-SOV-92-206-S), 25-26.

example, the public has called for the resignation of a politician who has contacted a judge regarding a case before the bench.¹¹⁰

The question of what prevents this from happening in the West is thus raised. What allows for judicial independence here? And why was it so difficult to maintain in the CPSU case. The obvious answer is the historical lack of judicial independence in Russia and the presumable lack of political culture among legal and political elites to support judicial independence. Yet, the CPSU case is a difficult one from which to draw conclusions given its immense political nature. Gorbachev's refusal may not be indicative of a lack of legal culture but of a fear of being made a scapegoat for all the crimes the CPSU committed during its 70-year reign.

D. THE SEVENTH CONGRESS OF PEOPLE'S DEPUTIES

Unfortunately, by the end of 1992 it was evident that the Court was being pulled into more political issues.¹¹¹ At the Seventh Congress of People's Deputies, the political struggle for power between Yeltsin and the Supreme Soviet was a main item of discussion. The main point of contention was the question of where the demarcation line of legislative power was to be drawn between Yeltsin and the Supreme Soviet. Because this political crisis was a threat to Russia's constitution, Zorkin offered to act as an arbitrator between Yeltsin and Khasbulatov.¹¹² The three parties were able to reach a compromise and the

¹¹⁰ Gerald L. Gall, *The Canadian Legal System* 3d ed. (Toronto: Carswell, 1990), 245-46.

¹¹¹ Wishnevsky, 8.

¹¹² I. Ivanov and G. Talalayev, "Yeltsin, Khasbulatov, Zorkin Discuss Compromise 12 Dec," (text). Moscow ITAR-TASS World Service in Russian

Congress adopted a resolution entitled "On the Stabilization of the Russian Constitutional System," which was to put an end to the crisis between the legislative and executive authorities. The resolution, in part, scheduled a nation-wide referendum on fundamental provisions of a new Constitution for April 11, 1993. Constitutional amendments adopted at the conference which would have curtailed Yeltsin's powers were to be suspended until the referendum.¹¹³ Unfortunately, only one-seventh of the conservative faction of deputies voted in favour of this resolution,¹¹⁴ a sign that the conflict between the legislature and Yeltsin was far from over.

In some circles, Zorkin's role in the compromise met with approval. Former head of the Soviet parliament Anatolii Lukianov stated that the Constitutional Court "for the first time displayed itself as a reliable, balanced power." According to Lukianov this was not a case of "intervention from the Constitutional Court in the political struggle, as there was a constitutional motive - the attempt to find a point of consent between powers."¹¹⁵

(12 December 1992). *FBIS Daily Report Supp. Central Eurasia* 14 December 1992 (FBIS-SOV-92-240-S), 3.

¹¹³ V. Titov, "Yeltsin, Congress Compromise to End Political Crisis," (text). Moscow *ITAR-TASS* in English (12 December 1992). *FBIS Daily Report-Central Eurasia* 14 December 1992 (FBIS-SOV-92-240-S), 4; "Zorkin Reads Stabilization Proposal," (text). Moscow *Radio Russia Network* in Russian (12 December 1992). *FBIS Daily Report Central Eurasia* 14 December 1992 (FBIS-SOV-92-240-S), 4-5 [Live Speech by Zorkin].

¹¹⁴ Alexander Sobyannin, "Political Cleavages Among the Russian Deputies," in *Parliaments in Transition: The New Legislative Politics in the Former USSR and Eastern Europe*, ed. Thomas F. Remington (Boulder: Westview Press, 1994), 201-202.

¹¹⁵ "Lukyanov on Zorkin Participation in Congress," (text). Moscow *INTERFAX* in English (15 December 1992). *FBIS Daily Report Central Eurasia* 18 December 1992 (FBIS-SOV-92-244), 4.

The opposition, on the other hand, criticized Zorkin's participation in the Congress.¹¹⁶ The compromise reached between Yeltsin and Khasbulatov did not meet with everyone's approval and the co-chairman of the right-wing extremist group, the National Salvation Front, vowed to challenge its constitutionality. However, given that Zorkin participated in its inception, an appeal to the Court seemed senseless.¹¹⁷

Zorkin responded by claiming that the Court's role in the mediation process was proper and necessary:

... not only for the two sides, but for many people, the court was seen in a not entirely accustomed light. ... But a government institution like the Constitutional Court is, above all, a defender of the constitutional order, the keeper both of power and its actual bearers. If, in our opinion, they make a mistake, then we must, with good part, help them through mediation.¹¹⁸

Other judges of the Court also justified the Court's role at the 7th Congress and claimed that it acted legally in accordance with Art. 80 of the Constitutional Court Act. The Court met at the request of Congress and gave Zorkin the mandate to act on its behalf as mediator. Justices Fbzeyev and Gadzhiyev, in an interview with *Rossiiskaia gazeta*, stated that the concept of the division of powers, necessary to protect civil society, was the most important constitutional issue in Russia and that the Court had to ensure that both the legislative and executive branches did not invade civil society. According to them, the novelty of the

¹¹⁶ "Lukyanov" *ibid.*

¹¹⁷ "National Salvation Front to Challenge Resolution," (text). Moscow INTERFAX in English (14 December 1992). *FBIS Daily Report-Central Eurasia* 15 December 1992 (FBIS-SOV-92-241-S), 14.

¹¹⁸ "Zorkin on Appearance at Congress," (text). Moscow *Rossiiskaia gazeta* in Russian (21 December 1992). *FBIS Report Central Eurasia* 15 January 1993 (FBIS-URS-93-006), 16.

division of powers concept in the Russian Constitution, coupled with the many archaic articles still in the Constitution, creates conflicts between the branches.¹¹⁹

This attempt to justify Zorkin's role as mediator under Art. 80 requires a very broad interpretation of that article which reads:

The Congress of RSFSR People's Deputies, with the agreement of the republics comprising the RSFSR, has the right to turn over to the RSFSR Constitutional Court for review differences and disputes between the designated republics as well as other questions.

Obviously, the judges were referring to the phrase "as well as other questions." Moreover, they ignored subsection (2) of that article which states that the Court can refuse to exercise this right if it finds that it will contradict its legal nature, tasks and purposes. At the end of 1992, it seemed like a good idea to most concerned that the Court play this role. Given that Zorkin was able to broker a compromise and end the crisis, the Court was in a favourable position.

Thus, 1992 came to a close; a resolution to the constitutional crisis confronting Russia was found only with the aid of the Constitutional Court. Some felt that Russia had been on the verge of a civil war in December 1992.¹²⁰

¹¹⁹ "High Court Judges on Court's Role in Congress Compromise," *Pravda*, Moscow Rossiiskaia gazeta in Russian (23 December 1992). *FBI's Report Central Eurasia* 6 January 1993 (FBIS URS 93 0120), 1-6.

A. Afanasyev, "Zorkin Calls for Delay in Referendum," *Pravda*, Moscow Komsomolskaia pravda in Russian (February 3, 1993). *FBI's Report Central Eurasia* 13 February 1993 (FBIS URS 93 0120), 8.

The crisis that broke out at the 7th Congress was a foreshadowing of the power struggle which was to come. Constitutional amendments initiated at this Congress were clearly designed to strip the president of most of his control over the executive branch and transfer it to the legislature.¹²¹ Unfortunately, Zorkin's involvement at the Congress also foreshadowed the role which he would later play as the constitutional crisis continued. As asserted by Michael Urban, Zorkin's involvement began "a pattern of direct involvement of the court in the political process [which] would disqualify that singular institution capable of assuming a neutral position for arbitrating the conflict between the executive and the legislature."¹²²

Michael Urban, "The Politics of Identity in Russia's Postcommunist Transition: The Nation Against Itself," *Slavic Review* 53, no. 3 (1994): 749.

¹²² *Ibid.*, 750.

CHAPTER THREE - THE POLITICIZATION OF THE COURT

A. ZORKIN AS JUDICIAL POLITICIAN

At the beginning of 1993, Valeri Zorkin was awarded the National Accord Prize by the National Harmony Committee for the civic action he performed on December 9th and 10th at the Congress of People's Deputies.¹ Zorkin's extrajudicial comments regarding Russia's political situation continued into the new year and in early February he expressed his opinion that the referendum should be postponed and a moratorium on introducing a new Constitution be imposed until the expiration of the term of both Congress and the president.² Zorkin also warned that without democracy, leadership would "degenerate into the blind arbitrariness of an authoritarian ruler."³

Zorkin's acceptance of the award, along with his appeal for a cancellation of the referendum was criticized in the press. Zorkin was now accused of acting in Khasbulatov's favour as well as out of a desire to be in the public spotlight. Far from being seen as the impartial arbitrator, he was accused of taking on the persona of a "subtle politician."⁴

¹ M. Sokolov, "Zorkin's Role in Political Transition," *Pravda*, 11 February 1993, *Moscow Kommersant* in Russian 11 February 1993. *RFE RL Report*, *Central Eurasia* 8 March 1993 (FBIS/REF 93-0307). The committee was translated as "National Consensus," is a non-governmental, international committee that embraces a number of prominent Russian and foreign writers; Julia Wishnevsky, "Russian Court Politics: What Role for the Judiciary in Government?" *RFE RL Research Report*, 12 February 1993.

² A. Alinasyev, "Zorkin Calls for Delay in Referendum," *Pravda*, 12 February 1993, *Komsomolskaia pravda* in Russian 12 February 1993. *RFE RL Report*, *Central Eurasia* 13 February 1993 (FBIS/UPS 93-117).

³ *Ibid.*, 12.

⁴ M. Sokolov, 3.

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Indeed, Zorkin was not reserved about his political opinions, and in a lengthy interview with *Literaturnaya gazeta*, he expressed his views on the Constitutional Court, the Constitution, federal relations within Russia, inter-ethnic problems, the power struggle between the legislature and the executive, the upcoming referendum, ex-President Gorbachev, and the impending trial of the GKChP [State Committee on the State of Emergency] before the Supreme Court.¹

In the interview Zorkin stressed that the Constitution was not a bad one because democratic amendments had been made to it, including the separation of powers and human and civil rights. According to Zorkin, although adoption of a new constitution was important, it should not be rushed, especially in the face of more pressing social problems, such as crime and poverty. He believed the problem laid with the authorities' lack of observance of the Constitution. Zorkin also stated that the constitution allowed for the Court to mediate between the executive and the legislature, and although such mediation would normally occur at a session of the Court, the situation was far from ordinary and thus the Court was justified in its political interference. On the topic of the referendum, Zorkin expressed concern that it could lead to early elections, which necessitated the adoption of a new election law. He also expressed concern that citizens would not comprehend the entire depth and all the consequences of all the answers they were supposed to provide.²

¹ "Zorkin on Constitutional Court, Elections," (text), Moscow *Literaturnaya gazeta* in Russian, 10 February 1993. *FBIS Report Central Eurasia* 6 March 1993 (FBIS-UPS 93 026), 14-18.
² *Ibid.*, 14-15.

At the Eighth Congress of People's Deputies held in March 1993, Zorkin delivered a speech in which he stressed that the cause of the constitutional crisis was not a bad Constitution, but rather the authorities' inability to live in accordance with it. This was to become his mantra throughout 1993. According to Zorkin, the only way out of the crisis was for the executive and the legislature to "reach an accord."⁷ Yet, Zorkin may have been mistaken in his views of the Constitution. Inherent problems within it, such as the contradiction giving the president complete powers while at the same time establishing the supreme powers of the legislators, were causing clashes between Yeltsin and the Supreme Soviet. The Constitution itself was providing the means for a constitutional crisis. Zorkin's response to this argument was that any contradictions within the Constitution must be interpreted in light of the principle of the separation of powers.⁸ However, this does not logically follow, and if it did, such contradictions would require interpretations by the Court, which again provided fodder for clashes between the legislature and the executive. Tentatively, it can be said that regardless of the quality of the constitution, it nevertheless was a powerful tool for the legislature to thwart Yeltsin with when it so desired. The entire constitutional drafting process also gave the legislature and the executive an issue to dispute, thus if this was removed, it would follow that there would be one less bone of contention in the political arena.

⁷ "Zorkin Delivers Speech to Congress 11 Mar," (text), Moscow Radio Rossii Network in Russian (11 March 1993), FBIS Daily Report-Central Eurasia 12 March 1993 (FBIS-SOV-93-047), 20.

⁸ "Zorkin on Constitutional Court Priorities," 16.

In response to Zorkin's speech, the Congress of People's Deputies resolved to consider Zorkin's message on the state of constitutional legality in the Russian Federation, to instruct the various organs of state power to bring all laws and enactments into line with the Constitution of the Russian Federation, and to adopt a law within three months on a mechanism for the implementation of the decisions of the Constitutional Court of the Russian Federation and on liability for the nonfulfillment of these decisions.⁹

After the Congress, the Constitutional Court was accused of being in the pocket of the Supreme Soviet.¹⁰ On a personal level, Zorkin was accused of being opportunistic, of stepping outside the bounds of propriety, of playing into Congress' hands, and of being of unsound mind.¹¹

B. POLITICAL TURMOIL AND THE APRIL REFERENDUM

Yeltsin continued to press for the national referendum which had been decided upon at the Seventh Congress of the People's Deputies. The referendum would be used to determine popular support for Yeltsin's package of constitutional reforms. On March 7, the president's office issued the draft referendum questions

⁹ "On Observance of Constitution," (text). Moscow *ITAR-TASS World Service* in Russian (12 March 1993). *FBIS Daily Report Central Eurasia* 15 March 1993 (FBIS-SOV-93-048), 26-27.

¹⁰ L. Yermakova, "Zorkin Comments, Leaves for U.S.," (text). Moscow *ITAR-TASS* in English (13 March 1993). *FBIS Daily Report Central Eurasia* 15 March 1993 (FBIS-SOV-93-048), 47.

¹¹ M. Sokolov, "The Deputies Met and Sat Down on the Constitutional Field," (excerpts). Moscow *Kommersant* (March 22-28 1993). *Current Digest of the Soviet Press*, XLV, no.13 (1993), 11.

- 1) Do you agree that the Russian Federation should be a presidential republic?
- 2) Do you agree that the top legislature of the Russian Federation should be a bicameral parliament?
- 3) Do you agree that a new constitution of the Russian Federation should be adopted by a constitutional assembly representing the multinational population of the Russian Federation?
- 4) Do you agree that each citizen of the Russian Federation has the right to possess, use and manage land as owner?¹²

The power struggle between the legislature and executive was continuing in full force and reached another apex when, at the Eighth Congress of People's Deputies, (March 10-13, 1993), the deputies decided to postpone the referendum.¹³ According to Sobyenin, at the 8th Congress the deputies rejected all of Yeltsin's compromise initiatives and put into effect the Constitutional amendments adopted at the 7th Congress that reduced presidential power.¹⁴ Sobyenin clearly sees the fault of the crisis laying with the deputies who opposed Yeltsin's economic reforms and were intent on forcing his resignation.¹⁵ The deputies had a corporate interest in preserving their powers and scaling back the president's.¹⁶

¹² "Yeltsin Press Office Presents Referendum Questions," (text), Moscow ITAR-TASS in English (7 March 1993). FBIS Daily Report-Central Eurasia 8 March 1993 (FBIS-SOV-93-043), 12.

