

A COMPARATIVE VIEW OF THE CHIEF JUSTICE'S ROLE

GUARDIANS OF THE CONSTITUTION: CONSTITUTIONAL COURT PRESIDENTS AND THE STRUGGLE FOR THE RULE OF LAW IN POST-SOVIET EUROPE

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INTRODUCTION

When the Berlin Wall fell and the governments of the former Soviet world reconstituted themselves under new constitutions, every country in the region created a new constitutional court.¹ Charged with ensuring that their nations' new constitutions would in fact be followed, these new courts often became both the center of the population's high hopes and a frequent annoyance for the elected governments that had to comply with their decisions. The hope was that the courts would be the "guardians of the constitution";² the reality

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¹ HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 1 (2000). The only potential exception to this generalization is Estonia, which created a constitutional panel within its Supreme Court instead. *Id.* at 249 n.2, 253 n.7.

² The phrase is associated with debate between Carl Schmitt and Hans Kelsen in 1931, which took place as the Weimar Republic teetered toward collapse. Schmitt's

was that many of these courts tried hard and were eventually squashed by ambitious political leaders who wanted to govern without judicial constraint.

This Article examines the infancy of two Constitutional Courts and their firebrand first Presidents—focusing on László Sólyom of the Hungarian Constitutional Court and Valerii Zorkin of the Russian Constitutional Court. In both cases, these Presidents came to be seen as the public faces of their respective Courts, and they often overstepped the bounds of judicial modesty to openly criticize their governments for failing to take constitutional principles seriously. Both frequently gave interviews to the media and spoke as if they personally were the mouthpieces of their Constitutions. Both set themselves up as political leaders in a fragile world of political reconstitution, and both created public personae for themselves, and for their Courts, as principled populists who stood up for the underdog in the big political fights of their time. In both cases, elected political leaders attempted to silence the voices of these outspoken Court Presidents. In both cases, however, the Court Presidents launched spectacular recoveries of their public positions in just a few short years, building on their popular reputations for being aggressive constitutional guardians. Both Presidents rose from the ashes of their respective Courts to emerge again as phoenix-like images of constitutionality itself.³

The tale I tell about Russia and Hungary is not just a tale of two Courts. It is, in many ways, a more general story about the fragility of

view was that the constitution needed a guardian and that the president—not the court—was the figure to guard it, because the court would be dependent on legality and therefore unable to take the initiative where it might be necessary. CARL SCHMITT, *DER HÜTER DER VERFASSUNG* [THE GUARDIAN OF THE CONSTITUTION] (1931). For a discussion of Schmitt's views on this point, see Gabriel L. Negretto & José Antonio Aguilar Rivera, *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship*, 21 *CARDOZO L. REV.* 1797, 1816-21 (2000). Schmitt's interlocutor in that debate was Hans Kelsen, who argued that courts were the proper guardian. HANS KELSEN, *WER SOLL DER HÜTER DER VERFASSUNG SEIN?* [WHO SHOULD BE THE GUARDIAN OF THE CONSTITUTION?] (1931). For a discussion of Kelsen's response to Schmitt, see ARTHUR J. JACOBSON & BERNHARD SCHLINK, *WEIMAR: A JURISPRUDENCE OF CRISIS* 70-71 (2000). Kelsen had been behind the creation of the Constitutional Court in Austria after the First World War, and he remained an advocate of the institution throughout his life. See Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 *J. POL.* 183, 188 (1942) [hereinafter Kelsen, *Judicial Review*] (suggesting that the dissolution of the Austrian Constitutional Court made the government more susceptible to fascism).

³ There are also, as we will see, very substantial differences between the two countries, the two Courts, and the two Presidents. For now, I am simply emphasizing the uncanny similarities.

new institutions and the importance of personality in shaping positions that have not yet established themselves as important offices that can retain their power regardless of the office holder. Until new institutions have a history that gives them a certain stability, it is often the first few occupants of an office who define the meaning, power, and shape that the office takes. While “great man” history is frowned upon these days, and often for good reason,⁴ there are moments in the development of institutions when their occupants are in many ways more important than the impersonal influences of structure. The early days of the Russian and Hungarian Constitutional Courts bear out this view that the accidents of occupancy can be crucial, particularly in the early days of institution building.

The tale I will tell is also a story of the establishment of a distinctive form of judicial power. Courts famously have the power neither of the purse nor of the army, and so they generally rely on other sources for authority, sources that are both intellectual and moral.⁵ Judicial power has an intellectual basis because courts are institutions of reason that publish not only their decisions but also their rationales. The cogency and persuasiveness of the reasons matter in determining the power that courts have. Judicial power has a moral basis because constitutions and laws are typically normative documents as

⁴ As Geoff Eley notes, the rise of social history in the 1960s and 1970s pushed the old political histories featuring major political leaders off to one side. Only with the rise of feminist history was the genre of biography reclaimed. But by then, of course, it was not the “great man,” but perhaps a great woman or someone altogether more ordinary that captured historians’ attention. And then the point of such histories was to use the individual biography to capture the complexity of the period, not the glory of a singled-out life. GEOFF ELEY, *A CROOKED LINE: FROM CULTURAL HISTORY TO THE HISTORY OF SOCIETY* 168-69 (2005).

⁵ The American literature has, of course, emphasized judges’ democratic deficit without sufficiently considering that there may be other sources of legitimating power available to judges. For the classic view on the democratic deficit, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962) (asserting that judicial review is counter-majoritarian because it places in the judiciary power that, in a democratic government, should reside with elected representatives). I have tried to argue more recently that there are other sources of judicial power. See Kim Lane Scheppelle, *Democracy by Judiciary. Or, Why Courts Can Be More Democratic Than Parliaments*, in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* 25, 28-31 (Adam Czarnota, Martin Krygier & Wojciech Sadurski eds., 2005) (arguing that judges often have superior information compared with legislators about what is going wrong in their societies and that many constitutions embody a substantive sense of what democracy requires, which courts are in a good position to elaborate); Kim Lane Scheppelle, *A Realpolitik Defense of Social Rights*, 82 *TEX. L. REV.* 1921, 1924 (2004) [hereinafter Scheppelle, *Realpolitik Defense*] (positing that courts may enable democratically elected governments to stand up to external pressures that would otherwise undermine the governments’ democratic mandate).

well as strictly legal ones, and courts must be seen as engaging in something bigger and more important than mere legalism. Having a principled and coherent vision is one way that a court can cajole from the other branches the critical resources it needs to function and the legitimacy it needs to hold off sheer force. In the early days of a court, when these principles are not yet established, a court can establish its unique place in the political order by virtue of being the locus of principled, moral, intellectual decisions. Here, too, the person of the constitutional court president can be crucial if the president can convey the intellectual and moral gravitas that allows the attribution of those principles to the institution. In both cases we will be examining, the Court Presidents took to the media early and often, holding press conferences, giving interviews, and explaining at every opportunity how a constitutional system works. In many ways, it was the extra-judicial lectures given by these experienced former professors that solidified the position of the new Constitutions and of the new Courts. Both Presidents made the case for the creation of a uniquely judicial form of power that transcended personality, while simultaneously personifying the rule of law themselves.

