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Politics, Judicial Review, and the Russian Constitutional Court

Carla L. Thorson

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For Steve

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Preface

On 19 August 1991, while I was conducting research at Radio Free Europe/Radio Liberty in Munich, Germany, the attempted coup d'état unfolded in the Soviet Union. An Emergency Committee was formed overnight in Moscow to govern the country "because President Gorbachev was too ill" to continue his duties as leader of the Soviet Union. Within hours a series of public statements were issued, listing all the relevant Soviet legal and constitutional provisions that justified this seizure of power, and Russian Federation President Boris Yeltsin had challenged each and every one. As is well known, the coup failed quickly, but the Soviet Union had disintegrated by the end of that year, and Yeltsin ultimately emerged as the first popularly elected president of an independent Russian Federation. One of the reasons Yeltsin won this political gamble, I have argued, was his willingness to swear allegiance to the "rule of law" and to create an independent constitutional court in Russia able to exercise judicial review. I was fascinated by the legal and constitutional maneuvering that took place that year. At no time in Soviet or Russian history had there ever been a change in leadership where adherence to constitutional norms or laws was paramount. The inspiration for this work came from that moment in history, that moment in Soviet politics when the constitution suddenly mattered.

Why are judicial review mechanisms being incorporated into so many states transitioning from authoritarian rule? Why do these courts become independent, powerful political actors in some cases but not in others? These are the central questions addressed in this comparative study of the several attempts to establish a constitutional court in Russia. The study analyzes why politicians would create an independent judicial institution with the authority to overrule their own decisions, and, once established, why politicians would involve the court in the political process and agree to abide by its decisions. It sheds light on the role constitutional courts play in the consolidation phase of a transition from authoritarian rule, and the functions these institutions perform in systems of representative government that help to sustain democratic politics. What it does not clearly show, however, is that a constitutional court on its own can cement democratic governance.

The focus here is on one of those countries with no tradition of independent judicial review or of democratic forms of governance—Russia. Past practices and historical precedent do not support the formation of an independent judiciary in Russia, and yet a potentially powerful constitutional court exists and has been functioning for 20 years. This, in and of itself, is surprising. During the course of the transition from the Soviet state to the Russian Republic, there were three attempts to create an independent judicial review mechanism, only one of which could be termed a success, albeit a limited one.

There are many ways to approach a study of a new constitutional court. This work focuses on the self-interested calculations of politicians. There are two stages to the process of establishing an independent and respected judicial institution: first, the creation of the court, and, second, the development of a potentially powerful institution. During the first stage, political actors establish a constitutional court to enhance their democratic credibility. Once it comes into existence, the constitutional court can take on a central political role or it can be marginalized. During the second stage, the interests of the politicians who enlist the court and the interests of the judges who serve on the court are often in conflict; politicians seek to alter the rules in order to increase their power while judges seek to solidify the rules in order to ensure the survival of the constitutional court. A successful constitutional court must first be used; the disputes it hears must be significant political questions; and then politicians must respect its decisions. In its first two decades, the Russian Constitutional Court evolved from an institution with a great deal of power and promise to one with a much more limited role and set of responsibilities. Russian politicians have both used the court to further their own political objectives and sought to limit its powers.

Commemorating the 20th anniversary of the Russian Constitutional Court, President Dmitry Medvedev, on the eve of Constitution Day in December 2010, addressed the justices:

There is no need really to talk about how important your work is, as everyone in our country understands its importance now. There was debate at one point whether the Constitutional Court's verdicts are a source of law.... I think that everyone sees clearly today that the decisions and explanations the Constitutional Court gives are unquestionably a source of law, with all the ensuing consequences.... I remember the unpolished state our legal system was in 20 years ago, the various discussions, and the many leaps and changes in our laws. I often wondered then if the Constitutional

Court would survive and find its place in our country, if our people would accept it, and its decisions would be sufficiently realistic and enforceable [T]he court's 20 years of work have dispelled any doubts.

(Medvedev, 2010)

That a Russian President would recognize the importance of the constitutional court is not necessarily a novelty in 2010, but almost 20 years earlier in 1991 it was quite striking to hear similar expressions of support for the rule of law and an independent judiciary from the then President Boris Yeltsin. What is even more startling is the fact that any Russian politician would seek this court's opinion on a political question or would agree to comply with the court's judgment when he or she disagreed with the finding.

Medvedev is now the third elected leader of the Russian Federation who has worked with the Russian Constitutional Court since it was established 20 years ago. At the same time, he is not the only politician either to comply with or to question its authority and seek ways to limit the court's power in the political realm. There has been an ongoing debate about the power and authority of the court over the course of the last two decades, during which time it has evolved from an institution with a tremendous amount of political power and promise to one with limited authority and somewhat marginalized influence.

Now 20 years on, it is an appropriate moment to take stock. The analysis which follows focuses on this early period of constitutional review in Russia—1989–2010—looking specifically at the political role of this judicial institution in the Russian Federation. It is a comparative look at the relatively weak Soviet Constitutional Oversight Committee set up in 1989 by Soviet President Gorbachev, the very powerful first Russian Constitutional Court set up by President Yeltsin in 1990, and the restructured, limited second constitutional court which reopened in 1995 and has been continuously operating through the end of Yeltsin's second term, the two-term Presidency of Vladimir Putin, and the Presidency of Dmitry Medvedev. For its part, the court has had three different chairmen during this time: Valerii Zorkin, Vladimir Tumanov, and Marat Baglai. To the surprise of many, the court's most controversial first Chairman Valerii Zorkin not only survived the 1993 constitutional crisis to remain a justice on the court, but he also was reelected to the chairmanship in 2003 by his colleagues and continues to serve in this capacity. These developments, along with the many cases considered, the procedural and jurisdictional changes, and even

the physical location of the court have been considered in the context of the relations among the political institutions and actors in the Russian Federation over these years.