¹³ Alexander Sobyenin, "Political Cleavages Among the Russian Deputies," in *Parliaments in Transition: The New Legislative Politics in the Former USSR and Eastern Europe*, ed. Thomas F. Remington (Boulder: Westview Press, 1994), 206.

¹⁴ Ibid.; see also Dwight Semler who states that before the 8th Congress, Yeltsin sought a compromise by proposing a series of constitutional amendments designed to grant more authority to parliament on defense, security and foreign policy matters in exchange for broader presidential powers over the economy, including the ability to appoint and remove the head of the Central Bank; Dwight Semler, "Special Reports: Crisis in Russia," *East European Constitutional Review* 2, no.2 (1993), 15.

¹⁵ Sobyenin, 202, 206.

¹⁶ Ibid., 188.

Yeltsin responded with a television broadcast to the Russian people on March 20, 1993 in which he announced that he had signed a decree establishing "special rule of government" until the crisis has been overcome. He stated that the powers of the People's Deputies would stay in place, but that any decisions directed at revoking presidential decrees would be invalid. The decree would also give instructions to the Government to carry out measures to stabilize the economy, ensure public order, and protect vital institutions. Protection of civil rights by the courts would not be restricted in any way. In his speech, Yeltsin also proposed a vote of confidence in the president to be held on April 25, 1993 by means of a national referendum. Yeltsin believed the constitutional crisis existed because of the absence of a clear division of powers and the contradictions in the Constitution and that the Congress was violating the separation of powers.¹⁷

Zorkin reacted before the Court did, and personally appeared on the floor of the Supreme Soviet and on television to condemn Yeltsin's appeal as unconstitutional and "an attempt at a coup."¹⁸ An hour after the broadcast of Yeltsin's appeal, Zorkin, along with Chairman Khasbulatov, Vice-President Rutskoi and Procurator-General Stepankov, appeared together at the press conference to denounce Yeltsin's actions.¹⁹

¹⁷ "Yeltsin Decrees 'Special Regime of Government,'" (text, Moscow Ostankino Television First Channel Network in Russian (20 March 1993)). *FBIS Daily Report-Central Eurasia* 22 March 1993 (FBIS/SEI 93 053), 13-15.

¹⁸ Wendy Slater, "Head of Russian Constitutional Court Under Fire," *RFE/RL Research Report* /RL 2, no.26 (1993) 2; Michael Urban, "The Politics of Identity in Russia's Postcommunist Transition: The Nation Against Itself," *Slavic Review* 53, no.3 (1994), 752.

¹⁹ Robert Sharlet, "Chief Justice as Judicial Politician," *East European Constitutional Review* 2, no.2 (1993), 36.

The Constitutional Court met forthwith on its own initiative in a closed session to determine the constitutionality of Yeltsin's televised decree of special rule. Nine of the judges supported the majority decision, but there were three separate opinions by Justices Morshchakova, Vitruk and Ametistov.

In the majority decision, the Court stated that although it shared the President's concerns for the fate of the country and for the preservation of the unity and integrity of the Russian Federation, certain parts of Yeltsin's decree were unconstitutional. First of all, according to the majority, the Constitution provided for the introduction of a "special regime of government" only in times of a state of emergency and not in the circumstances enunciated by Yeltsin. The majority found that the decree violated the separation of powers and the rule of law by attempting to nullify the effect of any Supreme Soviet resolutions that reversed Presidential edicts. In regard to the proposed referendum, the Court held that although the vote could be held, it could not decide who the leader of the country would be, it could only be a vote of confidence in Yeltsin himself. The submission of the draft constitution to a nation-wide vote also contradicted the Constitution and the "Law on Referendum of the Russian Federation."²⁰

The separate opinions focused on the fact that Yeltsin had not issued a legal, signed decree. According to each of the minority opinions, the televised address represented an

²⁰ "On the Correspondence to the Constitution of the Russian Federation of the Actions and Decisions of the President of the Russian Federation, B.N. Yeltsin Associated with His Address to the Citizens of Russia of 20 March 1993," in *Statutes & Decisions: The Laws of the USSR and its Successor States* 30, no.4 (July-August 1994), 87-91.

intention on the part of Yeltsin to carry out certain measures, and thus could not be the basis of an examination as it was not an "action or decision" as required by Art. 74(1)(1) of the Constitutional Court Act.¹¹ All three judges stated that the majority of the Court was mistaken by equating Yeltsin's implementation of a "special regime of government" with a declared "state of emergency."¹² Morshchakova stressed that there was nothing in the Presidential Address that changed the separation of powers in the Constitution.¹³ All stressed that the majority was wrong in declaring Yeltsin's address unconstitutional and emphasized that there were no grounds for impeachment. Ametistov's opinion was particularly invective and he accused the Court of a number of violations of the Constitutional Court Act: examination of a political instead of a legal act, failure to notify the participants of the session 10 days in advance, as well as those listed above. Ametistov was particularly hard on Zorkin for publicly commenting on a question that had been accepted for examination by the Court before a decision has been issued.¹⁴

¹¹ "Osoboe mnenie sud'i Konstitutsionnogo Suda Rossiiskoi Federatsii T.G. Morshchakovo v svyazi s zaklyucheniem... (Special Opinion of Judge Morshchakova) [unpublished manuscript, March 23, 1993], 1-2; "Osoboe mnenie syd'i Konstitutsionnogo Suda Rossiiskoi Federatsii E. M. Ametistova no delu o sootvetstvii Konstitutsii Rossiiskoi Federatsii deistvii i reshenii Prezidenta Rossiiskoi Federatsii B.N. Yeltsina, svyazannykh s ego Obrashcheniem k grazhdanam Rossii 20 marta 1993 goda" [Special Opinion of Judge Ametistov], [unpublished decision, April 1, 1993]; "Osoboe mnenie Konstitutsionnogo Suda Rossiiskoi Federatsii N.V. Vitruka pri vnesenii Konstitutsionnym Sudom zaklyucheniya o sootvetstvii Konstitutsii Rossiiskoi Federatsii deistvii i reshenii Prezidenta Rossiiskoi Federatsii B.N. Yeltsina, svyazannykh s ego Obrashcheniem k grazhdanam Rossii 20 marta 1993 goda" [Special Opinion of Judge Vitruk], [unpublished decision, March 23, 1993], 1-2.

¹² *Ibid.*

¹³ "Special Opinion of Judge Morshchakova," 1-2.

¹⁴ "Special Opinion of Judge Ametistov," 1-2.

In response to statements made by Ametistov and Vitruk to the press concerning their separate opinions, Justice Boris Ebzeev in an interview with *Rossiiskaya gazeta* stated that the Court had acted within its mandate by reviewing Yeltsin's television address on its own initiative and that it had so acted in order to defend the Russian Constitution. Ebzeev also defended Zorkin's actions and claimed that he had acted within the Constitutional Court Act because he had voiced his opinion before the question had been accepted for examination by the Court. He also denied that the Court was entering into the political fray but rather was defending the constitutional order of the Russian Federation.²¹ Zorkin also denied that the Court had done anything wrong in issuing its decision.²²

Two days after the television address, the president's press secretary issued a statement in which it accused Zorkin of a hasty and unilateral position which contravened legal ethics in voicing his opinions before the Court had examined Yeltsin's address.²³ At an emergency session of the Supreme Soviet, Deputy Sergei Nosovets also accused Zorkin of a "gross violation [for leading and taking part in the court's session], because he had

21. Katanyan, K. "Constitutional Judge Urges Review of Congress Decree," (text), Moscow Kuranty in Russian (23 March 1993). FBIS Daily Report-Central Eurasia 24 March 1993 (FBIS-SOV-93-055), 24; Katanyan, K. "Constitutional Court Judges Interviewed," (text), Moscow Kuranty in Russian (12 April 1993). FBIS Daily Report-Central Eurasia 14 April 1993 (FBIS-SOV-93-070), 28-30.

22. "Constitutional Court Judge Discusses Crisis," (text), Moscow Rossiiskaya gazeta in Russian (23 March 1993). FBIS Daily Report-Central Eurasia 23 March 1993 (FBIS-SOV-93-064), 10-12. Art. 74.1 of the Constitutional Court Act allows the it to hand down finding upon its own initiative concerning the actions and decisions of the President and other high officials of the RSFSR and of the republics of the RSFSR.

23. A. Afanasyev, "Zorkin Discusses Constitutional Court Role," (text), Moscow Komsomolskaya pravda in Russian (24 March 1993). FBIS Daily Report-Central Eurasia 23 March 1993 (FBIS-SOV-93-064), 22-24.

24. "Yeltsin Spokesman's Statement," (text), Moscow ITAF-TASS in English (23 March 1993). FBIS Daily Report-Central Eurasia 23 March 1993 (FBIS-SOV-93-054), 16.

already called the president's actions a crime, and according to the law he had no right to be in the court."²⁹ First Vice-Premier Vladimir Shumeiko accused the Court of going into politics.³⁰ The president's office issued a statement saying that the Court's decision was illegal, and hence invalid, because it violated the Constitution. The objections were (1) the decision was a political one, (2) that the decision was taken in a closed session and that the parties were not invited to attend, as stipulated by the Constitutional Court Act, and (3) that the Court addressed a televised appeal and not an official presidential decree.³¹

These objections clearly matched those found in the separate opinions, and for the most part, were valid ones. The Constitutional Court Act stipulated that all sessions were to be public with the exception of cases involving state, professional or commercial secrets.³² In terms of the Court considering the contents of a televised address, the law is unclear, as Art. 74(1) states that the Court may review "actions and decisions taken by the RSFSR President," and decide if they conform to the Constitution. "Actions and decisions" (*deistviya i resheniya*) are not defined, thus creating some ambiguity on this issue, which gives a certain credence to the separate opinions. It seems that the Court may have acted a little too quickly and should have waited until the legal decree was issued.

²⁹ "Deputy Attacks 'Hypocrisy,'" (text), Moscow Russian Television Network in Russian (23 March 1993), *FBIS Daily Report-Central Eurasia* 23 March 1993 (FBIS-SOV-93-054), 17.

³⁰ "Shumeiko Says Rutskoi's Behavior 'Cowardly,'" (text), Moscow INTERFAX in English (22 March 1993), *FBIS Daily Report-Central Eurasia* 23 March 1993 (FBIS-SOV-93-054), 18.

³¹ "Court Passed Decision Before Decrees Were Published," (text), Moscow Ostankino Television First Channel Network in Russian (23 March 1993), *FBIS Daily Report-Central Eurasia* 24 March 1993 (FBIS-SOV-93-055), 25; T. Ivanova, "Fedotov Questions Legality of Court's Actions," (text), Moscow ITAR-TASS World Service in Russian (23 March 1993), *FBIS Daily Report-Central Eurasia* 24 March 1993 (FBIS-SOV-93-055), 25.

³² Art. 28(2), 28(4) of the Constitutional Court Act, 1990.

This accusation, along with the separate opinions, raised the issue of what, in terms of constitutional questions, is truly non-political and focuses on a basic problem in the Law on the Constitutional Court found in Art. 1(3) which forbids the Court from reviewing political questions. Although political, the issue did centre on the constitutional structure of Russia. Thus, technically the Court was within its mandate, and its decision may very well have been legally correct had it not been for its hastiness.

Although the president's office continued to call the court's decision illegal, the published edict was considerably milder than the television address and did not contain some of the points that the Court had rejected as unconstitutional.³³ The text of the decree "On the Activities of Executive Bodies Until the Power Crisis is Overcome," was published on March 24, 1993. In the written version, Yeltsin called for a vote of confidence in the president on April 25, 1993 along with a ballot on the draft of the new Constitution of the Russian Federation and the draft law on elections. In the published edict, Yeltsin also decreed that:

Decisions by state bodies and officials aimed at suspending decrees and instructions of the president of the Russian Federation in the absence [of] a ruling from the Constitutional Court of the Russian Federation are to be deemed legally invalid and not subject to implementation, in accordance with accepted procedure.³⁴

³³ Sarah Reynolds, "Editor's Introduction," *Statutes & Decisions: The Laws of the USSR and its Successor States* 30, no. 4 (July-August 1994): 7.

³⁴ "'Text' of Yeltsin 20 Mar Decree Published," (text), Moscow: ITAR-TASS World Service in Russian (24 March 1993); *FBIS Daily Report: Central Eurasia* 24 March 1993 (FBIS-SOV-93-055), 22.

Despite the fact that the written edict had been changed to reflect some of the Court's concerns, the backlash continued and the Court was criticized for issuing an opinion before the decree was published and for dealing with a political, not a legal, question in a closed hearing.⁵⁵ The Court was accused of assuming unnatural political functions and a group of deputies declared that the attempt to establish the Constitutional Court as an independent judicial body was a failure.⁵⁶ However, others defended Zorkin's actions as an attempt to avert a greater calamity and instead blamed the current events on a lack of respect for the Constitution.⁵⁷ Zorkin, himself, appeared at the Ninth Congress of People's Deputies on March 27, 1993 and defended the Court's decision, claiming that the Court had been safeguarding constitutional principles.⁵⁸

Zorkin undoubtedly felt justified in his reaction to Yeltsin's televised appeal, given that if the decree had gone ahead in its original form, there would have been a clear violation of the separation of powers resulting in a drastic change in the constitutional structure of the Russian Federation. The problem was that Zorkin expressed an extrajudicial opinion on a grave political situation. Although this may have been an expression of a political bias, it seems more likely, given Zorkin's previous interviews with

"Court Passed Decision Before Decrees Were Published," 25; T. Ivanova, 25.

"'Unnatural Political Functions' of Court," (text), Moscow INTERFAX in English (24 March 1993). FBIS Daily Report Central Eurasia 24 March 1993 (FBIS-SOV-93-055), 34.

See comments by Russia's Prokuratura General V. Stepankov in "Comments on Zorkin, Constitution," (text), Moscow INTERFAX in English 26 March 1993. FBIS Daily Report Central Eurasia 29 March 1993 (FBIS-SOV-93-058), 21.