Finally, the tale I have to tell is also a story of the separation of powers as a contact sport. Hannah Arendt famously made the argument that successful constitutions do not just constrain power, they create power through the opposition of interest to interest.⁶ States (and courts) can fail. What prevents their failure in the early fragile days of a new constitution is the willingness of new institutions to deploy their power and to parry off the power of others in return. Presidents of new courts have to be willing to assert power to be granted power, and in the early days of a new institution, that power has to be asserted before anyone can really be sure that others will recognize it as such. The political strategies of constitutional court presidents, then, matter a great deal in the eventual recognition of the power of a court. Constitutional court presidents, in short, have to have sharp elbows to ensure that they can have a seat at the table of power.

Our story of Russia and Hungary in the early days of their Constitutional Courts will illustrate all three of these factors: the centrality of personality, the importance of establishing uniquely judicial power, and the strategic deployment of constitutional aggression. Before we examine our two cases, however, we should first consider the ways in which the legal systems of Hungary and Russia (and for that matter,

⁶ HANNAH ARENDT, *ON REVOLUTION* 151-52 (Penguin Books 1990) (1963).

most countries in the civil law world) differ from the legal system of the United States, because these differences affect the powers of the Chief Justice or Court President.

I. CHIEF JUSTICES, CONSTITUTIONAL COURT PRESIDENTS, AND DIFFERENCES IN INSTITUTIONAL STRUCTURES

Most of this Symposium addresses the American court system (and the American federal system, at that). But if we are to understand the situation of the high court president as a more general phenomenon, we need a comparative perspective to see that the United States is unusual for several reasons—reasons that bear on both the structure of courts and the capacities of court presidents. In particular, the Chief Justice of the United States is the head of a Court that both sits at the apex of a federal judicial system and that also entertains petitions to review decisions from state courts. This provides for an unusual centralization of judicial functions in one court, something many other countries have avoided. In addition, as other articles in this Symposium have argued, the unique structure of the American judiciary makes the role of the Chief Justice a particularly crucial one in the maintenance of the entire federal court system.⁷ Since I will focus on the role of the high court chief executive in legal systems constructed very differently from that of the United States, I first need to explain the general contours of a constitutional court and how it differs structurally from the U.S. Supreme Court.

A. *The Jurisdictional Segregation of Constitutional Courts*

The power of judicial review is diffuse in the United States, which means that any federal court can hear and decide federal constitutional questions. In systems that have constitutional courts, by contrast, it is typically the case that *only* the constitutional court has the power to rule on constitutional matters.⁸ As a result, in these systems,

⁷ See generally Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575 (2006); Theodore W. Ruger, *The Chief Justice's Special Authority and the Norms of Judicial Power*, 154 U. PA. L. REV. 1551 (2006).

⁸ Constitutional courts have their intellectual origin in the work of Hans Kelsen, the Austrian legal theorist and creator of the first specialized constitutional court, that of Austria in its post-World-War-I constitution. It was important for Kelsen that the constitutional court, bearing as it did enormous political weight in his constitutional order, be the only court that could exercise judicial review. Kelsen, *Judicial Review, su-*

all constitutional questions have to be referred to the constitutional court, both from other sorts of courts and from other places in the political system. Not only is the constitutional court the *only court* to hear constitutional questions, but it also has the jurisdiction to hear *only constitutional questions*, which means that questions of routine interpretation of other legal sources are simply never on a constitutional court's docket. The "ordinary courts" do not deal with constitutional questions, and the constitutional court does not deal with ordinary legal questions. As a result, a constitutional court is generally the only court that has the power to nullify laws inconsistent with the constitution and to require the government to take steps to correct the problem.

The constitutional court typically has a jurisdictional segregation from other courts, which means that constitutional court decisions have a different status and audience than decisions of the U.S. Supreme Court. If the constitutional court rules in a case that would be a "case or controversy" in the United States (that is, where there are concrete individuals locked in a dispute), the constitutional court has the final word in the matter only if the case involves only a constitutional claim. Because the constitutional question can be just one of many in a concrete dispute, matters decided by the constitutional court will often be referred back for final resolution to the ordinary court that sent the case to the constitutional court in the first place.⁹ In short, the constitutional court can address a specific factual matter only insofar as that matter presents only a constitutional claim. All

pra note 2, at 192. For a discussion of Kelsen's contribution, see MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 147-48 (2002).

⁹ This is especially true of cases that are referred to the constitutional court by an ordinary court judge who has a constitutional question that cannot be resolved by her court. The judge in such a case is supposed to send the constitutional question to the constitutional court for resolution, staying the proceedings in her court until she gets an answer. When the constitutional court provides the answer to the constitutional question, the case in the ordinary court can be resumed. See Herbert Hausmaninger, *Judicial Referral of Constitutional Questions in Austria, Germany, and Russia*, 12 TUL. EUR. & CIV. L.F. 25, 29-36 (1997) (explaining the constitutional question referral process in Austria, Germany, and Russia). This may look like the old system of interlocutory appeals in the United States, but it has a different rationale. Rather than ensuring an intermediate question is finally settled through the usual mechanisms of appeal, the constitutional referral process sends a constitutional question to the only court that can hear it. The ordinary judge cannot make a ruling on the matter and must wait for the one body that *can* make such a judgment to make it.

other claims (including ones that depend on fact finding) have to be settled elsewhere.¹⁰

But constitutional courts often have the power to rule in matters that are not strictly cases or controversies in the American sense. *Abstract* review allows constitutional courts to review laws for their constitutionality in the absence of a concrete dispute.¹¹ While most constitutional systems, including Russia's, only allow certain political actors (the President of the country, the head of either chamber of Parliament, or a substantially sized fraction of members of Parliament, for example) to ask for abstract review,¹² some countries, like Hungary, allow even lone individuals to request review.¹³ If a law is found constitutionally deficient on abstract review, the court will nullify the offending law immediately or will order the parliament or the executive to correct it within a fixed time. More than with the U.S. Supreme Court, then, the decisions of a constitutional court will be directed at the government and not simply at the litigants before it. This poses a special problem of compliance because the vast majority of adverse decisions will require government action first and foremost. Clever constitutional court leadership, combined with politicians willing to respect the court's constitutional judgments, can ensure that decisions will be followed. Bad court leadership can aggravate already annoyed politicians who might find the constitution a burden in any event.

Constitutional courts, then, have a particular and narrow but politically crucial function in the broader context of judicial power: they review laws, decisions, and actions of government for their constitu-

¹⁰ See HELMUT STEINBERGER, *MODELS OF CONSTITUTIONAL JURISDICTION* 29 (1993) (“[The constitutional court’s] scope of review should be restricted to scrutinizing the challenged act as to the violation of constitutional rights and not to its lawfulness in general.”).