After a preliminary discussion in Chapter 1 of how this constitutional court fits into the continuum of judicial institutions around the world as well as of the context of the socialist legal system in which this new institution was placed, Chapter 2 offers an analysis of the three attempts to establish judicial review in Russia: why these institutions were created and how self-interested politicians determine the institutional design of all three bodies. It demonstrates that politicians are willing to create institutions endowed with judicial review powers, and these courts will have greater authority when more and more politicians have an interest in the future system but are uncertain about who will be in power.

Chapter 3 is an analysis of the petitioners and the types of political issues that were challenged in each of the three periods. It shows that legislative deputies are more likely to appeal to the court, and they will continue to do so even when they lose cases or when the court refuses to take up their petition. Chapters 4 and 5 then analyze the case record of the Soviet Constitutional Oversight Committee and the first Russian Constitutional Court and why they both failed: who among political actors used these institutions and how these institutions were involved in promoting political interests. These analyses show the variety of ways that politicians see the constitutional court as a means to gain a political advantage, and all of the political issues that have been taken up by these institutions. In Chapters 4 and 5 we also see the risk of a court becoming directly involved in political controversies and why these first two institutions failed.

Chapter 6 looks at why the second Russian Constitutional Court has survived thus far, drawing some analogies to other courts around the world, and to what extent the current court can be viewed as a powerful political actor. The analysis shows that politicians will use a constitutional court for political gain, even when the court actively avoids hearing political cases, and that they will change the procedural rules to gain political advantage.

In total, the Russian experience of transition from authoritarian rule demonstrates two things. On the one hand, constitutional courts are invaluable institutions for solidifying the division of powers and offering politicians another means of resolving political disputes in divided distributed government. On the other hand, the first two decades of judicial review also clearly illustrate how complex the political relationships among these institutions can be. Rules can be changed and powers

can be altered, making it very difficult for any court to uphold and enforce the rule of law. When a court is expected to rule in the political sphere, political winds can easily alter the atmosphere and the legal landscape for each and every judgment.

The record of the Russian Constitutional Court is mixed on all fronts. It has, however, survived for two decades, demonstrating great courage in some instances and great cowardice in others. It has taken on some very high-profile political questions and made some major mistakes, but the court has also demonstrated caution, taking quiet, calculated political risks to great effect. With 20 years of hindsight, this court has assumed a greater role in Russian politics than anyone might have expected back in August 1991. As you consider this court's record in the following pages, it would be wise to recall that the US Supreme Court took almost 100 years to assume the level of respect and authority that it enjoys today.

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As with all such undertakings, there are numerous people and organizations that have made immeasurable contributions to the completion of this work. First and foremost, I would like to thank Professor Barbara Geddes who guided me to the light at the end of the tunnel, Professor Martin Shapiro for his wisdom and insights into comparative courts, and Professor Andrzej Korbonski for his advice on Russian and East European politics. Scholars at Radio Free Europe/Radio Liberty, Dr. Vera Tolz and Dr. Elizabeth Teague, also deserve special notice for their encouragement and inspiration early on. I am grateful to Dr. Jeremy Azrael of the RAND Corporation both for his input on the subject and for his introduction to Justice Ernest Ametistov of the Russian Constitutional Court. Most essential to this study, I would like to thank the justices of the Russian Constitutional Court and the court's staff who graciously offered their time and access to the court records.

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Notes on Transliteration

Throughout this book a standard American Library Association—Library of Congress system of Russian transliteration has been used. However, in the case of well-known names and words the more common spelling is used (e.g., Yeltsin instead of El'tsin). The Russian soft sign, represented in transliteration with an apostrophe ('), is generally omitted for the sake of readability, particularly in the case of proper names.

Abbreviations, Acronyms, and Foreign Phrases

<i>Bundesverfassungsgericht</i>	German Constitutional Court
<i>Conseil Constitutionnel</i>	French Constitutional Council
CPSU	Communist Party of the Soviet Union
<i>Deklaratsii</i>	Declarations
<i>Demokratizatsiia</i>	Democratization
<i>Glasnost</i>	Openness
KGB	State Security Bureau
<i>Konstitutsionnoe soveshchanie</i>	Constitutional Assembly
MVD	Ministry of Internal Affairs
<i>Normativnii akti</i>	Normative acts
NSF	National Salvation Front
<i>Obiazatelnye</i>	Binding
<i>Obrashcheniia</i>	Petitions
<i>Opredelenie</i>	Formal Determination
<i>Perestroika</i>	Restructuring
<i>Postanovlenii</i>	Pronouncements
<i>Pravovoe gosudarstvo</i>	Law-based State
RCP	Russian Communist Party
<i>Rechtsstaat</i>	State ruled by law
<i>Resheniia</i>	Decisions
RSFSR	Russian Soviet Federated Socialist Republic
<i>Ukazi</i>	Decrees
USSR	Union of Soviet Socialist Republics
VAAP	All-Russian Agency for Authors' Rights
<i>Zakoni</i>	Laws