"Zorkin Addresses Congress on Court's Position," (text), Moscow Russian Television Network in Russian 27 March 1993. FBIS Daily Report-Central Eurasia 29 March 1993 (FBIS-SOV-93-058), 47.

the media, that he saw himself as the defender of Russia's constitution. Zorkin, by far, was taking the brunt of criticism aimed at the Court because of his role as spokesman. Although the Constitutional Court Act did not specify that the Chairman of the Court will act as its spokesman, this seems to be a function that was given to him by the other members of the Court and by the media. The problem in this case was that Zorkin reacted immediately to Yeltsin's address, before the Court had decided to review the situation and then participated in the decision, clearly a violation of the Act.

Khasbulatov reacted to the Court's decision with a call to begin impeachment procedures against Yeltsin and described the appeal as "a direct attempt at a coup d'etat."¹⁹ The Court's evaluation of a portion of Yeltsin's appeal as a substantial violation of the Constitution could serve as a sufficient juridical basis for an impeachment vote, based on the constitutional amendments adopted at the 7th Congress in December, 1992.¹⁰ However, the Court's decision did not, in and of itself, find grounds for impeachment. Yeltsin's office reacted with a statement claiming that direct impeachment of the president would violate the Constitution. The statement claimed that a footnote to Art. 121.6 in the text of the "Law on amendments and supplements to the Constitution of the Russian Federation"

¹⁹ "Khasbulatov on Court's Ruling," (text), Moscow INTERFAX in English (23 March 1993), FBIS Daily Report-Central Eurasia 23 March 1993 (FBIS SOV-93 054), 14.

¹⁰ Sobyenin, 207; Article 121.6, amended on December 9, 1992 states that: "The powers of the President of the Russian Federation may not be exercised in order to change the national and state structure of the Russian Federation, or to dismiss, or suspend the activities of, any lawfully elected agencies of state power, in which case such powers are discontinued immediately." The words: "in which case such powers are discontinued immediately," were added by the amendment; "Ob izmeneniiakh i dopolneniiakh Konstitutsii (Osnovnogo Zakona) Rossiiskoi Federatsii - Rossii," *Vedomosti*, No. 2, st. 55 (14 ianvaria 1993 goda), 98.

of December 9, 1992, advised that this provision did not come into effect until the holding of a referendum on the draft of a new Constitution.⁴⁰ The parliamentary press service retaliated with a statement claiming that the footnote became invalid after the deputies at the 8th Congress cancelled the agreement adopted by Yeltsin and Khasbulatov at the 7th Congress, bringing Art. 121.6 into effect.⁴² Not much became of this debate, and a motion to hold a vote on Yeltsin's impeachment was held at the 9th Congress of People's Deputies which convened on March 26. The resolution to remove both Yeltsin and Khasbulatov, held on March 28, fell short of the necessary two-thirds majority.⁴³ The Congress, instead, agreed to hold a national referendum on questions concerning confidence in Yeltsin, support for his economic reform and whether to hold early presidential and parliamentary elections.⁴⁴

The Referendum went ahead as scheduled on April 25, 1993, with the following questions put to the electorate:

- (1) Do you have confidence in the President of the Russian Federation, B.N. Yeltsin?
- (2) Do you approve of the socio-economic policy being carried out by the President of the Russian Federation and the Government of the Russian Federation since the year 1992?
- (3) Do you consider it necessary to hold early elections for the President of the Russian Federation?

⁴⁰ Ibid., 101; see also "Impeachment: What's Behind the Drama," *Text*, Moscow Mayak Radio Network in Russian, 23 March 1993, *FBIS Daily Report-Central Eurasia* 23 March 1993, *FBIS* 93-054, 14.

⁴¹ "Parliament Rejects Impeachment Motion," *Text*, Moscow *Pravda* 15 March 1993, English (23 March 1993), *FBIS Daily Report-Central Eurasia* 23 March 1993, *FBIS-SOV* 93-054, 15.

⁴² Semler, "Special Reports: Crisis," 14.

⁴³ Remington et al., "Transitional Institutions," 116.

(4) Do you consider it necessary to hold early elections for people's deputies of the Russian Federation?⁴⁶

The Constitutional Court decided days before that the first two questions would have to be adopted by a majority of the turnout and not by a majority of those on the voters' lists.⁴⁶ The third and fourth questions required a majority of the votes of citizens included on referendum lists because they concerned an amendment or an addition to the Constitution. On the first two questions, Yeltsin received support from 58 percent of those who went to the polls, giving him greater legitimacy for his reform program.⁴⁷ The referendum also gave Yeltsin the opportunity to take the drafting of a new Constitution out of the hands of the legislature and award it to a Constitutional Assembly which he summoned in June.⁴⁸

Unfortunately for the Constitutional Court, the controversy surrounding Yeltsin's March appeal and the ensuing decision of the Court impacted negatively on the Court. Events surrounding the referendum raised many questions as to the Court's viability within the Russian political system. According to one of the judges of the Constitutional Court, one of the causes of the constitutional crisis was the discrepancy between Russia's constitution and the actual domestic situation:

⁴⁶ "In the Case of the verification of the Constitutionality of Part Two of Point 2 of the Decree of the Congress of People's Deputies of the Russian Federation of 29 March 1993 "On the All-Russian Referendum of 25 April, the Procedure for the Tabulation of its Results, and the Mechanism for the Realization of the Results of the Referendum," in *Statutes & Decision: The Laws of the USSR and its Successor States* 30, no.5 (September-October 1994), 41.

⁴⁶ *Ibid.*

⁴⁷ "Yeltsin Satisfied with Referendum," (text). Moscow Radio Moscow World Service in English (28 April 1993). *FBIS Daily Report-Central Eurasia* 29 April 1993 (FBIS-SOV-93-081), 15.

⁴⁸ Urban, 754; see also Sergei Parkhomenko, "Special Reports: Crisis in Russia," *East European Constitutional Review* 2, no.2 (1993), 21.

The present constitution of the Russian Federation, together with its entire package of amendments, is the result of our state policy. Of course, we are faced with a constitution that was adopted in a non-existent state, which had a different economic and political system. It does not meet today's requirements, no matter how it is patched up or amended.⁴⁹

This explanation for the crisis is based in the institutional hypothesis in that it ties the problem to the existence of an out-dated constitution. It raises the question of the legitimacy of the Constitution and the inability of this Constitution to shape the conduct of the elites.

Zorkin on the other hand would disagree with this, as throughout the year he had been arguing that the problem was not the Constitution, but the lack of respect for it coupled with an inability to compromise. Zorkin's explanation raises issues of political culture and the strategic choice. Strategic choice theories emphasize the need to compromise and negotiate in order to maintain a successful democracy. This lack of compromise could possibly be tactical decisions on the part of elites, or an example of an unwillingness to compromise because of their political culture. The argument has been raised by some scholars that Russian political culture does not favour compromise.⁵⁰

⁴⁹ Statement made by Justice Vladimir Oleyunik in A. Krasulin, "Court Judge Says Referendum Will Favor Yeltsin," (text). Moscow ITAR-TASS in English (6 April 1993). FBIS Daily Report-Central Eurasia 7 April 1993 (FBIS-SOV-93-065), 46.

⁵⁰ Vera Tolz, "The Moscow Crisis and the Future of Democracy in Russia," RFE/RL Research Report 2, no.43 (1993), 9; Bruce R. Smith, "Constitutionalism in the New Russia," in *Law and Democracy in the New Russia*, eds. Bruce R. Smith and Gennady Danilenko (Washington: The Brookings Institution, 1993), 4.

The political situation in early 1993 also indicated the existence of institutional problems in Russia which were connected with the Constitution, the existing power structures, and the ability of those power structures to use a war of laws to impede each other. The Congress, a hold-over from the Soviet period, was frustrating Yeltsin's reforms. The Constitution was inconsistent in parts, which allowed both the executive and the legislature to issue laws on the same topic, thereby complicating the situation.

Effects of strategic choices made by elites are also highlighted by these events: Yeltsin's attempt to compromise with the Congress and its failure to do so, the Court's decision to use its right to initiate a decision on its own, and Zorkin's decision to publicly address Yeltsin's March appeal to the people. Possibly, the effects of political culture are also evident here and may underscore Zorkin's activities. His quick decision to jump into the media spotlight and to comment on Yeltsin's actions outside of the Courtroom indicate a certain lack of understanding of the importance of the appearance of impartiality. These ideas will be expanded upon and discussed in Chapter Four.

C. DRAFTING A NEW RUSSIAN CONSTITUTION

With the Referendum over, attention was once again focused on the drafting of a new Constitution and numerous drafts were being worked out by various committees. Of these various drafts the two most prominent, and the most likely to resemble the final version, were the Presidential Draft and the Draft of the parliamentary Constitutional Commission, chaired by Oleg Rumyantsev. Both of these drafts were published in the

spring of 1993.⁵¹ The two drafts differed significantly in terms of the provisions on the Constitutional Court, and the Presidential Draft clearly limited the powers of the Court in comparison to that of the Constitutional Commission. In general, the provisions of the Presidential Draft which dealt with the Constitutional Court were less comprehensive than those in the draft of the Constitutional Commission and it appears that the drafters of the former expected that a legislative enactment would eventually be passed which would deal with matters relating to the Constitutional Court that had not been addressed in their draft constitution.

The major difference between the two drafts, in regard to the Courts, was that the Constitutional Commission Draft stated in Article 100 that the Constitutional Court was to be the highest body of judicial power responsible for defending the constitutional system in the Russian Federation.⁵² However, the Presidential Draft created a new body called a Supreme Judicial Office (*Vysshee sudebnoe pravitel'stvo*) which would have the following powers:

- to provide interpretations of the Constitution;
- to issue findings on the existence of grounds for the removal of the President from office;
- to remove federal judges appointed by the Council of the Federation from their positions, if the grounds established by federal law exist;

⁵¹ "Proekt Konstitutsiia Rossiiskoi Federatsii: Glava XVII. Sudebnaia Vlast'," [Constitutional Commission Draft], *Konstitutsionnii vestnik* No.16 (May 1993), 50-53; "Proekt Konstitutsiia Rossiiskoi Federatsii: Glava 7: Pravosudie," [Presidential Draft], *Konstitutsionnii vestnik* No.16 (May 1993), 88-90. For a translation of the Presidential draft see "Yeltsin's Draft Constitution for Russia," (text), Moscow *Izvestia* (April 30, 1993). *The Current Digest of the Post-Soviet Press* XLV, no.20 (1993), 10-19.

⁵² Constitutional Commission Draft, 50.

- to adopt resolutions on which courts of the Federation have jurisdiction over particular cases;
- to submit proposals to the President on either the appointment of a candidate for the position of Prosecutor-General (Generalnii prokuror), or his removal; and
- to consider cases on the constitutionality of judicial practices, as well as other cases, on the basis of representations from the Federal Assembly, the President, the Constitutional Court, the Supreme Court, and the Higher Court of Arbitration.⁵³

This Supreme Judicial Office would be composed of the Chairmen and Deputy Chairmen of the Constitutional Court, the Supreme Court and the Higher Court of Arbitration, as well as three federal judges appointed by the Council of the Federation, acting on the representation of the President.

The creation of such a body would have meant the reduction of the former powers of the Constitutional Court. Article 121 of the Presidential Draft established the specific powers which were left to the Constitutional Court.⁵⁴ The Court would be given the power to consider whether the following conform to the Constitution: laws and resolutions of the Federal Assembly; presidential decrees; acts of other federal bodies; the constitutions of the republics and the charters of the *krais* and *oblasts*; other legal acts of the subjects (*sub'ekta*) of the Federation; and intra-republic and international agreements. The Constitutional Court would also have the power to resolve jurisdictional disputes between federal state bodies; between federal state bodies and state bodies of the subjects of the Federation; and between the state bodies of the subjects of the Federation. Thus, although the powers of the Constitutional Court would be much the same, the ability to issue findings on the existence

⁵³ Article 125, Presidential Draft, 89-90.

⁵⁴ *Ibid.*, 88-89.

of grounds for impeachment of the president was taken away from it. Previously, it had not had the power to interpret the Constitution, so giving this power to the Supreme Judiciary did not make a huge difference in this regard.

The Draft of the Constitutional Commission, on the other hand, did not allow for the creation of a "supervisory" body over and above the Constitutional Court. According to this draft, the Constitutional Court would be the sole interpreter of the Constitution.⁵⁵ As per Article 100, the Constitutional Court would have the jurisdiction to resolve questions regarding the constitutionality of:

- federal laws and other acts of the Supreme Council of the Federation;
- acts of the President, the government of the Russian Federation, and other federal bodies of executive power;
- the constitutions of the republics, the charters of the krais and oblasts, federal laws about the autonomous oblasts, autonomous okrugs, and other acts of their legislative and executive bodies;
- agreements between the Russian Federation and the republics, krais, oblasts, autonomous oblasts, and autonomous okrugs;
- agreements between the republics, krais, oblasts, autonomous oblasts and autonomous okrugs;
- international treaties of the Russian Federation;
- parties and other social unions; and
- practices of the application of law.⁵⁶

The Constitutional Court would also determine jurisdictional disputes between: federal bodies of state power; federal bodies of state power and bodies of power in the republics, *krais*, *oblasts*, autonomous *oblasts*, autonomous *okrugs*; and between the various bodies of power in the regions.⁵⁷

⁵⁵ Art. 100(5), "Constitutional Commission Draft, 51.

⁵⁶ Article 100(2), *ibid.*, 50.

⁵⁷ Article 100, clause 3, *ibid.*

The fact that the Presidential Draft created a type of supervisory body above the Constitutional Court, the Supreme Court and the Court of Higher Arbitration was criticized by members of the Constitutional Court and by members of the Russian academic community. Members of the Court met with Yeltsin on May 29, 1993 to express their concern that the creation of the Supreme Judicial Office would deprive each branch of judicial power of its independence.⁵⁸ Legal scholar B. Strashun also criticized the creation of a Supreme Judicial Office by the Presidential Draft, which, according to him, formed a roof over the other three federal courts.⁵⁹

According to Strashun, this contemplated Supreme Judicial Office would have a series of powers which previously belonged to the Constitutional Court, as well as a series of others which pertained to personnel and which were not inherently those of a court. In effect, the competence of the Constitutional Court would be greatly reduced under this draft. Strashun also felt that the Presidential Draft eradicated the separation of powers. This draft also eliminated the Constitutional Court's present power to decide the constitutionality of political parties and other social unions.

Moreover, Strashun was critical of the fact that the Presidential Draft did not determine the competence of the Supreme Judicial Office in a comprehensive manner. For

⁵⁸ "Rossiiskaia gazeta on Yeltsin Meeting with Judges," (text). Moscow Rossiiskaia gazeta in Russian (1 June 1993). *FBIS Daily Report-Central Eurasia* 2 June 1993 (FBIS-SOV-93-104), 19.