¹¹ Abstract review occurs when a constitutional court is asked to review legislation for constitutionality “in the abstract”—that is, as a facial challenge to a law without any concrete parties who have been affected by this law in the picture. In fact, abstract review may and often does occur before a law has even gone into effect. Louis Favoreu, *Constitutional Review in Europe*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 38, 40-42 (Louis Henkin & Albert J. Rosenthal eds., 1990).

¹² See KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [Constitution] art. 125(2) (Russ.) [hereinafter *RUSSIAN CONSTITUTION*], available at http://www.oefre.unibe.ch/law/icl/rs00000_.html (listing the parties that may request that the Constitutional Court hear a case).

¹³ See A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 32A(3) (Hung.) [hereinafter *HUNGARIAN CONSTITUTION*], available at http://www.oefre.unibe.ch/law/icl/hu00000_.html (“Everyone has the right to initiate proceedings of the Constitutional Court in the cases specified by law.”).

tionality—period.¹⁴ As a result, they are constantly engaged with the review of government action and constantly directing their decisions at the constitutional improvement of the state. The president of a constitutional court, then, will be someone in the midst of political controversy all the time, since the constitutional court can hardly be apolitical with this jurisdictional mandate.

B. *The Institutional Segregation of Constitutional Courts*

Jurisdictional segregation of constitutional questions implies institutional segregation as well. Typically, a constitutional court is not in a hierarchy with other courts,¹⁵ as, for example, the U.S. Supreme Court is with respect to other federal courts. It would therefore be highly surprising if the constitutional court president had any administrative responsibilities that touched other courts, and she typically does not. The ordinary courts will generally be governed in hierarchy by a supreme court, which is the final court of appeal.¹⁶ In the Soviet period, supreme courts in the Soviet orbit not only had the power to overturn decisions below, but also to issue general normative direc-

¹⁴ Actually, this is not quite true. Some constitutional courts certify election results, decertify political parties, and conduct other such political functions. Constitutional courts also often adjudicate jurisdictional disputes between branches of government. See, e.g., RUSSIAN CONSTITUTION art. 125(3) (conferring authority on the Russian Constitutional Court to adjudicate intra-governmental disputes). But the crucial point here is that constitutional courts cannot hear garden-variety matters of statutory interpretation or regulatory adjudication, types of cases that are the bread and butter of U.S. Supreme Court jurisdiction.

¹⁵ For example, the judicial reform that created the Russian Constitutional Court separated it from other courts. See Peter Krug, *Departure from the Centralized Model: The Russian Supreme Court and Constitutional Control of Legislation*, 37 VA. J. INT'L L. 725, 737-38 (1997) (calling the Constitutional Court established in 1993 "a new, specialized court separate from the ordinary judicial system").

¹⁶ Depending on the court system, other bits of jurisdiction may be hived off into other specialized courts that are not in hierarchy with the ordinary court system. For example, *arbitrazh* (commercial) courts in Russia and administrative courts in France and Germany have their own jurisdiction, hierarchy, and administrative structures. For more on the *arbitrazh* courts and their jurisdiction, see Kathryn Hendley, *Remaking an Institution: The Transition in Russia from State Arbitrazh to Arbitrazh Courts*, 46 AM. J. COMP. L. 93, 95 (1998) (noting that *arbitrazh* courts have the power to adjudicate disputes among corporations and between corporations and the government). For more on the structure of the French legal system, see John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109, 111 (1996) (recounting how the French *Conseil d'Etat* and lower administrative courts emerged from the denial to ordinary judges of judicial power over administration). The structure of the German legal system is explained in David Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795, 1809-12 (1988).

tives: “guiding explanations” that were to govern the interpretation of lower courts.¹⁷ Since the collapse of the Soviet empire, supreme courts have generally retained their powers to exercise appellate jurisdiction over lower courts and sometimes even to go on issuing guiding explanations.¹⁸ The constitutional courts, by contrast, were added to this system without having any administrative relationship to the other courts. As a result, constitutional court presidents simply do not play an institutional role in the national judiciary as the Chief Justice of the United States does as the top administrator of the federal court system.

That said, constitutional court presidents do typically control the administrative machinery of their own courts. The office of the general secretary of the court typically screens petitions, manages the general administrative staff of the court, and deals with everything from the physical facilities of the court to the routine correspondence going out of the building in the direction of parties, government agencies, and other courts. And the general secretary typically works at the direction of the president of the court. While individual justices of constitutional courts have “clerks” (who are not new law school graduates but typically mid-career professionals who are often law professors in their own right), the constitutional court itself will typically have a staff of general experts who will be deployed under the office of the general secretary.¹⁹ For example, in countries that are bound to comply with the jurisprudence of the European Court of Human

¹⁷ Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution* (pt. 2), 14 CARDOZO ARTS & ENT. L.J. 297, 299 n.10 (1996).

¹⁸ See Hausmaninger, *supra* note 9, at 35, for a recent example of just such a “guiding explanation.”

¹⁹ For information about the staff of the Russian Constitutional Court, see Constitutional Court of the Russian Federation, <http://ks.rfnet.ru/english/booklet.htm> (last visited June 6, 2006). While the structure of the staff of the Russian Constitutional Court is mandated by statute, *id.*, the staff of the Hungarian Constitutional Court is only vaguely referenced in Hungarian law, *see* Act No. XXXII of 1989 on the Constitutional Court art. 18 [hereinafter Hungarian Constitutional Court Act], *available at* <http://codices.coe.int/NXT/gateway.dll/Codices/a15711/b15712/c15713/d15733.htm> (last visited June 6, 2006) (stating that an office of the Constitutional Court shall carry out the administrative work of the court). The statute regulating the Court leaves the details of the administrative apparatus to the internal workings of the Court. I had an office in the Hungarian Court building during the time I served there as a researcher (1994-1998), and I can say from my experience that the General Secretary of the Court always had a close working relationship with the President of the Court. For example, the two met regularly to work out the assignments for the judges as *rapporteurs* (opinion writers) on specific cases.

Rights (ECHR), there is often an office that is part of the general administrative staff that produces memos about the relevant ECHR jurisprudence on upcoming matters on which the constitutional court will rule. In addition, there are general offices under the purview of the general secretary to handle international inquiries, to produce press releases on court activity, to publish (or not) the decisions of the court, and to engage in active correspondence with the substantial general public that addresses the court for relief. Managing the internal operation of the constitutional court can be a substantial job, and that job generally falls to the general secretary, who is directly responsible to the president of the court.

Institutional segregation of the constitutional court, then, means that the constitutional court president does not have administrative responsibility with respect to other courts. But the president does have administrative control over the constitutional court itself, control that, given the enormous political role of the institution, is a substantial power in its own right.

C. *Judicial Selection and Judicial Leadership on Constitutional Courts*

Judges on constitutional courts are generally appointed in a manner that is not only different from the appointment of judges in the United States, but that is also different from the appointment process of any other court in their own jurisdiction. Constitutional judges are typically selected by some combination of presidential or prime ministerial appointment and parliamentary approval, but they are only chosen to serve for a fixed term of years. In Hungary, the term has remained nine years, once renewable, since the beginning of the Court in 1989;²⁰ in Russia, the term has changed repeatedly, but now features life tenure, with a mandatory retirement age of seventy.²¹ Be-

²⁰ See Hungarian Constitutional Court Act, *supra* note 19, art. 8(3) (“The Members of the Constitutional Court shall be elected for nine years. Any Member of the Constitutional Court may be re-elected once.”).

²¹ Alexei Trochev details the changing tenures of the judges:

In 1991, the RCC [Russian Constitutional Court] Justices were elected for an unlimited term, subject to a compulsory retirement age of 65. In 1994-95, RCC Justices were appointed for a single non-renewable term of 12 years, while their mandatory retirement age was raised to 70. In February 2001, the time that constitutional judges could spend on the bench was increased from 12 to 15 years, and the mandatory retirement age of 70 was abolished. However, 10 months later, this mandatory retirement age of 70 was brought back. Finally, in April 2005, Russia abolished the 15-year term while keeping the mandatory retirement age of 70.

cause the terms of constitutional judges are more predictable than they are in the United States, the process of their appointment occurs on a more regular schedule. In Hungary, that regular schedule allows log-rolling, political compromise, and tacit understandings about the balance of political preferences on the Court to ensure that most political factions get their representatives on the Court.²² In Russia, where constitutional judges are appointed by the President with the approval of the Federation Council (the upper house of Russia's parliament), there has been less political compromise in practice.²³ The process of judicial appointment is simultaneously more political and less political than in the United States. It is more political because in Hungary, all political factions expect that they will have representation on the Court, while in Russia, the Russian President, in practice, almost single-handedly selects the Court; it is less political because in Hungary there is generally an understanding about the representative quality of the Court, while in Russia, the selection of judges is widely considered a technical matter that is not a subject of political discussion.

Within countries that have constitutional courts, ordinary court judges typically have civil service careers in which they enter the lower-level judiciary first and are promoted up through the ranks on the basis of seniority and merit. Constitutional judges typically enter the judiciary for the first time later in their careers, and more often from academia than from anywhere else. They have different qualifica-

Alexei Trochev, *Tinkering with Tenure: The Russian Constitutional Court in Comparative Perspective 1* (Mar. 11, 2006) (unpublished manuscript, on file with author).

²² During the four years I lived in Hungary, I observed that vacancies for constitutional judges were rarely filled one-by-one. Instead, the Parliament typically waited for multiple vacancies to open up and then filled them as a package. This was encouraged by the constitutionally mandated process for selecting constitutional judges, which started in a specially constituted committee of the Parliament in which each political party with a fraction in the Parliament got one vote, followed by a two-thirds vote of all of the members of the Parliament. See HUNGARIAN CONSTITUTION art. 32A(4) (outlining the procedures for determining new members of the Court). Because minority parties could dominate the selection committee, but could only get a candidate through the Parliament with the aid of the majority party, compromises were struck to enable a set of candidates of diverse views to get through the process all at once. This process ensured that no one political party could dominate the Court.

²³ None of the people nominated for judgeships on the Russian Constitutional Court have ever been refused, or even much debated by the Federation Council. The existence of openings on the Constitutional Court has also not been quite as predictable as in most courts with fixed terms of office, because the terms of office of the justices have been changed so frequently that each individual justice practically had her own personal term of office until they were regularized and equalized in 2005. Trochev, *supra* note 21, at 23 tbl.1.

tions, backgrounds, and levels of education than most judges in their own systems or, for that matter, most judges in the United States.²⁴ Because the vast majority of constitutional judges enter the judiciary from either academia or the higher reaches of politics, they are often well known before they issue any decisions at all, but they are usually not known for their political beliefs.²⁵

Not only are constitutional judges appointed in a different sort of process than other judges in their own countries, but also the leadership of the court is differently determined. In many constitutional courts, the judges themselves select their own president and vice president, who serve for substantially shorter terms than their overall terms of office. In Hungary and Russia, the term of the Chairman or President of the Court is three years, renewable until the judicial term

²⁴ For example, constitutional judges in Hungary must meet stringent qualifications:

The Members of the Constitutional Court shall be elected by Parliament from among outstanding theoretical legal experts, university professors, or Doctors of Political Sciences and Laws, or lawyers with at least twenty years of practice in the field. Practice in the field shall be in a field which requires a degree in Political Sciences and Laws.

Hungarian Constitutional Court Act, *supra* note 19, art. 5, § 2. The same is true in Russia:

A citizen of the Russian Federation who has by the day of the appointment attained at least forty years of age, with an irreproachable reputation, who has higher juridical education and an experience in the legal profession of at least fifteen years, who possesses recognised high qualifications in the sphere of law, may be appointed as the Judge of the Constitutional Court of the Russian Federation.

Federal Constitutional Law on the Constitutional Court of the Russian Federation art. 8 (1994) [hereinafter Russian Constitutional Court Act], *available at* <http://codices.coe.int/NXT/gateway.dll/Codices/a15711/b15712/c15713/d15748.htm> (last visited June 6, 2006).

²⁵ For example, Géza Kilényi, elected to the Hungarian Constitutional Court in the first round of judges, had been deputy minister of justice before his elevation to the bench. The second President of the Hungarian Constitutional Court, János Németh, had been the president of the Hungarian Election Commission for seven years before his term on the Court. While both had been in political offices, the political offices they had held were not partisan offices or offices where one would have expected the personal views of the occupants to be visible. For biographies of former justices of the Hungarian Constitutional Court, see *The Constitutional Court of the Republic of Hungary, Former Members*, <http://www.mkab.hu/content/en/encont2b.htm> (last visited June 6, 2006). Recently, these high-level political positions have been more overtly political. The current President of the Hungarian Constitutional Court, Mihály Bihari, was a member of Parliament for the Socialist Party from 1994 to 1998. *The Constitutional Court of the Republic of Hungary, Present Members*, <http://www.mkab.hu/content/en/encont2.htm> (last visited June 6, 2006). In Russia, virtually all of the constitutional judges were professors before their time on the Constitutional Court.

of office is up.²⁶ As a result, internal leadership of the Court is accountable not to the external political forces that put the judges onto the Court in the first place, but instead to the internal relations among the judges. This means that all Court Presidents have to consider how they are seen by their fellow justices if they want to be re-elected in the job. The President can be removed from that office (though not from the Court itself) by the equivalent of a no-confidence vote of the other justices. By contrast, in the United States, the President appoints the Chief Justice, who can be not only the newest member of the court but also the least popular. In constitutional courts, court presidents must have the ongoing support of their colleagues to stay on the job.