⁵⁹ B. Strashun, "Dve konstitutsii dlia odnoi strany - ne mnogo li?" *Konstitutsionnii vestnik*, No. 16 (May, 1993), 147-160.

example, the Supreme Judicial Office could consider cases on the representation of the Federal Council, the President, the Constitutional Court, the Supreme Court and the Higher Court of Arbitration. However, the draft did not address what type of cases these would be, therefore one had to guess. Thus, he did not have much faith in how the Supreme Judicial Office would operate in practice. According to him, this body had no parallel in the world and it was unnecessary in the already complex Russian judicial system. Furthermore, in Strashun's opinion, the political motives behind its creation were very transparent.

Strashun believed that the existing structure of the Courts and their powers, if improved as suggested by the Constitutional Commission's Draft, would be closer to the optimal situation. Strashun clearly wanted to see the judiciary operate as an independent third branch of government and was fearful that the Presidential draft would eliminate this possibility.

Boris Krylov, Doctor of Juridical Science and department chief of the Supreme Soviet Institute of Legislation and Comparative Law, was also critical of the Presidential draft because it increased the president's power to shape the judiciary. His criticism was rooted in the president's ability to nominate the three federal judges who would be appointed to the Supreme Judicial Office.⁶⁰

⁶⁰ "New Constitution Seen 'Reviving Autocracy'." (text) Moscow *Rossiyskaia gazeta* in Russian (28 April 1993) *FBIS Daily Report Central Eurasia* 30 April 1993 (FBIS-SOV-93-082), 27.

The two drafts also differed in regard to the actual powers of the Constitutional Court. For example, both maintained that judges were irremovable, however the Constitutional Commission Draft stipulated that judges must retire at the age of 70, while the Presidential Draft does not give an age for retirement. Instead it stipulated that the powers of a judge could be terminated or suspended only on the basis and according to procedures established by federal law. Thus, it was most likely that the drafters of the Presidential draft foresaw that the question of the age of retirement would be addressed in a legislative act. The idea of establishing an age of retirement was not a new concept, as the original enabling act of the Court, the "RSFSR Law on the Constitutional Court", established the age of sixty-five as the age of retirement. However, a provision in the Constitution is much stronger, as in order to change a provision of a Constitution, a particular amending procedure would have to be followed. A legislative act is much easier to change and thus would not afford the judges the same type of security as that of a Constitutional provision.

The draft by the Constitutional Commission also restricted judges from political activities, in that they could not be deputies, hold any other office, engage in any business activities or be a member of a social union. The Presidential Draft did not address the issue of political activity by members of the Court, however, this type of provision existed in the "RSFSR Law on the Constitutional Court," and therefore the Presidential drafters may have felt that this type of provision belonged to a legislative act and not to the Constitution.

In both drafts, the members of the Court were to be immune, however, immunity in the Constitutional Commission Draft extended to the judge's correspondence, means of communication, documents, and the judge's home and office. Both drafts also maintained that all judges are independent and are only subordinate to the Constitution and the law.

Both drafts also addressed the necessity that the full and independent administration of justice depended on availability of funds to properly maintain the Court and the judges. The drafts both stipulated that the budgets for the Courts could not be reduced unless certain requirements were met. The requirements established by the Constitutional Commission draft appear to afford better protection to the Courts, as the Presidential Draft only stipulated that funds allocated to the courts could not be reduced during the fulfilment of the relevant budget, but set out no conditions to be met before the funds could be reduced. The Draft of the Constitutional Commission required that before the budgets of the various Courts could be reduced, the Constitutional Court, the Supreme Court, and the Higher Court of Arbitration must agree to such a reduction.

Clearly, the necessity of a Constitutional Court was recognized in both drafts and they were similar in most aspects except for the proposed creation of the Supreme Judicial Office by the Presidential draft. It would appear that although Yeltsin was acknowledging the need for the institution of a Constitutional Court, he seemed to want to somehow limit its independence, which would attest to the fact that he was undoubtedly frustrated by the role the Court was playing in the current political situation. Yet, on the positive side, there

appeared to be a determination to maintain some form of the separation of powers and judicial review within Russia's constitutional structure.

In early June, 1993, Yeltsin convened a Constitutional Conference in Moscow to finish the drafting process. The Conference was comprised of 700 regional and republican officials, top party leaders and interest group representatives.⁶¹ This event, unsurprisingly, also turned into a fiasco. Khasbulatov stormed out of the Kremlin because he was only given seven minutes to speak to the assembly. Some members of the Constitutional Court also left the session after Khasbulatov, leading to a denunciation of the judges by Mikhail Fedotov, Minister of Press and Information, for taking political action.⁶² The press service of the Constitutional Court issued a clarification the same day stating that the judges had left the Kremlin to go to the Constitutional Court Building in order to discuss the situation.⁶³ That day, Yeltsin signed an instruction suspending protection of the chairman and the members of the Constitutional Court, along with the Constitutional Court Building.⁶⁴

Possibly, these incidents were unrelated, but the timing of Yeltsin's instructions is rather suspicious. Even if Yeltsin's intentions were innocent, the executive's power to

⁶¹ Dwight Semler, "Special Reports," *East European Constitutional Review* 2, no.3 (1993), 20.

⁶² "Fedotov Says Court Judges Broke Law," (text). Moscow Russian Television Network in Russian (5 June 1993). *FBIS Daily Report-Central Eurasia* 7 June 1993 (FBIS-SOV-93-107), 38.

⁶³ "Court Clarifies Report on Judges," (text). Moscow Radio Rossii Network in Russian (5 June 1993). *FBIS Daily Report-Central Eurasia* 7 June 1993 (FBIS-SOV-93-107), 34.

⁶⁴ *Ibid.*

control protection of the judges and their building shows that a certain level of dependence existed between the Court and the executive branch.

However, the Constitutional Conference did result in the publication of a new draft law on July 15, 1993.⁶⁵ In this draft, the institution of a Supreme Judicial Office was omitted, however, the Constitutional Court was not given the mandate to interpret the Constitution.

One can assume that Yeltsin was persuaded of the lack of necessity or undesirability of such an institution. Yet, at this point in time, he was still not willing to give the power of constitutional interpretation to the judiciary. Still, elimination of the Supreme Judicial Office was a positive step. Such a body would obviously have undermined the judicial system in Russia and the separation of powers. The very fact that this body would have had the power to consider cases on the constitutionality of judicial practices would have placed the judges of the three federal courts in a tenuous position.

Another problem for Yeltsin at this time was that the old Constitution did not address how a new Constitution would be adopted. However, Congress, reacting to the latest Yeltsin draft, passed a resolution on the procedure for adopting a new Constitution. The resolution stipulated that the new constitution could be adopted by a two-thirds vote of the registered deputies, or by a referendum with the participation of more than 50 percent of

⁶⁵ "Russian Federation Draft Constitution," (text). Moscow *Rossiiskie vesti* in Russian (July 15, 1993). *FBIS Report-Central Eurasia* 26 July 1993 (FBIS-URS-93-096), 1-27.

eligible voters. Ratification by referendum would only succeed if at least 51 percent of the voters in each component member of the Federation voted yes, and if the overall affirmative vote exceeded two-thirds of those participating.⁶⁶ Clearly, ratification by referendum would be difficult, indicating that parliament, once again, was trying to undermine Yeltsin's initiatives.

The entire amount of time and effort that was being put into constitution drafting, and the arguments that it was causing between the executive and legislative branches is another indication of the importance of institutional theory in explaining events in Russia at this time. Elites were very concerned with how their political institutions would be set up. The Constitution was of major importance to all powers because it would define their powers and the rules of the political game. Elites were clearly trying to use the existing Constitution to their benefit, therefore, it is no surprise that the composition of the future Constitution was vital to all concerned.

Strategic choice theory has some bearing here as well. Strategic choice theory emphasizes the importance of compromise and pact-making. The idea of compromise, though being used somewhat in the drafting process, did not seem to exist between parliament and executive. This was clearly seen in the events at the Eighth Congress and in the Deputies' efforts to thwart the April Referendum.

⁶⁶ Semler, "Special Reports," 21.

D. THE OCTOBER CRISIS

By mid-1993 the politicization of the Court had become clear, and a definite split had developed among the members of the Court. Zorkin appeared to be supporting Yeltsin's rival, Ruslan Khasbulatov, the Supreme Soviet Chairman, and the Deputy Chairman of the Court, Nikolai Vitruk, made a public statement urging Zorkin to resign because of his political activities.⁶⁷ As well, the legality of the Court's rulings began to be questioned more openly in the media and by some members of the Court itself.⁶⁸

The events which occurred during the fall of 1993 clearly exemplify the politicization of the Court, the lack of impartiality, and the sharp rift between members of the Court. In September 1993, with the confrontation between parliament and president escalating, Yeltsin signed a decree on September 21, disbanding the Supreme Soviet and terminating the powers of the Congress of People's Deputies.⁶⁹ With the decree, presidential rule came into effect. Khasbulatov, Rutskoi and other deputies refused to leave the White House (the parliamentary seat of power in Moscow). After a ten-day stand-off, which included the storming of the television tower Ostankino by parliamentary supporters, the army was called in and the White House was shelled on October 4, 1993, resulting in 127 dead, hundreds wounded, and the parliamentary leadership under arrest.⁷⁰

⁶⁷ Slater, 1-2.

⁶⁸ *Ibid.*, 2-3.

⁶⁹ "Yeltsin Edict on Constitutional Reform Published," (text), Moscow *Trud* in Russian (22 September 1993), *FBIS Daily Report Supp Central Eurasia* 22 September 1993 (FBIS-SOV-93-182-S), 3-5.

⁷⁰ Dwight Semler, "The End of the First Russian Republic," *East European Constitutional Review* 2-3, nos. 4-1 (1993-1994), 107.

The Constitutional Court went into an emergency session upon announcement of the decree and, on their own initiative, declared that Yeltsin's act was unconstitutional and that it served as grounds for his removal as President.⁷¹ The Court found that Yeltsin's decree violated the separation of powers under Articles 1 and 3. Yeltsin also violated, among others, Art 121-5(11), which states that the President is not entitled to dismiss or suspend the Congress of the Supreme Soviet. This was done in defiance of Yeltsin's order that the Court would not sit again until the start of the work of the Federative Assembly.⁷²

The divisiveness of the Court was soon apparent. Some members of the Court questioned the legal basis of the decision, and during a press conference, three of the Court's judges stated that they intended to propose that the Court overrule its decision.⁷³ Judge Ernest Ametistov told journalists that there were defects in existing legislation which did not allow the Constitutional Court to examine the constitutionality of the actions of top state

⁷¹ "On the Correspondence to the Constitution of the Russian Federation of the Actions and Decisions of the President of the Russian Federation B.N. Yeltsin in Connection with His Edict No. 1400 of 21 September 1993 'On Staged Constitutional Reform in the Russian Federation' and His Appeal to the Citizens of Russia of 21 September 1993," Conclusion of the Constitutional Court of the Russian Federation, 21 September 1993 in *Statutes & Decisions: The Laws of the USSR and its Successor States* 30, no.6 (November-December 1994), 33.

⁷² "Court Meets Despite Yeltsin's Decree," (text). Moscow Russian Television Network in Russian (21 September 1993). *FBIS Daily Report-Central Eurasia* 22 September 1993 (FBIS-SOV-93-182-S), 13; and "Yeltsin Decree Deemed Illegal," (text) Moscow ITAR-TASS World Service in Russian (21 September 1993). *FBIS Daily Report-Central Eurasia* 22 September 1993 (FBIS-SOV-93-182-S), 13-14.

⁷³ The judges were Vitruk (Deputy Chairman of the Court), Kononov and Ametistov; see "Three Judges Support Yeltsin at News Conference," (text). Moscow Mayak Radio Network in Russian (23 September 1993). *FBIS Daily Report Supplement-Central Eurasia* 24 September 1993 (FBIS-SOV-93-184-S), 17-18.

officials.⁷⁴ As well, Judge Kononov made the statement that: "It is explicitly forbidden that the issue of the president's impeachment or the constitutionality of his actions and decisions, or the issues of the constitutionality of a normative act, should be conducted by the Court's own initiative."⁷⁵ However, Judge Gadis Gadzhiev was quick to point out that since the Congress had been banned, there was no one to appeal to the Court, and given the circumstances, the Court had to act quickly.⁷⁶ Most judges were quick to give their personal opinions on the political situation facing the country.⁷⁷

Immediately after the decision was released, Zorkin made a personal appeal in which he accused Yeltsin of placing himself above the Constitution. Zorkin proposed early elections for both Parliament and President.⁷⁸ His appeal had the tone of a presidential edict, something which did not endear him to many people.⁷⁹

⁷⁴ "Judge Questions Court's Ruling," (text). Moscow *ITAR-TASS World Service* in Russian (22 September 1993). *FBIS Daily Report-Central Eurasia* 22 September 1993 (FBIS-SOV-93-182-S), 14.

⁷⁵ G. Dolgov, "Dissenting Judges Interviewed," (text). Moscow *Russian Television Network* in Russian (24 September 1993). *FBIS Daily Report Supplement-Central Eurasia* 27 September 1993 (FBIS-SOV-93-185-S), 38-39.

⁷⁶ V. Shirokov, "Judge Defends Court's Actions," (text). Moscow *Pravda* in Russian (28 September 1993). *FBIS Daily Report-Central Eurasia* 30 September 1993 (FBIS-SOV-93-188), 27.

⁷⁷ K. Katanyan, "Judge Disagrees With Court Ruling," (text). Moscow *Kuranty* in Russian (23 September 1993). *FBIS Daily Report Supplement-Central Eurasia* 24 September 1993 (FBIS-SOV-93-184-S), 18. For the opposite opinion, as expressed by Judge Vladimir Oleynik, see A. Ostapchuk, "Court Seen as 'Sole Guarantor' of Rights," (excerpts). Moscow *Nezavisimaya gazeta* (24 September 1993). *FBIS Daily Report Supplement-Central Eurasia* 24 September 1993 (FBIS-SOV-93-184-S), 19.

⁷⁸ V. Zorkin, "Announcement of the Chairman of the Constitutional Court of the Russian Federation," 22 September 1993, in *Statutes & Decisions: The Laws of the USSR and its Successor States* 30, no.6 (November-December 1994), 34-35.

⁷⁹ S. Reynolds, "Editor's Introduction," *Statutes & Decisions: The Laws of the USSR and its Successor States* 30, no.6 (November-December 1994), 6.