D. *The Overtly Political Role of Constitutional Courts*

Constitutional courts are avowedly political institutions. Because these courts have jurisdictional and institutional segregation from the rest of the legal system and because their judges, court leadership, and administrative personnel are chosen differently, they do not look like regular courts and are therefore not held to the standards of political disengagement of ordinary courts. Instead, constitutional courts often appear more like third chambers of parliament²⁷ or negative legislatures²⁸ because the questions they receive necessarily require answers that have political consequences. Indeed, they cannot avoid political engagement, because, unlike the U.S. Supreme Court, the jurisdiction of constitutional courts is limited to constitutional matters which tend to have high political impact. Moreover, constitutional courts do not typically have formally recognized discretionary powers to choose which cases they will decide.²⁹ If a constitutional

²⁶ Hungarian Constitutional Court Act, *supra* note 19, art. 4; Russian Constitutional Court Act, *supra* note 24, art. 23.

²⁷ See ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* 225-53 (1992) (exploring the political roles of constitutional courts).

²⁸ See Kelsen, *Judicial Review*, *supra* note 2, at 187 (“The decision of the Constitutional Court by which the statute was annulled . . . was a negative act of legislation.”).

²⁹ In practice, because of the huge press of cases, however, courts have to find a way to triage their decisions. The Russian Constitutional Court separates cases into first impression cases (*postanovlenia*) versus mere elaborations (*opredelenia*). *Postanovlenia* require formal briefing, oral arguments, and plenary sessions of a senate of the court. *Opredelenia* are decided on the basis of the initial submissions and are generally written by one judge as *rapporteur*, with the decision then voted on in a full plenary session of the Court, without full oral argument. Scheppele, *Realpolitik Defense*, *supra* note 5, at 1954 n.145. In Hungary, the Court uses more or less formal procedures accord-

question falls within the jurisdiction of the court, the court must answer it.³⁰ As a result, there is no “political question doctrine” or other evasive doctrinal mechanism for avoiding tough political issues. Given the prevalence of abstract review, there are not even mootness, ripeness, and other fact-based procedural tactics for avoiding a decision on the grounds that the case is not ready to be decided. Without these devices for leaving matters over until another day, these courts are therefore built for political controversy, and political controversy they get.³¹

ing to the sort of norm that is reviewed. Hungarian cases only engage the whole Court if a statute is being reviewed; administrative regulations are dealt with by three-judge panels. Georg Brunner, *Structure and Proceedings of the Hungarian Constitutional Judiciary*, in LÁSZLÓ SÓLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 65, 74-75 (2000) [hereinafter CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY].

³⁰ In Hungary, the court must hear all legitimately filed petitions within its jurisdiction and must also refer all petitions not within its jurisdiction to the state body that bears responsibility for inquiring into the matter raised. Hungarian Constitutional Court Act, *supra* note 19, art. 23, § 2.

In Russia, the reasons for legitimately dismissing a petition are listed in the Constitutional Court’s framework statute:

The Constitutional Court of the Russian Federation shall take decision to dismiss the petition in the events where:

1. resolution of the question raised in the petition does not fall under the jurisdiction of the Constitutional Court of the Russian Federation;
2. in accordance with the requirements of the present Federal Constitutional Law the petition is inadmissible;
3. the Constitutional Court of the Russian Federation has issued a ruling on the object of the petition, that ruling retaining its force.

If the act the constitutionality of which is being contested has been abrogated or terminated by the beginning or during the consideration of the case, the proceedings initiated by the Constitutional Court of the Russian Federation may be cancelled, except for the events when constitutional rights and freedoms of citizens have been violated by the operation of the act.

Russian Constitutional Court Act, *supra* note 24, art. 43.

³¹ This is not to say that constitutional courts do not have any evasive tactics for avoiding head-on political conflicts. Constitutional courts often decide controversial matters on procedural rather than substantive grounds. So, for example, when the Hungarian Constitutional Court decided its first abortion case, the Court struck down the communist-era abortion law on the grounds that it had been enacted as an administrative regulation rather than as a constitutionally required statute, thereby avoiding the more politically controversial question of when life began under the Hungarian Constitution. See *On the Regulation of Abortion*, Decision 64/1991 (Hung. Const. Ct. Dec. 17, 1991), translated in CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY, *supra* note 29, at 178, 191 (leaving it to parliament “to draw the line between the unconstitutional extremes of total prohibition and unrestricted availability of abortions”). Similarly, when the Russian Constitutional Court had to rule on the legality of the Chechen War, the Court limited itself to inquiring whether the procedures for declaring war had been properly followed by involving the Parliament appropriately, avoiding the

As a result, it is far more common in constitutional court systems to find that court presidents are considered major political figures and are expected to play a role in public debate over constitutional issues. Anxiety about “judicial activism,” which is a commonplace of American constitutional discussion, simply does not appear the same way in systems that have courts specially designed for a political workload. If a constitutional court were not active, it would appear to be shirking its responsibility. And if the president of the court were not a widely known political figure, the court would lose crucial visibility. Constitutional courts are first and foremost political institutions and are recognized as such. Their presidents are clearly seen as political actors.

* * *

All of these institutional differences suggest that we are likely to find that constitutional court presidents play a different role in establishing the “institutional judiciary” of their respective countries than does the Chief Justice of the United States. First, constitutional court presidents only preside over the development of constitutional law and not over any other branch of law,³² so their influence over the rest of the judiciary is not as substantial as is that of the Chief Justice of the United States. Second, constitutional court presidents do not have administrative responsibility for courts outside their own, giving them a lower profile in the “institutional judiciary” than the U.S. Chief Justice.

But the internal selection of constitutional court presidents by their fellow justices and their public role in speaking on behalf of a court that is designed to be activist gives the constitutional court

question of whether the war violated the rights of people living in Chechnya. *In re* Edict No. 2137, On Measures for the Restoration of Constitutional Legality and Law and Order on the Territory of the Chechen Republic, ROSSIISKAIA GAZ., Aug. 11, 1995, translated in 31 STATUTES & DECISIONS: THE LAWS OF THE USSR & ITS SUCCESSOR STATES 48, 51 (Sept.-Oct. 1995) [hereinafter STATUTES & DECISIONS].

³² Examined more closely, this statement may be a bit misleading because an increasing number of constitutional systems have “horizontal application” of constitutional norms, which means that they have spillover effects into other areas of legal doctrine, including even into private law. For a discussion of horizontal application of constitutional norms, see Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT’L L. 435, 442-43 (2002) (“The state action/horizontal effect doctrine is the doctrinal vehicle whereby background rules of property, contract, and tort are made subject to constitutional norms dealing with the level and distribution of important goods.”).

president a *larger* responsibility than the U.S. Chief Justice in another sense. Many governments, particularly those recovering from an authoritarian and human-rights-violating period, want to locate responsibility for its maintenance in a “guardian of the constitution.” And that guardian is, in many constitutional systems, the constitutional court. Given the role of the court president in speaking on behalf of the justices of the constitutional court, the court president is generally the public personification of the guardian of the constitution. This is a very different role, and in many ways a bigger and more important role, than that possessed by the Chief Justice of the United States. The public voice of the court projects itself as the voice of the constitution itself. And that is what gives the office of the constitutional court president—at least the constitutional court president who does the job well—its immense moral power.

Court presidents in constitutional courts, then, may not have the *administrative* power that the U.S. Chief Justice has, but these presidents have greater *moral* power to speak on behalf of the constitution itself.

With that background, we can now tell our tale of two Courts, where Constitutional Court Presidents were faced with different challenges and different resources with which to address them. At first, both Presidents seemed to be beaten by stronger political forces. But then, drawing on their resources as the guardians of the Constitution, they were able to claw their way back to power by taking the constitutional and moral high ground.

II. A TALE OF TWO COURTS

A. *From President to President: László Sólyom as Hungarian Constitutional Guardian*

By the time it was clear that the Soviet Union would loosen its grip on its dependent states in the eastern part of Europe at the end of the 1980s, Hungary had already moved substantially toward legal and political change. By the mid-1980s, there were rumblings in civil society, rumblings that would intensify into the earthquake that changed the government from a one-party Communist state to a multiparty democracy in 1989. The cracks in the monolithic façade of official Communism emanated from many directions: post-Marxist, now-liberal intellectuals had founded the *samizdat* journal *Beszélő* (Speaker); post-Marxist, now-socialist intellectuals had built an insider critique of the government; and populists harnessed Hungarian nationalism for fur-

ther Hungarian independence.³³ The rumblings were audible in the area of environmental activism, where the civil society organization *Duna Kör* (Danube Circle), among others, focused on the potential ecological harm to the Danube River caused by a major dam project.³⁴ And the rumblings were also audible as a group of Budapest intellectuals formed the *Nyilvánosság Klub* (Publicity Club, Openness Club, or Committee for Press Freedom) devoted to increasing press freedom and reducing censorship.³⁵ The Magyar Democratic Forum (MDF) was founded in 1987, first as a loose intellectual organization with populist roots, and then as a nascent political party ready to contest elections.³⁶ While there were many highly visible dissidents—dissidents who are quite prominently written into the histories of each of these organizations—involved in these activities, one rather unassuming individual played a crucial but less visible role in all three (*Duna Kör*,³⁷ *Nyilvánosság Klub*, and the MDF): László Sólyom.³⁸

³³ These three opposition movements are detailed in RUDOLF TÓKÉS, *HUNGARY'S NEGOTIATED REVOLUTION 167-209* (1996).

³⁴ For the history of the environmental movement in Hungary, see REGIONAL ENVIRONMENTAL CENTER, *PROBLEMS, PROGRESS AND POSSIBILITIES: A NEEDS ASSESSMENT OF ENVIRONMENTAL NGOS IN CENTRAL AND EASTERN EUROPE*, at ch. 6 (Country Reports: Hungary) (Apr. 1997), available at <http://www.rec.org/REC/Publications/NGONeeds/Hungary.html>; on the *Duna Kör* specifically, see CHRISTY DUIJVELAAR, REGIONAL ENVIRONMENTAL CENTER, *SIDE REPORT (HUNGARY: DUNA KÖR) to BEYOND BORDERS: EAST-EAST COOPERATION AMONG ENVIRONMENTAL NGOS IN CENTRAL AND EASTERN EUROPE* (May 1996), available at <http://www.rec.org/REC/Publications/BeyondBorders/Hung3.html>.

³⁵ Péter Bajomi-Lázár, *Press Freedom in Hungary: 1988-1998*, at 20 (Open Society Inst. (OSI)-Int'l Policy Fellowships (IPF), Draft Working Paper, Nov. 1999), available at <http://www.policy.hu/discus/messages/102/peterbl-pressfree.pdf>.

³⁶ András Bozóki & Gergely Karácsony, *The Making of a Political Elite: Participants in the Hungarian Roundtable Talks of 1989*, in *THE ROUNDTABLE TALKS OF 1989: THE GENESIS OF HUNGARIAN DEMOCRACY* 71, 83-86 (András Bozóki ed., 2002) [hereinafter *ROUNDTABLE TALKS*].

³⁷ Sólyom's role in the *Duna Kör* gave rise to a new, liberal legal theory with which Sólyom would come to be associated:

Almost from its inception, the Danube Circle had sought out the lawyer in his corner office at Budapest's Lorand Eotvos University. Here the pale, bespectacled professor would sit among the glass-doored cases filled with leather-bound volumes and give advice. Sólyom became crucial to the movement. For he had written a legal tract published in the official press that would help the opposition. In it, he maintained that any action not specifically illegal was possible.

Victoria Pope, *A Dam on the Danube: The Greening of Hungarian Politics*, APF REP. (1989), available at <http://www.aliciapatterson.org/APF1203/Pope/Pope.html>.

³⁸ Sólyom's official biography on the Hungarian presidential website refers to his pre-1989 membership in all three organizations. Office of the President of the Repub-

László Sólyom had been trained as a lawyer and a librarian in Pécs, a provincial city in Southern Hungary. He received his first doctorate in civil law from the Friedrich Schiller University of Jena, then located in the German Democratic Republic. After returning to Hungary, he worked at the Library of Parliament and in the Institute of Political and Legal Sciences of the Hungarian Academy of Sciences. He obtained his second doctorate (*habilitation*) from the Hungarian Academy of Sciences and took a faculty position in the department of civil law at the University of Budapest (ELTE), where he taught in the 1980s and 1990s as a university professor.³⁹ A specialist in torts and environmental law⁴⁰ (a field which he helped to found in Hungary), Sólyom was an unlikely candidate to be thrust into the position of the guardian of the constitution. As was true of many of the top intellectuals in Hungary at that time, he had stayed away from fields that would have had a political taint before 1989. Private law was, during the late communist years, far more respectable precisely because it was more amenable to nonpolitical work that could meet international standards than was the field of constitutional law.

Sólyom was one of the members of the democratic opposition involved in the Hungarian National Roundtable of 1989, the forum that produced a negotiated transition toward a system of multiparty elections, democratic transformation, and a new commitment to the rule of law.⁴¹ Here, too, he was not the most visible representative of his party, but he was crucial in establishing the basic ground rules through which the roundtable talks between the Communist Party and the democratic opposition would take place.⁴²

Perhaps the most substantial result of the roundtable negotiations was an almost wholly new Constitution. Technically developed as a set of amendments to the existing Constitution (otherwise known as Law XX of 1949), the new Constitution was voted on piecemeal by the existing Hungarian communist Parliament over two weeks in mid-

lic of Hungary, President László Sólyom, *available at* http://www.keh.hu/keh_en/laszlosolyom.html (last visited June 6, 2006).

³⁹ *Id.*

⁴⁰ *See id.* (noting Sólyom's work in torts and damages and his involvement with environmental movements).

⁴¹ András Bozóki, *Biography of the Key Participants*, in *ROUNDTABLE TALKS*, *supra* note 36, at 385, 404.

⁴² *See* Bozóki & Kerácsony, *supra* note 36, at 86 ("Sólyom played his most important role . . . during the preparatory talks . . .").