Judge Ernest Ametistov issued a separate opinion which was published in *Rossiiskie vesti* on September 25, 1993. Ametistov held that in rendering its opinion, the majority of the Court violated certain aspects of the Law "On the Constitutional Court of the Russian Federation" and of the Constitution. One such violation was the hearing of a political question which was prohibited under Art. 1(3). In his decision, Ametistov accused the majority of the deputies and the leadership of the Congress and the Supreme Soviet of illegal activity by opposing the economic reform being conducted by Yeltsin because Yeltsin had been given this mandate by the people of Russia during the April Referendum.⁸⁰

The hastiness of the decision could prompt one to question whether enough care was given to the determination of the legality of Yeltsin's decree: was the law properly reviewed and did the judges act in an objective manner? Three days after the ruling the Court issued a statement indicating its willingness to suspend its decision if Yeltsin cancelled the decree and the two sides agreed to hold presidential and parliamentary elections in December.⁸¹ This belief held by the Court that it could rescind a ruling also raises the question of the role the Court believed itself to be playing in the constitutional crisis. A court should not have the power to undo a proper legal ruling for political expediency and it clearly appeared that the Court was motivated by politics and not by law.

⁸⁰ "Separate Opinion of Judge of the Constitutional Court of the Russian Federation Ernest Ametistov," in *Statutes & Decisions: The Laws of the USSR and its Successor States* 30, no.6 (November-December 1994), 35-39.

⁸¹ I. Bel'skiy, "Court Says Ready for 'Compromise' on Yeltsin Decree," (text). Moscow ITAR-TASS in English (24 September 1993). *FBIS Daily Report Supplement-Central Eurasia* 27 September 1993 (FBIS-SOV-93-185-S), 41.

Yet, the majority decision appeared to be legally correct. Yeltsin had violated the Constitution with Decree No. 1400. Thus, the decree was properly reviewed, but the question of objectivity remained. Undoubtedly the Court saw itself as the defender of the Constitution, but its prestige had been greatly affected by this time by its polarization and by the appearance of bias. Unfortunately, with the political situation as it was in Russia, the Court appeared to be out of its depth. This is not necessarily an indication that the creation of the Court was premature, simply that its duty to protect constitutional order in Russia was extremely difficult in such a chaotic situation.

Although Zorkin was continually criticized for favouring Khasbulatov, Judge Ametistov's dissenting opinion shows an incredible political bias. It clearly supported Yeltsin's policy, and despite the fact that Ametistov accused the majority of issuing a political statement, he was the one who ignored the Constitution for the politically expedient analysis. To accuse the Court of deciding a political question, when Yeltsin's actions were clearly unconstitutional, is nonsensical.

This political stance of the Court was criticized by its own members. Some judges blamed the politicization of the Court on the Constitutional Court Act. The law prohibited the Court from examining political questions, but in reality, the Court was often obligated to examine questions concerning the power struggle between the executive and legislative branches. They also blamed the Supreme Soviet for the manner in which judicial

candidates were nominated, as the result was apparently the creation of a politicized Court.⁸²

On 7 October 1993, Yeltsin issued Edict No. 1612, suspending the Constitutional Court, claiming, among other things, that twice in the past year the Court had placed the country on the brink of civil war by its hasty actions and decisions, that the Chairman of the Court was carrying out political activities and, that the Court had turned into a weapon of political struggle.⁸³ Yeltsin was referring to the Court's most recent decision regarding his dissolution of Parliament and to the decision of the Court in March 1993, which held that Yeltsin's appeal introducing "special rule" violated the Constitution. Edict No. 1612 held that the activity of the Court would be suspended until the passage of a new Constitution, but that the rights and guarantees of the judges would be retained by them in accordance with the Law "On the Constitutional Court of the Russian Federation." In this Edict, Yeltsin mentioned the possible formation of the Supreme Judicial Office.

Thus ended Russia's first attempt to establish judicial review. In the circumstances, Yeltsin was probably justified in dissolving Parliament for political expediency, although he had to violate the Constitution in order to do so. The response of the Court indicates that it

⁸² "Judges Criticize 'Politicized' Court," (text). Moscow Russian Television Network in Russian (29 September 1993). *FBIS Daily Report - Central Eurasia* 30 September 1993 (FBIS-SOV-93-188), 28.

⁸³ "Edict No. 1612 of the President of the Russian Federation, 7 October 1993," in *Statutes & Decisions: The Laws of the USSR and its Successor States* 30, no.6 (November-December 1994), 40-41; see also "Constitutional Court Suspended," (text). Moscow ITAR-TASS World Service in Russian (7 October 1993). *FBIS Daily Report-Central Eurasia* 8 October 1993 (FBIS-SOV-93-194), 7-8.

was trying to do its job. Unfortunately, political considerations outweighed constitutional ones. The Court ended up in a precarious position because of its politicization, and because it was simply impossible to defend Russia's constitutional order in the circumstances. However, despite Yeltsin's suspension of the Court's activities, the institution itself was not eradicated. Yeltsin's new constitution provided for a Constitutional Court, but at the same time, increased presidential powers. Interestingly, at the time, it was not the institution that was seen as the problem, but rather its members. This view was expressed by some journalists, as was the belief that the "institution of the Constitutional Court must unflinching be preserved and the separation of powers restored."⁸⁴ Boris Vladimirov, writing for *Rossiiskie vesti*, claimed that the institution had not been premature, but that some judges had been unprepared to fulfill their responsibilities. He stated that the judges overtly showed their political preferences and that they made procedural violations in coming to decisions. Vladimirov also called Zorkin's role in the March 1993 impeachment attempt "shameful."⁸⁵

Most likely, it was easiest for observers to blame the problems of the Court on the politicization of its members, thus looking simply at the personalities and not at the institution. Given Zorkin's extrajudicial activities, it is not difficult to see why.

⁸⁴ B. Vladimirov, "'Collapse' of Constitutional Court Traced," (text), Moscow *Rossiiskie vesti* in Russian (16 October 1993). *FBIS Daily Report-Central Eurasia* 20 October 1993 (FBIS-SOV-93-201), 35.

⁸⁵ *Ibid.*, 33-34.

E. CONCLUSION

Although 1993 started out on a promising note for the Court, as the year continued, the Court was increasingly in the political spotlight. The political environment was a difficult one for the Court, and having already established itself as constitutional mediator at the 7th Congress of People's Deputies at the end of 1992, the Court continued to try to play this role.

The events of 1993 clearly highlight institutional problems in the Court structure as well as Russia's political structure, effects of strategic choices made by elites, and effects of political culture. Elaboration of these ideas continues in Chapter Four.

CHAPTER FOUR: REBUILDING THE CONSTITUTIONAL COURT

Despite its many set-backs and suspension in October 1993, the institution of a constitutional court within the Russian political system was maintained. The Russian Constitution of 1993 defined the Court's role in Russia's new constitutional order and by early 1994, a parliamentary committee was working out a new draft law on the Constitutional Court. This chapter will examine the Court's revised institutional structure as well as the events of the Court's first term to determine if they can be explained using the theoretical concepts laid out in Chapter One.

A. THE RUSSIAN CONSTITUTION OF DECEMBER 1993

On December 12, 1993, the draft constitution was submitted to the electorate and was approved by referendum. Ratification occurred with a simple majority, requiring 50 percent participation of the electorate.¹ The Congress and Supreme Soviet were replaced with a lower house of 450 seats called the Duma and by an upper house called the Federation Council, composed of representatives of the component entities (subjects) of the Russian Federation.² Although the separation of powers was maintained, the President was given a wide power to rule by edict. Apart from the need to comply with the constitution and with federal legislation, the power seems virtually unlimited.³

¹ Dwight Semler, "The End of the First Russian Republic," *East European Constitutional Review* 2-3, nos. 4-1 (1993-1994) 113.

² Articles 94 and 95 of the Russian Federation Constitution, 1993, in S.E. Finer et al., *Comparing Constitutions* (Oxford: Clarendon Press, 1995), 245-295.

³ Art. 90 Constitution of the Russian Federation, 1993.

Under the new constitution, the President's powers include the right to submit to the Federation Council candidates for appointment to the offices of judges of the Constitutional Court,⁴ and the Federation Council has the power to appoint the judges under Article 102.

Article 80 makes the President the guarantor of the Constitution and of human rights and freedoms, a power which was formerly solely reserved for the Constitutional Court. Article 85 enables the President to act as conciliator of disagreements between the central bodies of state power and those of the regions. In the event of a failure to reach an agreement, he may refer the dispute to the appropriate court, but is not obliged to do so. However, Article 125, clause 3 states that the Constitutional Court resolves jurisdictional disputes between federal bodies of state power; disputes between federal bodies of state power of the Russian Federation and those in the regions; and disputes between the federal bodies of state power in the regions themselves.

The Constitution retains the Constitutional Court's right of legislative initiative in matters within its jurisdiction.⁵ The Constitution also stipulates that judges are to be independent and subordinate only to the Constitution of the Russian Federation and to federal law.⁶ Immunity and nonremoval have been maintained.⁷ The size of the Constitutional Court was expanded to consist of 19 judges, an increase from the previous number of thirteen.⁸

⁴ Art. 83

Art. 104.

⁵ Art. 120.

⁶ Art. 121 and 122.

⁸ Art. 125.

The jurisdiction of the Constitutional Court as specified by the Constitution is to determine the constitutional conformity of the following:

- (a) federal laws and normative acts of the President of the Russian Federation, the Federation Council, the State Duma or the Government of the Russian Federation;
- (b) the constitutions of the republics and the charters of subjects of the Russian Federation and laws and other normative acts issued by them on matters falling within the jurisdiction of organs of state power of the Russian Federation or within the joint jurisdiction of organs of state power of components of the Russian Federation;
- (c) treaties between organs of state power of the Russian Federation and organs of state power of subjects of the Russian Federation and treaties between organs of state power of subjects of the Russian Federation;
- (d) international treaties of the Russian Federation that have not entered into force.⁹

Questions on these issues may be referred to the Constitutional Court at the request of the President, the Federation Council, the State Duma, one-fifth of the members of the Federation Council or deputies of the State Duma, the Government of the Russian Federation, the Supreme Court, the Higher Court of Arbitration, or the organs of legislative and executive power of the subjects of the Russian Federation.¹⁰ This narrows the range of who has the right to bring a petition before the Court regarding the constitutionality of a piece of legislation in the abstract. Under the old law, a single People's Deputy could petition the court, and, in fact, did so in the Communist Party case.

⁹ Art. 125(2).

¹⁰ Art. 125(2).

The Constitutional Court may examine complaints of the violation of constitutional rights and freedoms of private citizens when it is requested to do so by another court.¹¹ In essence, this means that an individual complaint will only come before the Court if the citizen has a case before an ordinary court in which a constitutional issue has been raised. Then either the citizen or the Court can refer the constitutional question to the Constitutional Court.¹²

Most importantly, for the first time, the Constitutional Court is given the power to interpret the Constitution of the Russian Federation. At the request of the President, the Federation Council, the Duma, the government of the Russian Federation or the organs of legislative power of the subjects of the Russian Federation, the Court may provide an interpretation.¹³ This is an expansion of the Court's powers and is important in that it more fully recognizes the concept of the separation of powers and increases the prestige of the Court.

Section Two of the Constitution (Concluding and transitional provisions) stated that the Constitution would come into effect on December 12, 1993, the day of the nation-wide vote. More importantly, this section, under part 5, stated that "the judges of all courts in the Russian Federation shall retain their powers until the expiry of the term

¹¹ Art. 125(4).

¹² Jane Henderson, "The Russian Constitutional Court," *Russia and the Successor States Briefing Service* 3, no.6 (1995), 22.

¹³ Art. 125(5) Constitution of the Russian Federation, 1993.

for which they were elected." This meant that all the former judges of the Constitutional Court would retain their positions.

Although the Constitution of 1993 expands presidential powers vis-à-vis the legislative organ, the powers of the Constitutional Court were not compromised. The only snag is Art. 80, naming the President as the guarantor of the Constitution. However, this may be a symbolic power as the means by which he is to defend the Constitution are not laid out.

Therefore, it is impossible to say that Yeltsin saw the institution of the Court as a failure. More likely, he was aggravated by the activities of some of its justices, namely Valerii Zorkin. Yeltsin's biggest problems in 1993 were his battle with parliament, Chairman Khasbulatov, Vice-President Rutskoi, and the perceived bias of the Court.

B. LAW "ON THE RUSSIAN FEDERATION CONSTITUTIONAL COURT" 1994

i. The Drafting Process

The members of the Constitutional Court, using the right of legislative initiative under Article 104(1) of the Constitution, began to draft a new law in early 1994. The draft was sent to the Duma's judiciary committee and to the president's legal office. Resistance to the draft was met from both the legislative and executive branches, and the outrage was greatest concerning the last chapter of the draft law regulating the comfortable social and

material situation of the justices and the Court staff.¹⁴ A new group, consisting of Court members and representatives from the Duma and president's office, was formed to improve the draft. This group was a Subcommittee of the Duma Committee on Legislation and Judicial-Legal Reform. A revised draft was presented on March 24, 1994, and the last chapter on the social status of judges was dropped.¹⁵

On April 8, 1994, Vladimir Isakov, Chairman of the Duma Committee on Legislation and Judicial-Legal Reform, presented the draft law for its first reading to the Duma. The Duma refused to pass the draft because of a concern regarding the selection procedures and a concern regarding the size of the Court. All factions wished to see a new law on the Court passed, but members of the Duma wanted some input into the selection process and thus a new Article 9 was added which gave other political branches the right to propose candidates to the president. The Communist Party of Russia suggested that the Court be given the right to initiate an examination regarding the most important issues, but this was not supported by the rest of the Duma. An actual vote was not taken, and the Committee agreed to consider the Duma's suggestions and re-submit the draft for first reading when the revisions had been made.¹⁶

On May 11, 1994, draft was re-submitted for a first reading by Liudmila Zavadskaja, Chairwoman of the Subcommittee of the Committee on Legislation and

¹⁴ Alexander Blankenagel, "The Court Writes its Own Law," *East European Constitutional Review* 3, no.3 (Summer/Fall 1994), 75.

¹⁵ *Ibid.*, 75.

¹⁶ *Federalnoe sobranie-parlament Rossiiskoi Federatsii Bulletin Gosudarstvennoi Dumy* No. 23 (8 April 1994 goda), 9-11.