October 1989.⁴³ The new Hungarian Republic was officially declared about two weeks before the fall of the Berlin Wall.⁴⁴

The new Constitution created (through a last-minute amendment) the Hungarian Constitutional Court.⁴⁵ About a month after the adoption of the new institution, Parliament elected its first five justices—including László Sólyom—who each received “an overwhelming majority of votes.”⁴⁶

The Constitutional Court itself opened for business on January 1, 1990, fully five months before the first multiparty democratic elections. With Sólyom as the acting President, the Court immediately started to issue path-breaking decisions. First, the Court issued a decision striking down the law that allowed trade unions to represent their members without their members’ consent, citing the principles of human dignity and the right to the free development of personality.⁴⁷ Then, faced with petitions from thousands of people who were angered that a tax on mortgages had just been passed, the Hungarian Constitutional Court struck down the tax as unconstitutional on the grounds that it unilaterally changed the terms of mortgage contracts.⁴⁸ Upholding freedom of contract and relying on notions of human dignity were just the first signs that this new Court was going to take the new Constitution seriously and create what Sólyom would later call the

⁴³ The new Constitution involved nearly a hundred amendments to the old Constitution. Klas Bergman, *Jubilant Hungary Sets New Course*, CHRISTIAN SCI. MONITOR, Oct. 25, 1989, at 3. These amendments changed about ninety percent of the previous text. Judy Dempsey, *Hungary Steps out of Stalin’s Shadow*, FIN. TIMES (London), Oct. 19, 1989, at 2.

⁴⁴ See Patricia Koza, *Hungarians Cheer New Republic’s Proclamation*, UPI, Oct. 24, 1989 (describing the declaration of the democratic republic).

⁴⁵ Kálmán Kulcsár, the minister of justice at the time, presented the bill on the Constitutional Court to Parliament on Friday, October 20, 1989; the new Constitution was to be finalized on Monday, October 23, 1989. “I am of the view,” he said during his presentation, “that it can serve to satisfy us all that in Hungary today there is no political power, nor is there any notable political force, which would not pursue, or wish to pursue, its political activity within a constitutional framework, reckoning with and accepting the institutional system of constitutional control.” *Justice Minister Kulcsár Presents Bill on Constitutional Court*, BBC SUMMARY WORLD BROADCASTS, Oct. 21, 1989.

⁴⁶ *Hungarian National Assembly Session EE/0625/C1/1*, BBC SUMMARY WORLD BROADCASTS, Nov. 28, 1989.

⁴⁷ On Trade Union Representation, Decision 8/1990 (Hung. Const. Ct. Apr. 23, 1990), translated in CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY, *supra* note 29, at 105.

⁴⁸ See Barnabas Gerô, *The Role of the Hungarian Constitutional Court* nn.44-45 (Inst. on East Central Europe, Working Paper, Mar. 1997), available at <http://www.ciaonet.org/conf/ece01/ece01geb.html> (discussing the facts and holding of Decision 13/1990 of the Hungarian Constitutional Court).

“revolution under the rule of law.”⁴⁹ If the previous communist government had failed to take law seriously, the Constitutional Court would indicate its revolutionary break from the past by making the rule of law one of its key normative pillars.

The first multiparty elections put a center-right government into power in the summer of 1990, and that new Parliament elected a second round of five constitutional Justices in July 1990. Soon thereafter, Sólyom’s fellow Justices elected him as the President of the Court in the Court’s first formal election of a leader.⁵⁰

Sólyom continued to lead the Constitutional Court into the political headwinds with major constitutional pronouncements. Asked by the new democratically elected Prime Minister whether the government’s proposed privatization program was constitutional, the answer of the Constitutional Court was a resounding “no.”⁵¹ The Court held that the government’s plan discriminated by giving property back only to the holders of land that had been taken into agricultural cooperatives, leaving out of the scheme others whose land had been taken under other laws and for other reasons.⁵² From this decision, it was clear that the Constitutional Court was going to take as aggressive a stance toward the new, democratically elected government as it had taken toward the outgoing communist government under which the Court had issued its first bold decisions. Constitutional supervision was to be continual, aggressive, and without regard to the democratic pedigree of the government making the laws.

Sólyom made his distinctive public mark on the Court and on Hungarian political life with his stirring concurring opinion in the death penalty case in late October 1990.⁵³ The Court confronted the death penalty, which had been a key tool of the communist govern-

⁴⁹ László Sólyom, *Introduction to the Decisions of the Constitutional Court of the Republic of Hungary*, in CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY, *supra* note 29, at 1, 38.

⁵⁰ Brunner, *supra* note 29, at 70-71.

⁵¹ On Compensation for Expropriated Property, Decision 21/1990 (Hung. Const. Ct. Oct. 4, 1990), *translated in* CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY, *supra* note 29, at 108, 109-10. The center-right government at the time was led by the Magyar Democratic Forum, the political party that Sólyom had helped to found. Even so, this did not keep Sólyom from building majorities in the Court to rule against this government frequently whenever, in Court majority’s view, the government got out of constitutional line.

⁵² *Id.* at 113-14.

⁵³ On Capital Punishment, Decision 23/1990 (Hung. Const. Ct. Oct. 31, 1990) (Sólyom, P., concurring), *translated in* CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY, *supra* note 29, at 118, 125.

ment, and declared it to be flatly unconstitutional.⁵⁴ As it turns out, however, the outgoing communist government, arguing the case before the Court, refused to defend the law and suggested that European legal development pushed Hungary in the direction of abolition.⁵⁵ Experts appointed by the Court also found the death penalty to be unconstitutional under the country's new constitution.⁵⁶ Even the President of the Hungarian Supreme Court urged the death penalty's demise.⁵⁷ As a result of the near-unanimous views put before the Court, the decision was not surprising, but Sólyom's lengthy, concurring and philosophically ambitious opinion was.

Sólyom argued that the right of human dignity was not just any simple right, but was instead a "mother right" (*anyajóg*) that contained within it potential and implicit rights that were not yet defined.⁵⁸ It was the task of the Constitutional Court, he noted, to develop its own legally justifiable views of these rights, independent of public opinion, legislative intent, or political will.⁵⁹ To do this, the Constitution must be seen as a whole, embodying a coherent system of principles. Sólyom called his approach to the new Constitution the development of an "invisible Constitution."⁶⁰ As his death penalty concurrence revealed, Sólyom's particular worry was that the new democratically elected Parliament would keep amending the Constitution to the point where it lost its core principles:

The Constitutional Court must continue in its effort to explain the theoretical bases of the Constitution and of the rights included in it and to form a coherent system with its decisions, which as an "invisible Constitution" provides for a reliable standard of constitutionality beyond the Constitution, which nowadays is often amended out of current political interests The Constitutional Court enjoys freedom in this process as long as it remains within the framework of the concept of constitutionality.⁶¹

The reaction to Sólyom's declaration of the invisible Constitution was immediate and intense. Endre Babus, an influential journalist writing for the weekly newsmagazine *HVG* (a weekly newsmagazine on

⁵⁴ *Id.* at 118-19 (majority opinion).