Judicial-Legal Reform. Articles 9 and 12 had been amended to allow for the Duma to propose candidates for the Court to the President, and to set the term of appointment to 12 years. The draft was passed 340 (75.6%) in favour, 2 against, and 5 abstentions.¹⁷

At the second, and final reading, of the draft law on June 24, 1994, Evdimitia Zavadskaia informed the Duma that during the interim, the Subcommittee had received various suggestions for amendments from various legislative and executive bodies. She then went through the amendments one by one to ensure that each received the required two-thirds support. As it turned out, none of the suggested amendments was passed, and the recommendations presented by the Subcommittee were accepted with very little debate. In fact, on most proposed changes, the majority of deputies did not vote.¹⁸

The right to initiate examinations was not given to the Court, as this would violate the Constitution because it had not been provided for in the list of enumerated powers under Article 125 of the Constitution. Zavadskaia also stated that such a right violates the principle of the separation of powers.¹⁹ The Duma also debated the limit on the term of appointment, but it was agreed that the term would be 12 years and the age limit would be seventy.²⁰

¹⁷ *Federalnoe sobranie-parlament Rossiiskoi Federatsii. Biulleten zasedaniia Gosudarstvennoi Dumi* No. 31 (11 mai 1994 goda), 7-10.

¹⁸ *Gosudarstvennaia Duma stenogramma zasedaniia Biulleten* No. 43 (24 iunia 1994 goda), 14-24.

¹⁹ *Ibid.*, 17.

²⁰ *Ibid.*, 20.

The draft was adopted by a vote of 331 in favour (73.6%), 5 against, and 27 abstentions.

ii. The 1994 Law

On July 14, 1994, the Law on the Constitutional Court came into effect upon approval by the Federation Council.

The law holds that the main principles of the activity of the Court are "independence, collegiality, glasnost, the adversarial nature of the proceedings, and the equality of the parties."²¹

The powers of the Court contained within the Law mirror those laid out in the Constitution. The Court retains the right of legislative initiative on matters within its own purview and, once again, is mandated to rule exclusively on questions of law.²² A change from the previous law on the Court is that the Court could no longer hear cases on its own initiative. The motivation may have been an attempt "to insulate the court from political troubles."²³ During its first term, the Court was able to use this provision to determine the constitutionality of Yeltsin's March 20, 1993 televised "Address to the Citizens," and to consider Edict No. 1400 of September 21, 1993 which disbanded Parliament.

²¹ Art. 5, Law "On the Russian Federation Constitutional Court," Moscow Rossiiskaia gazeta (23 July 1994). Translated in *FBIS Daily Report-Central Eurasia* 28 July 1994 (FBIS-SOV-94-145-S), 2.

²² Art. 3, *ibid.*, 1.

²³ *Justice Delayed: The Russian Constitutional Court and Human Rights*, a report of the Lawyers Committee for Human Rights, (New York: March 1995), 18.

The financial independence of the Court is more concretely laid out in the law, stating that the federal budget will annually make provision in a separate article for the funds necessary to ensure the Court's activities and the funds will be handled independently by the Court. Moreover, the Constitutional Court's spending estimates cannot fall below the level of the previous financial year.²⁴ The law also specifies that "No restrictions of any kind are permitted on the legal, organizational, financial, information, material, technical, personnel, or other conditions for the Russian Federation Constitutional Court's activity

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Although these provisions were toned down from the original draft, they have been criticized for not offering enough financial compensation. Another criticism is the division of salary from social benefits. Instead of paying the judge a salary large enough to cover both compensation and social privileges, the state retains the right to manage those privileges. That is, the judges are not given a high enough salary to cover housing and medical expenses, but instead, these are provided to the judges and their families. Vladimir Chetvernin, Divisional Director at the Institute of State and Law, accuses the Russian state of retaining its paternalistic approach to the issue of financial guarantees and in doing so, hinders the independence of the judiciary by controlling the distribution of social goods.²⁶

²⁴ Art. 7, Law on the Constitutional Court, 1994.

²⁵ *Ibid.*

²⁶ V. Chetvernin, "Three Questions to the Authors of the Act," *East European Constitutional Review* 3, No. 3 (Summer/Fall 1994), 82.

Independence is also guaranteed by provisions on immunity, irremovability, and the granting of material and social support and security guarantees. For example, the law provides for social provisions, housing provisions, social and consumer services, state life and health insurance for the justices and for property belonging to them and their families.²⁷

In terms of selection of judges, under the new law various bodies can propose candidates to the President, who then submits the names to the Federation Council. The Council then votes by secret ballot for the individual judges.²⁸ In order to be appointed, a judge will have to be at least 40 years of age, possess an unblemished reputation, have higher legal education and at least 15 years of experience in the legal profession. This was changed from the previous law, which required a person to be at least 35 years old and have 10 years of experience in a legal speciality. Most likely this was changed to ensure a more experienced and mature group of people were sitting on the bench.

The increase in the size of the Court to nineteen allows the Court to sit as two separate chambers for certain types of cases. Having two chambers would allow the Court to hear a greater number of cases and reduce the problem of long delays from which the first Court suffered.²⁹ The division into two chambers parallels the structure of the Federal Constitutional Court of Germany.

²⁷ Art. 13; for irremovability see Art. 14 and for immunity see Art. 15. Immunity covers a guarantee that the judge will not be subject to proceedings, even after their powers have expired, for the opinions expressed at a Court session or in a ruling handed down by the Court.

²⁸ Art. 9.

²⁹ Henderson, 21.

Like the previous Act, this law also forbids the judges from occupations and actions incompatible with their positions; that is, they cannot be members of political parties, they cannot be deputies in the Duma or Federation Council, cannot engage in private practice or other entrepreneurial activities except for academic or creative activities.³⁰ One thing that has changed slightly from the previous law is the prohibition on judges discussing in the mass media their views on matters before the court. This prohibition was expanded to include not only the matters which were under examination or had been adopted for examination, but also matters which could be subject to examination. Given the frequency which Zorkin commented on matters before the court had formally accepted them for examination, it is no wonder that this was more clearly spelled out.

Another major change in the new law is the limit on tenure. Under the previous law, the judges were appointed for life until the age of sixty-five. The new law, on the other hand, imposes a tenure of 12 years with an age limit of 70. The new law also stipulates that the judges cannot be appointed for a second term.³¹ These provisions regarding tenure apply only to those judges appointed under the new law. Thus, the members of the former Court who were appointed under the 1991 law will sit for life until the age of 65, while the new judges will serve for a term of 12 years or until they reach the age of seventy.

³⁰ Art. 11.

³¹ Art. 12.

Like the previous law, the new law specifies when the powers of a judge can be suspended or terminated. Suspension will occur in the event of the Court giving its consent to arrest a justice or to institute criminal proceedings against him, or if the justice is temporarily unable to carry out his functions due to health reasons.³² The powers of a justice can be terminated under a number of conditions: violation of the procedure for appointing a person to the Court, expiry of tenure or the attainment of retirement age, resignation, loss of citizenship, a conviction against the judge, the commission of an act by the judge that brings the honour and dignity of justices into disrepute, the continuation of occupations or actions incompatible with the position of justice, failure to take part in the Court's sessions, incapacity as deemed by a court ruling, absenteeism, health problems, or death.³³ Reasons for termination were expanded under the new law, as previously termination only occurred if the judge retired, she/he reached the maximum age limit, was declared incapable or died. Thus, the new law incorporates many reasons which previously only led to suspension into causes for actual termination of the judge's powers. Again, the obvious reason for this is the apparent disapproval of Zorkin's activities during the Court's first term. Presumably, these new provisions will not affect judicial independence, as the Court itself must initiate such a finding and submit it to the Federation Council. Thus, the powers of a judge will not be terminated at the whim of the executive or legislature.

Rulings of the Court are binding,³⁴ however the law again lacks specificity on the consequences for non-implementation of the Court's ruling. Article 81 states that:

³² Art. 17.

³³ Art. 18.

³⁴ Art. 6.

"Nonimplementation, improper implementation, or prevention of the implementation of a Russian Federation Constitutional Court ruling entails the liability prescribed by federal law." As to what this liability will be, the law is silent. However, it is impossible to legislate on deference to a Court's decisions. This is something that most likely has to be achieved with time. As the Court gains respect and the idea of constitutionalism becomes further ingrained in the Russian national consciousness, hopefully, acceptance and implementation of the Court's ruling will be done without hesitation.

Procedural items on filing an appeal with the Court are laid out in the law, something which the previous law omitted. In fact, the procedures to be followed in filing and presenting a petition to the Court are quite detailed. For example, under Article 62, parties must present pleadings to the Court in which they comment on the merits of the question under legal examination and cite legal arguments to substantiate their position. The article further specifies that the parties cannot use their pleadings to make political statements. The law also encompasses sections on expert and witness testimony.³⁵ This meticulous regulation of Court protocol is likely an attempt to prevent the justices from going astray, but such detailed procedure on unimportant matters is not a benefit for a Court of final jurisdiction. A strict procedural law opens the way for mistakes, which can then serve as a means for questioning the legitimacy of the Court on charges of procedural irregularity.³⁶

³⁵ Articles 63 and 64.

³⁶ Blankenagel, 78.

A person who violates procedure during a session or who fails to obey the chairman's lawful directives may be fined up to an amount 10 times the minimum wage.³⁷

Overall, the new law on the Court has met with approval. Russian advisors to the Court, Boris Strashun and Vadim Sobakin, support the new law and feel that it safeguards the Court against politicization and immunizes it from partisan politics to the extent that a law can do so. They approve of the provisions which allow for the removal of a judge who is misbehaving.³⁸

A review of the changes from the previous law indicates that politicization of the former court was seen as a problem by the drafters of the new law. One problem of the past was Zorkin's political involvement. The curtailment of the powers of the Chairman in the new Act reflects a perception that the old law placed too much power in the hands of the Chairman. However, as pointed out by Alexander Blankenagel, this is a partial misconception of the causes of the Court's past politicization. According to Blankenagel, the Court's problem lay in its majority: Zorkin was usually supported by seven or eight of the 13 justices, and it was this majority that produced the decisions favourable towards Khasbulatov and the Supreme Soviet near the end.³⁹ Thus, the new law tries to control the Chairman and the justices in Arts. 17, 18 and 22, which regulate the suspension and removal of the justices. Under the 1991 Act, political activity could only lead to

³⁷ Art. 54.

³⁸ B. Strashun and V. Sobakin, "Defending the Constitutional Court Act," *East European Constitutional Review* 1, No. 4 (1995), 46-48.

³⁹ Blankenagel, 78.

suspension.⁴⁰ but under the new law, an act by a judge that brings the honour and dignity of the Court into disrepute is grounds for termination.⁴¹ Seemingly, some of Zorkin's actions during the first term of the Court would have been classified by some as bringing the honour and dignity of the Court into disrepute

The Court did not become operational until its full component of judges was met on February 7, 1995. It took the Federation Council half a year to elect the six judges needed to make up the full contingent of nineteen.⁴² In the meantime, constitutional issues remained in limbo. Yeltsin proposed a number of candidates after the Law on the Constitutional Court was passed, but the Federation Council failed to support most of his choices.⁴³ Only in February 1995, were the last two vacant posts filled, and the Court was able to resume work.

C. THE FIRST TERM OF THE CONSTITUTIONAL COURT: ANALYSIS AND APPLICATION

Creating an institution that had the means of limiting governmental power was a strong step in the move to creating a constitutional democracy in Russia. The fact that the Russian Constitutional Court was established when the Soviet Union still existed, itself

⁴⁰ Articles 14 and 18 of the 1991 Constitutional Court Act.

⁴¹ Art.18 of the 1994 Constitutional Court Act.

⁴² Henderson, 21. See Appendix "B" for a list of the new judges.

⁴³ Dmitrii Orlov, "Importance of Constitutional Court Emphasized," (text). *Moscow Rossiiskie vesti* (8 February 1995). *FBIS Daily Report Supplement-Central Eurasia* 23 February 1995 (FBIS-SOV-95-036-S), 27

unwilling to take this bold step towards the separation of powers, indicates a certain earnestness on behalf of the Russian political reformers.

After the Court was suspended in October 1993, many politicians, judges and other analysts blamed the politicization of the Court for its problems.⁴⁴ But no one tried to explain why this politicization happened, except, perhaps, for pointing the finger at Zorkin and accusing him of being power driven.

Most of the theories described in Chapter One touch upon the issue in some manner and can help us to understand what was happening to the Court during the given time period. The Court's predicament raises issues of state-building, constitutionalism, institution building and institutional legacies, strategic choices, elite political culture and the effect of the external political environment on judicial institutions. But does one stand out more than the others?

Russia was moving in the direction of democracy by 1991; semi-competitive elections had been held for the Congress of People's Deputies and fully competitive elections had been held for the Russian presidency. It was recognized that democracy

⁴⁴ Boris Vladimirov, "Collapse of Constitutional Court Traced," (text). Moscow *Rossiiskie vesti* in Russian (16 October 1993). *FBIS Daily Report-Central Eurasia* 20 October 1993 (FBIS-SOV-93-201), 33; I. Lediakh "Federal'nyi konstitutsionnyi zakon 'O Konstitutsionnom Sude Rossiiskoi Federatsii,'" *Rossiiskaia iustitsiia* No. 11 (1994), 7; "Judges Criticize 'Politicized' Court," (text). Moscow Russian Television Network in Russian (29 September 1993). *FBIS Daily Report-Central Eurasia* 30 September 1993 (FBIS-SOV-93-188), 28.

included not only competitive elections, but also the protection of civil rights, and the Constitution was amended to include the separation of powers and a Constitutional Court.

Thus, the stones were in place to build a constitutional democracy, and the creation of the Constitutional Court was hailed as an important step in this direction. Then, why was the Court unable to live up to the expectation that it would act as an independent and impartial arbitrator within Russia's constitutional structure?

Was there an unresolvable dichotomy between state-building and constitutionalism? Was Holmes correct in suggesting that the limitation of powers was incompatible with the democratization process and that a Constitutional Court was premature? During the period under examination, the Constitution was used as a political weapon, and the Court was used by politicians as another means to advance their agendas. Constitutions are used by politicians in other countries to advance their interests, but Russia was in the middle of an economic and political transformation. The economy was chaotic because of inflation, ruble devaluation and increased poverty. Russia was in the middle of a state-building process and events show that Yeltsin desired greater powers to enact his reform agenda than the Constitution would allow. The constitutional crisis which erupted between the legislature and Yeltsin also impeded Yeltsin's ability to enact and implement reforms.

Events in Russia between 1991-1993 indicate that the theoretical literature on state-building and constitutionalism has some application here. Although the limitation of power

is necessary to protect individual liberty, the inherent contradiction between constitutionalism and state-building, as described by Sejersted,⁴⁵ exists. Constitutionalism can and will impede the powers of the state, and the Russian Constitutional Court demonstrated this.

But, it does not follow that it was a mistake to embark on the constitution-building process, as argued by Holmes.⁴⁶ It was not the Constitution's rigidity that was the problem, but the fact that it was so easily amendable. Giving political elites a free hand would probably not have been the best solution, as absolute power has a tendency to corrupt absolutely. Placing complete trust in an elected body and hoping that accountability to the electorate will keep it in line is not the optimal solution. The electorate voiced its support for Yeltsin's economic reforms in the April Referendum. Yet, the Supreme Soviet and the Congress of People's Deputies clearly did not heed these wishes and continued to oppose Yeltsin throughout 1993.

In the end, Yeltsin resorted to extra-constitutional means to resolve the political impasse, much as Holmes predicted. But, the blame cannot be laid at the door of the Court. It may not have helped the situation, but it surely was not the cause of the constitutional crisis.

⁴⁵ Francis Sejersted, "Democracy and the Rule of Law: Some Historical Experiences of Contradictions in the Striving for Good Government," in *Constitutionalism and Democracy*, eds. Jon Elster and R. Slagstad (Cambridge: Cambridge University Press, 1988), 132-33.

⁴⁶ Stephen Holmes, "Conceptions of Democracy in the Draft Constitutions of Post-Communist Countries," Working Paper 5.11, Conference on Markets, States and Democracy, University of California at Berkeley Center for German and European Studies (February 11-13, 1993).

It is also hard to support Holmes' argument that the creation of a Constitutional Court was premature. Between 1991 and 1993, the President and Parliament, along with a number of other bodies (the Prime Minister, the Chairmen of the Supreme Soviet, the Council of Nationalities and the Council of the Republic), were involved in a "war of laws."⁴⁷ Both executive and parliament were trying to increase their respective powers, regardless of the Constitution.⁴⁸ It can be argued, that although the Court was far from perfect in its role as guarantor of the Constitution and arbiter of disputes between the branches of powers, the Court did contribute to the maintenance of the separation of powers in Russia.

Yeltsin may have been more likely to expand his powers in the very beginning if the Court had not existed. It prevented him from stepping into the Legislature's area of powers in the MVD/KGB case and it prevented him from completely suspending the activities of a political party in the Communist Party case. The Court also affected Yeltsin's actions in March, 1993, by speaking out against his appeal to the people.

It seems more logical that the problem was not the prematurity of the court, but the institutional order in which it resided and poor choices on the part of certain elites, both political and judicial. These choices will be discussed below.

⁴⁷ Dominic Gualtieri, "Russia's New 'War of Laws'." *RFE/RL Research Report* 2, no.35 (1993), 10-15.

⁴⁸ Vera Tolz, "Drafting the New Russian Constitution." *RFE/RL Research Report* 2, no.29 (1993), 2-3.

The lack of new Russian Constitution created problems for the Constitutional Court. As seen in Shakhrai's reaction to the court's first decision, the old constitutional framework was a problem for the Court. In the beginning, Zorkin also expressed the need for a new constitution given that the old RSFSR one was obsolete.⁴⁹ This view would change, but it is impossible to agree with Zorkin's later views that the extant constitution would suffice. Although the Court was probably capable of dealing with the amended Brezhnev Constitution, there was a serious issue of institutional legitimacy. The constitution could be used as a political weapon because it was viewed by many as illegitimate. Decisions of the Court were often criticized on this basis.

The case involving the merger of the Security and Internal Affairs Ministries was one such example. Shakhrai, in criticizing the decision, stated that imperfections in the Constitution allowed for it to be interpreted in different ways depending on the political viewpoint of the interpreter.⁵⁰

The Constitution was also easily amendable by Congress, requiring a majority of not less than two-thirds of the total number of elected deputies.⁵¹ This allowed for it to be used as a tool to frustrate Yeltsin: when Congress wished to do something that would

⁴⁹ D. Muratov, "Constitutional Court Chairman Zorkin Cited," (text), Moscow *Komsomolskaia pravda* in Russian (8 February 1992). *FBIS Daily Report-Central Eurasia* 19 February 1992 (FBIS-SOV-92-033), p. 45.

⁵⁰ "Shakhrai Threatened With Impeachment: Defends His Position," Russian Television (16 January 1992). *BBC Summary of World Broadcasts. Part I, USSR* (18 January 1992) SU/1281/C2/4.

⁵¹ Art. 185, Constitution of RSFSR, as amended on 10 December 1992.

otherwise be a constitutional violation, it could just amend the Constitution to allow for it. This was recognized as a problem by Yeltsin's government in the Constitution of 1993.⁵² Because constitutions represent the fundamental, basic law of a country, they normally contain complex amendment procedures to prevent hasty constitutional changes.⁵³

Interestingly, the actors involved acted within the institutional structures to advance their goals. Clearly, institutional arrangements were affecting political choices. Legislation enabled the deputies to use the Constitutional Court and the Constitution against Yeltsin and they were quick to use both institutions. For the most part, in terms of constitutional matters, all actors involved, including Yeltsin, acted within the prescribed set of institutional rules until the fall of 1993, when the crisis reached its peak.

Other institutional flaws include the 1991 law "On the Constitutional Court," and some judges blamed aspects of the law for the Court's downfall. Ernst Ametistov claimed that the Court's right to examine cases on its own initiative was what "led to the

⁵² Art. 135 of the December 1993 Constitution states that amendments to state structures, human and civil rights and freedoms, and the amendment provisions themselves, can only be achieved by the passage of a new Constitution by a Constitutional Assembly or by a referendum. Art. 136 states that amendments to the rest of the Constitution require the approval of the organs of legislative power, along with two thirds of the subjects of the Russian Federation.

⁵³ In the United States, amendments require a special majority of Congress, followed by ratification by three-quarters of the states. The German Constitution requires a special majority of each House. The French Constitution states that amendments must be passed by both Houses, but the President may then submit them to the people or resubmit them to both Houses convened in one body, in which case a three fifths majority is required; S.E. Finer et al., *Comparing Constitutions* (Oxford: Clarendon Press, 1995), 13-15.

tragic consequences for the country and the court itself last fall."⁵⁴ Justice Morshchakova had foreseen this as a problem as early as July 1993. According to her, the choice by the Court to examine a case on its own initiative was ultimately a political decision and not a legal one.⁵⁵

The ability to initiate an examination of a constitutional issue was used by the Court to review Yeltsin's March 1993 decree, and to review Yeltsin's September decree to disband Parliament. This right was removed from the Court's mandate with the 1994 Law on the Constitutional Court, signalling that Ametistov and Morshchakova were not the only ones to see this as a problem. Although this was not the root of the Court's politicization, it clearly struck at the idea of judicial independence and impartiality, not to mention the separation of powers. The right to initiate an examination allowed the Court to step into the political arena in an overt manner and opened the door for criticism of its decisions. It would be hard to accept as impartial a decision regarding a political issue that the Court had initiated. Although this might not have been the case, the apprehension of bias would be there, creating a convenient excuse for politicians to ignore or criticize the decision.

It appears that the Court had good intentions in initiating such cases and believed it was necessary to preserve Russia's constitutional order. However, to maintain the

⁵⁴ Inna Muravyova, "Ernst Ametistov: The Constitutional Court is not Above All Courts," *Vek*, October 7, 1994, cited in *Justice Delayed: The Russian Constitutional Court and Human Rights*, 18.

⁵⁵ "Judge Morshchakova on Constitution, Role of Court," (text). Moscow Kultura in Russian (19 June 1993). *FBIS Daily Report-Central Eurasia* 16 July 1993 (FBIS-SOV-93-089), 20.

semblance of impartiality, the Court would have been better off to wait until a proper petition was brought before it by an interested party. The cases that the Court chose to initiate were clearly sensitive political issues. Yet, it is not surprising that, given the existence of the right within its enabling statute, the Court took advantage of it.

The prohibition against ruling on political questions was an understandable provision in the previous legislation, and was there to keep the Court out of the political arena. However, its lack of definition, coupled with the right to initiate an examination, caused problems for the Court. Its inclusion in the new law indicates that politicization was a problem, and that elites believed that keeping "political issues" away from the Court will help to avoid a repetition of this problem. The change in wording, from the Court "does not review political questions," to the Court "rules exclusively on questions of law" may have some impact on which types of cases the Court decides to hear in the future, but this is difficult to predict. Probably, the Court's past experiences will play a more vital role in this determination than a change in the wording of the statute.

The basic problem comes down to the question of the separation of law and politics. Objectively speaking, for a Court to function efficiently, it makes more sense for it to focus on the legal issues of a question, not the political. Otherwise the separation of powers becomes blurred. But, it is difficult, if not impossible, to separate law and politics at the constitutional level. A constitution is not a neutral political framework and it should be recognized that legal institutions, especially a Constitutional Court, are designed to carry

out political designs.⁵⁶ No political body wants a court interfering with political issues, but the juxtaposition of a Constitution within a political regime, can place a court in a difficult position. Part of the Russian Constitutional Court's problems in defining the area between law and politics can be blamed on bad choices.

This explanation focuses on a hypothesis raised in the strategic choice literature, which emphasizes the importance of elite decisions. The effect that strategic choices can have on a given situation are apparent in the type of cases that the Court accepted for review. The Tatarstan and CPSU cases come to mind. It is possible that the Court made a mistake by examining such divisive political issues when it was still an inexperienced institution and when Russia was still experiencing the chaos of reform. Kommers states that the German Federal Constitutional Court is one of that country's most trusted institutions because of its role in protecting basic rights. The Court's jurisprudence has contributed to the development of constitutional awareness among the German people.⁵⁷ This may have been a problem with the Russian Constitutional Court. Although the Court examined a number of individual complaints which focused on the infringement of individual rights, it quickly stepped into the role of constitutional arbitrator, which led it into the political fray.

⁵⁶ Ziyad Motala, *Constitutional Options for a Democratic South Africa* (Washington: Howard University Press, 1994), 3.

⁵⁷ Donald P. Kommers "The Federal Constitutional Court in the German Political System," *Comparative Political Studies* 26, no.4 (1994), 486.

This impact of strategic choices by elites can be seen in other areas. Michael McFaul suggests that Yeltsin made certain political and institutional mistakes after the August 1991 coup attempt. He claims that at that time Yeltsin had the option to "consolidate a democratic polity - disbanding old Soviet government institutions, adopting a new constitution codifying the division of power between executive, legislative, and judiciary as well as federal and regional bodies, and calling new elections to stimulate the development of a multi-party system."⁵⁸ According to McFaul, Yeltsin's mistake was that he did not dismantle the Supreme Soviet and the Congress of People's Deputies; Yeltsin's error was to focus on creating a market economy to the detriment of the political system.⁵⁹

Alexander Sobyenin believes that Yeltsin made mistakes in choosing the leadership of the Supreme Soviet in 1991 when he was its Chairman.⁶⁰ Yeltsin himself acknowledges that he missed an opportunity after the August 1991 coup attempt, and should have used the occasion to radically restructure the parliamentary system. Although, he believes that Russian society may not have been ready to elect any decent candidates to a new parliament.⁶¹

⁵⁸ Michael McFaul, "State Power, Institutional Change, and the Politics of Privatization in Russia," *World Politics* 47 (1995) 226-27.

⁵⁹ Ibid.

⁶⁰ Alexander Sobyenin, "Political Cleavages Among the Russian Deputies," in *Parliaments in Transition: The New Legislative Politics in the Former USSR and Eastern Europe*, ed. Thomas F. Remington (Boulder: Westview Press, 1994), 185.

⁶¹ Boris Yeltsin, *The Struggle for Russia*, trans. Catherine A. Fitzpatrick (New York: Times Books, 1994), 126.

This analysis supports hypotheses raised by the strategic choice literature, such as Di Palma's theory that the skill and judgement, the "political crafting," of elites can make or break a democracy,⁶² as well as the institutionalism literature. The idea that the Congress of Peoples' Deputies was the wrong institution for Russia at that time is reflected in the views of others and many feel that Yeltsin made a mistake in 1991 by not disbanding it along with the Brezhnev constitution. Remington supports the view that the Congress of People's Deputies created a deadlock and was an obstacle to political and economic reform.⁶³

In addition to emphasising skill and judgement, strategic choice theory also focuses on elite behaviour and stresses the importance of compromise, consensus and pact-making. Rustow claims that during a democratic transformation elites will go through phases of struggle, compromise and habituation. It seems that the Russian elites were clearly in the struggle phase, although trying to shift towards the compromise phase. A clear example of an attempt at compromise was the Seventh Congress of People's Deputies in December 1992. Zorkin attempted to broker a compromise between Yeltsin and Khasbulatov, and it seemed that a solution to the constitutional crisis had been worked out. Unfortunately, the legislature and the executive were soon back to the struggle phase, and by the Eighth Congress, the deputies were unwilling to give Yeltsin the support he needed to move ahead with his reform programme.

⁶² Guiseppe Di Palma, *To Craft Democracies: An Essay on Democratic Transitions* (Berkeley, University of California Press, 1990), 8-9.

⁶³ Remington, Thomas F. et al., "Transitional Institutions and Parliamentary Alignments in Russia, 1990-1993," in *Parliaments in Transition: The New Legislative Politics in the Former USSR and Eastern Europe*, ed. Thomas F. Remington (Boulder: Westview Press, 1994), 159-60.

The Court, clearly, tried to play the role of mediator in the dispute between parliament and Yeltsin and continually pressed the parties to compromise. Zorkin repeatedly stressed that the problem was not the Constitution, but an inability on the part of the politicians to compromise. The Court claimed that it had the authority under Art. 80 of the 1991 Law on the Constitutional Court to act as a mediator in executive-legislative disputes. But, to accept this position, Art. 80 must be read very broadly since on its face it appears to refer to disputes between the republics. Moreover, Art. 80(2) states that the Court can refuse these powers of review if it feels that there would be a contradiction of its legal nature, tasks and purposes. Undoubtedly, the Court felt it was acting in a positive manner to alleviate the constitutional crisis, but it is possible that its intervention into the political arena exacerbated tensions between the parties. The intervention, although lauded by some, provided another means by which to accuse the Court of impartiality. This again, is an example of the effect that strategic choices can have.

Przeworski's focus on the importance of the decision-making process of economic reform and the need for elites to have "some specific minimum probability" of benefiting from the new democratic order may be seen in this research. Although this research does not purport to be a study on the Russian economy and economic reform, it is clear that many elite struggles focused on these issues. The elites could not compromise, for

whatever reason, on an economic reform programme and this had a detrimental effect on the constitution building process and on the Constitutional Court itself.

Zhang argues that institutional problems in post-communist states make elite pact-making difficult. As described above, institutional legacies clearly had an impact on pact-making between Yeltsin and Congress, Congress itself, the Constitution and the war of laws. Whether the inability to compromise was Yeltsin's or Congress' fault, Yeltsin clearly was able to use a populist argument to circumvent Congress' opposition to his reforms. The April Referendum gave him the right to claim he was acting in the interests of the people, and this was the argument used to disband Congress and the Supreme Soviet in September, 1993, once the crisis reached its peak.

Zhang's arguments lead us back into the connection between institutions and strategic choices. Institutions affected the choices both political and legal elites made during the period in question.

The politicization of the Court was the major factor in the Court's suspension. This politicization appears to be rooted in both institutional and strategic choice areas. Justice Morshchakova stated that the politicization of the Court was established when it was formed because its members were nominated by political factions within the Congress. She believes that this type of nomination process meant that the judges would be representatives

of the interests of these factions.⁶⁴ Coupled with this was the fact that almost half of the judges had been former deputies.⁶⁵

Institutionally, the selection process allowed for various factions to nominate people they felt were supportive of their views. The institution allowed for elites to make strategic choices that they believed would benefit themselves and their interests. Yet the institutional selection of judges is equally political in other countries, including Germany, France, the United States, and in eastern Europe.⁶⁶ There really seems to be no way to avoid the selection of judges by politicians. Moreover, the political nature of the selection process is recognized through tenure requirements. A judge is appointed for life or a fixed term, so that she/he does not fear a loss of his job due to his decisions. With tenure, the motivation to defer to a politician's wishes should be lessened. The judges on the Constitutional Court were appointed for life. Thus, it seems like something other than the selection process can explain the Court's politicization. Political/legal culture spring to mind, and this possibility will be discussed below. However, on an institutional note, the judges may not have felt secure in their tenure, as salaries, protection, and social benefits were doled out by the State.

The issue of enforcing the Court's decisions highlights both institutional and strategic choice arguments, along with the possibility of a political/legal culture

⁶⁴ "Judge Morshchakova," 18-19

⁶⁵ *Ibid.*

⁶⁶ Herman Schwartz, "The New East European Constitutional Courts," *Michigan Journal of International Law* 13 (Summer 1992), 759.

explanation. Judge Morshchakova believed that the lack of a mechanism to punish those who failed to implement the laws was a factor in why the laws were not working.⁶⁷

The enforcement issue arose a number of times during the Court's first term. It was raised in the first case the Court dealt with, the merger of the KGB and MVD, as the initial reaction by Yeltsin's team was negative. The reluctance to accept the decision may be explained by the historical absence of an independent court having the power to rule on constitutional issues. This could invoke a political culture argument; that is, respect for independent courts was lacking and elites were unwilling to support the separation of powers. Yet, the ruling of the Court was followed, indicating that elites were not completely unwilling to deal with constitutional obstacles.

The Tatarstan ruling also raised issues of enforceability. Yet, it is difficult to pinpoint this as an example of political culture. Too many other issues were involved in that decision, the main one being the nature of federal relations in Russia. The question of federalism can be a very sensitive political issue that is best left to politicians. It is more likely that the Court made a mistake by accepting this case. A decision such as this was impossible to enforce legally and only called into question the impartiality of the Court. The strategic choice by the Court to rule on this issue was a mistake.

⁶⁷ "Judge Morshchakova," 19.

Even Gorbachev's refusal to testify at the Communist Party case is not clearly indicative of a lack of political and legal culture. The entire history of the Soviet Union and the CPSU was in the dock during that trial, and undoubtedly many Russians were looking for a scapegoat for the excesses of the past. Gorbachev knew this, and as former General Secretary of the Party, he would have made the perfect fall guy. It is hard to imagine that in similar circumstances, a Western leader would have taken the stand.

It seems that only when the constitutional crisis reached a peak, was the Court completely ignored. Even the Court's ruling concerning Yeltsin's March 20, 1993 appeal to invoke special presidential rule, was not ignored, and he toned down the decree to correspond to the Court's decision. Thus, it is difficult to cite lack of political and legal culture as the reason why Yeltsin was able to disband the Supreme Soviet and suspend the Constitutional Court in September 1993.

In these cases where enforcement was a problem, other explanations point away from the political culture argument. The law could have been stricter regarding summons to the Court and the law was silent on who was responsible for implementation. But, if an entire government chooses to ignore the Court's decision, such as the Tatarstan ruling, a piece of legislation mandating enforcement will not make much difference. As stated by Neal Tate, judicial decisions are not self-enforcing, but depend upon the acquiescence of executives,⁶⁸ thus invoking the strategic choice and political/legal culture theories.

⁶⁸ C. Neal Tate, "Courts and Crisis Regimes: A Theory Sketch with Actual Case Studies," *Political Science Quarterly*, 46, no. 2 (1993), 319.

Enforcement of a finding of constitutional nonconformity is not something that can easily be institutionally legislated if the appropriate political culture does not exist. There will always be situations where elites will not wish to enforce judicial decisions, such as the October crisis, but if the political culture of a nation accepts the idea that judicial decisions are to be enforced, then elites will enforce them, and find other ways to circumvent the ruling; perhaps by passing new legislation.

Coupled with the idea of enforcement and implementation of judicial decisions is the idea of the political role of law courts and the effect of the political environment on the court. Two Russian advisors to the Constitutional Court, Boris Strashun and Vadim Sobakin, suggest that the external political environment would be the cause of any future problems with the Court and the institution or the laws governing it.⁶⁹ This suggests that environmental factors are paramount to the viability of a Constitutional Court.

Studies of courts in crisis regimes show that under certain conditions, a regime will choose not to implement a judicial decision, or somehow otherwise limit the independence of the judiciary. Explanations can be found in both environmental factors and in political culture. Similarities exist in various crisis regimes, indicating that Yeltsin's act to suspend the Court was not unique. Moreover, the institution of a Constitutional Court was maintained within Russia's constitutional structure. This is an indication that the political and legal culture of Russia's elites was maturing.

⁶⁹ Boris Strashun and Vadim Sobakin, "Defending the Russian Constitutional Court Act," *East European Constitutional Review* 1, no.4 (1995), 48.

Zorkin's own personal outspokenness and its effect on the demise of the Court is difficult to explain and on its face seems to be rooted in a lack of legal culture. Sharlet hypothesizes that Zorkin's political verbosity may have been rooted in Zorkin's belief that his extrajudicial comments were appropriate because he was Chairman of the body empowered with constitutional control of Russia, and that as a former constitutional law professor and as former head of the expert panel on the Constitutional Commission, he was additionally qualified.⁷⁰ This explanation highlights the role of the personality as well as that of political/legal culture.

Was Zorkin in Parliament's pocket as accused? Sharlet thinks not, but it was a widely held belief that he was trying to undermine Yeltsin in favour of parliament.⁷¹ Yeltsin definitely believed that Zorkin was power driven and was firmly against him in the battle with parliament.⁷²

Zorkin's behaviour raises the question of political and legal culture. His constant use of the media to express his political views is simply unheard of in Western legal culture. Although he was not alone in this, he was more often interviewed because he was Chairman. It is difficult to explain why the members of the Court felt that the open

⁷⁰ Robert Sharlet, "Chief Justice as Judicial Politician," *East European Constitutional Review* 2, no.2 (1993), 34.

⁷¹ *Ibid.*, 32-33.

⁷² Yeltsin, 195, 206-207.

expression of their views would not affect the appearance of impartiality, especially in Russia's volatile political environment.

Lack of experience and perhaps an inflated sense of self-importance propelled the judges. Zorkin, despite criticisms, clearly felt justified in his role as mediator and protector of the Constitution: "... the Constitutional Court is, above all, a defender of the constitutional order."⁷³

During the Communist Party case, issues of political/legal culture were raised. As discusses above, Gorbachev's refusal to testify may indicate a lack of political culture, but it impossible to say for certain because of the other factors involved. The constant telephone calls between Zorkin and Gorbachev and Zorkin and Yeltsin raises the legal culture argument. Neither elites, nor the media, questioned the perception of these communications. But, as stated earlier in this paper, communications between politicians and judges is strictly frowned upon in North America. Legal culture seems to be the most reliable explanation for this behaviour.

Morshchakova also cited a lack of legal culture or "cult of law" as a problem for Russia, but she placed more emphasis on objective factors, such as Russia's contradictory

⁷³ "Zorkin on Appearance at Congress," (text). Moscow *Rossiiskaya gazeta* in Russian (21 December 1992). *FBIS Report-Central Eurasia* 15 January 1993 (FBIS-URS-93-006) 16.

legislation. According to her, the bulk of legislation was contradictory, creating a problem for the courts who had to make rulings concerning these laws.⁷⁴

From the above analysis, we see that there are many theoretical explanations for what happened to the Court. To some extent, political culture did play a part in the judges' actions, in their relationships with other political actors, and in their choices to support various actors involved in the constitutional struggle.

However, institutional problems combined with the choices made by political and judicial elites seem to be more determinative. There were problems with the institutional structure of the Court, but these were not determinative except when coupled with elite decisions. The institutional structure allowed for abstract review and gave the Court the right to initiate examinations of the constitutionality of actions and decisions of the President and legislative bodies. The Court, instead of exercising caution, jumped into the political arena. This caused criticisms against the Court and affected its appearance of independence and impartiality. This is not to say that a Court should not make every effort to defend the constitutional structure of a state. In fact, this is the purpose of such a body. However, the judges likely needed more experience in order to be effective in this arena.

⁷⁴ "Judge Morshchakova," 18-19.

The cases initiated by the Court were the ones that caused the most uproar: the March Appeal and the disbandment of the Congress and Supreme Soviet in September 1993. By September 1993, the Court was so political, and so harshly criticized, that there was probably nothing it could have done to avert its suspension. However, its decision regarding Yeltsin's March appeal may not have met with so much criticism if it had waited until a Deputy brought an appeal, and if Zorkin had not so quickly jumped in front of the cameras. These choices were not wise ones to make.

This paper has shown that objective political theories can be relevant in explaining a situation that on its face seems rooted in subjective conditions, such as political environment and political culture. Although the latter played a role, the former are very important in analyzing and exploring what happened to the Constitutional Court from 1991 until 1993.

CONCLUSION

The establishment of the Constitutional Court in 1991 was a positive step for Russia towards a constitutional democracy.

From the above analysis, we see that the Constitutional Court did have a vital role to play in Russia's democratization and constitution-building process. For the most part, it did what it could to maintain the separation of powers and to mediate between legislative-executive disputes.

Unfortunately, the Court failed to remain apolitical during its first term, but it has been given a second chance. Hopefully, lessons will be learned from its first experience with constitutional oversight. Not only will the Court's personnel be more experienced, but legislators were given a second chance to improve the Law on the Constitutional Court.

The institution of a Constitutional Court consistently appeared in the draft constitutions of 1993, and its powers were actually increased in terms of constitutional interpretation in the 1993 Constitution. This is a clear indication that regardless of elite perception of the problem, the institution itself was deemed a necessary part of Russia's constitutional structure.

Events which occurred over the 1991-1993 period illustrate the problems of constitution-building and the tension between negative and positive aspects of power. Despite the practical impediment the Court represented to the political elites, it nevertheless was an important institution in the constitution-building process.

The role and effect that courts have in the constitution-building process has been neglected in scholarly research. This paper has attempted to fulfill part of that gap. Further research on comparative aspects of the role of courts in the state-building process would be very useful and would add to our theoretical knowledge of the political role of courts in the democratization process.

APPENDIX A

THE JUDGES OF THE 1991 CONSTITUTIONAL COURT¹

Ametistov, Ernest Mikhailovich: Doctor of Juridical Sciences, leading researcher of the all-Union scientific research institute for soviet state formation and law.

Ebzeev, Boris Safarovich: Doctor of Juridical Sciences, Professor of the Department of State and Law of the Saratovskii Legal Institute.

Gadzhiev, Gadis Abdullaevich: Candidate of Juridical Sciences, Senior Lecturer, People's Deputy of the Dagestan SSR. Representative of the Dagestan Supreme Soviet Commission on Law and Legality.

Kononov, Anatolii Leonidovich: Candidate of Juridical Sciences, Deputy Chairman of RSFSR Supreme Soviet Commission on Pardons, People's Deputy.

Lychin, Viktor Osipovich: Candidate of Juridical Sciences, Lecturer at the Russian Social-Political Institute.

Morshchakova, Tamara Georgievna: Doctor of Juridical Sciences, Senior Chief Assistant of the all-Union Research Institute of State Formation and Law.

Oleinik, Vladimir Ivanovich: Chairman of RSFSR Supreme Soviet Subcommittee on Freedom of Conscience, Creed and Charity, People's Deputy.

Rudkin, Iurii Dmitrievich: Doctor of Juridical Sciences, Deputy Chairman of the RSFSR Supreme Soviet Commission on Legislation, People's Deputy.

Seleznev, Nikolai Vasil'evich: Procurator of the Kemerovskaya oblast'

Tiunov, Oleg Ivanovich: Doctor of Juridical Sciences, Chairman of the RSFSR Supreme Soviet Subcommittee on International Affairs and Foreign Economic Relations, People's Deputy.

Vedernikov, Nikolai Trofimovich: Doctor of Juridical Sciences, Chairman of the RSFSR Supreme Soviet Commission on pardons, professor, People's Deputy

Vitruk, Nikolai Vasil'evich: Doctor of Juridical Sciences, Head of the Department of State and Law of the Ministry of Internal Affairs Law Faculty (USSR).

Zorkin, Valerii Dmitrievich: Doctor of Juridical Sciences, Professor of the Department of State and Law of the Ministry of Internal Affairs Law Faculty (USSR).

¹ "Ob izbranii sudei Konstitutsionnogo Suda RSFSR," Postanovlenie S"ezda Narodnykh Deputatov, *Rossiiskaia gazeta* (31 oktiabria 1991 g.), 1.

APPENDIX B**THE JUDGES ADDED TO THE 1995 CONSTITUTIONAL COURT¹**

Baglai, Marat V.: Doctor of Juridical Sciences, aided in drafting of the Constitution, practitioner.

Danilov, Iuri: Deputy Chairman of the State Committee for Anti-Monopoly Policy.

Iaroslavtsev, Vladimir Grigorevich: Candidate of Law. Judge from St. Petersburg.

Khokhruakova, Olga Sergeevna: Staff member of the Institute of Legislation and Comparative Jurisprudence

Strekozov, Vladimir: Doctor of Juridical Sciences, Deputy Head of Military Academy of Economics, Finance and Law.

Tumanov, Vladimir Aleksandrovich: Doctor of Juridical Sciences, Professor, President of the International Legal Sciences Association, Deputy to State Duma.

¹ Jane Henderson, "The Russian Constitutional Court," *Russia & the Successor States Briefing Service* 3, no.6 (1995), 25.

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