⁵⁵ *Id.* at 120.

⁵⁶ *Id.*

⁵⁷ *Id.* at 120-21.

⁵⁸ *Id.* at 125 (Sólyom, P., concurring).

⁵⁹ *Id.* at 125-26.

⁶⁰ *Id.*

⁶¹ *Id.*

the model of the *Economist*), pronounced that the theory of the “invisible Constitution” not only allowed the Court to interpret the Constitution, but also to write it.⁶² Members of Parliament were dismayed that the President of the Court would argue that the Constitution was not just what was written, but what was unwritten as well. László Salamon, chair of the constitutional committee of Parliament from 1990 to 1994, told me in an interview in 1995 that he was disturbed by the concept of an “invisible Constitution”:

If we consider that [measuring a law against the “invisible Constitution”] is the general practice, then it is obvious that the Parliament will not know whether a law will comply or not. . . . The more invisible the constitution is, the more difficult it is to see it. It’s the same if you take the highway, and there are all these cars on it that are not lit up when they are driving at night—then the number of accidents will rise.⁶³

Salamon’s constitutional committee could be forgiven for not being able to guess the decisions of the Court in advance, he said.⁶⁴

Even with this criticism, however, there were few people in public life who advocated ignoring or evading the decisions of the Court.⁶⁵

⁶² He repeated this criticism in English later: “At that time and place the Constitutional Court, or more precisely the President, stated its intention to replace its role of guarding and interpreting the Constitution by the role of drafting it.” Endre Babus, *The Superego of the Transformation*, 40 HUNG. Q. (Spring 1999), available at <http://www.hungarianquarterly.com/no153/003.html>.

⁶³ Interview with László Salamon, Deputy Speaker, Hungarian National Assembly, in Budapest, Hung. (Nov. 15, 1995).

⁶⁴ *Id.*

⁶⁵ In an interview I conducted with Imre Kónya, founder of the Independent Lawyers’ Forum and a member of Parliament with the Magyar Democratic Forum in the 1990s, he recalled conversations he had with József Antall, prime minister from 1990 to 1993, when Antall was on his death bed. Though the Constitutional Court frequently ruled against the Antall government in those early days, Antall nonetheless had the view that the Court was to be obeyed and respected, even when one disagreed with its holding. Antall had also reprimanded one of the few public critics of the Constitutional Court, Smallholders’ Party leader István Torgyán, for his comments. After the parliamentary elections of 1994, when the government changed hands away from Antall’s and Kónya’s party, there was still no public criticism of the Court. Asked whether a government could even think about failing to follow a decision of the Court, Kónya said:

They just can’t do it, to not obey the court. It’s so developed already in Hungary that no one would dare upset this. Now that the [current government’s] popularity is down, they cannot confront the Court like this. It’s a situation that even someone not sensitive to constitutional issues like [the then-prime minister] would realize that he cannot go head to head with the Constitutional Court or he will be put out of his seat.

Interview with Imre Kónya, Deputy Leader, Parliamentary Fraction of the MDF, in Budapest, Hung. (Nov. 24, 1995).

Sólyom gave frequent interviews and speeches advocating the view that the Constitutional Court's decisions simply elaborated principles already contained in the constitutional text, and were thus not activist. Activist or not, few spoke out against the Court as an institution, though individual decisions were still criticized.

Perhaps most crucially, however, Sólyom became for all practical purposes the voice of the Court. Whenever Court decisions were issued, it was often Sólyom who spoke to the press explaining what the decisions meant. For example, when the Court struck down the law that would have extended the statute of limitations for crimes committed during the communist era—a law that would have allowed former communist leaders to be put on trial—Sólyom was in the lead in explaining why the values of the rule-of-law state were more important than the principle that no crime should go unpunished. As one news report indicated:

“There is no reason for joy,” said the president of the court, Dr. László Sólyom, in announcing the court decision Mar. 3.

“The whole matter was about a conflict of values. No matter how many serious crimes were committed, the ethical glory of punishing a villain is not worth risking the legal guarantees of our constitutional state,” Sólyom said.⁶⁶

Criticism of this “justice law” decision echoed around the anti-communist political parties. The MDF thought that the Court's decision was “immoral” and the Independent Smallholders' Party was “shocked.”⁶⁷ To calm the criticism, Sólyom took to the airwaves again and defended the Court's decision. In an interview on Hungarian radio, Sólyom said:

In the case of such an important judgment the Constitutional Court must step out in front of the public and once again explain clearly what is the substance of this decision and its significance The Constitutional Court had been created to ensure unconditionally the implementation of the Constitution. If the legislature, either by mistake or deliberately, think they can breach the Constitution, it is the role of the Constitutional Court to correct this mistake

But I want to emphasize that this decision of the Constitutional Court does not place a formal legalistic attitude against the sense of justice, but

⁶⁶ Ken Kasriel, *Court Rules “Justice” Law Unconstitutional*, INTER PRESS SERVICE, Mar. 5, 1992.

⁶⁷ *Reaction to Constitutional Court Ruling; MDF Calls Court Verdict “Morally Unacceptable”; Independent Smallholders Shocked* (Hung. Radio broadcast, Mar. 4, 1992), translated in BBC SUMMARY WORLD BROADCASTS, Mar. 7, 1992.

one form of morality against another morality. Here I am thinking that it is true that moral justice demands that the criminal is punished, but moral justice also demands that the criminal receives his punishment in accordance with the law.⁶⁸ So punishment can never be arbitrary, only what is set out in the law.

In short, Sólyom insisted that the Court's decisions placed the law first and foremost, against any other moral sensibility.

When particular decisions of the Constitutional Court were controversial in Hungarian public life, questions arose about what could be done to change them. Shoring up the Constitutional Court's position by giving a public interview again, Sólyom indicated that "there is no legal possibility for the reinterpretation of previous decisions."⁶⁹ Perhaps surprisingly, there were no serious attempts to either limit the Court's jurisdiction or to amend the Constitution to nullify any Court decision after the first multiparty elections in 1990. Gripping about particular decisions quickly fizzled into diffuse support for the Court in general.

The Constitutional Court was very active during Sólyom's first term as Court President. In just the first three years of the Court's operation, it considered some six thousand petitions, published between two hundred and three hundred decisions each year, and struck down many favorite laws of the first elected government.⁷⁰ Nonetheless, "even the Justice Minister [whose job was to defend the laws eventually struck down] agreed that the Court has been vital in guarding the law."⁷¹

Sólyom was reelected by his fellow justices to a second three-year term as Court President in March 1993.⁷² Considering the Court's accomplishments going into its fourth year, Sólyom placed the Court above ordinary politics as the force that stabilized constitutional meaning. He extolled the virtues of the Constitutional Court:

[T]hree years ago the Constitution, composed as it was of basic sentences, could be explained in many ways, and was in practice exposed to selfish interpretations by various political forces. Owing to the court,

⁶⁸ *President of the Constitutional Court Defends Zétényi/Takács Ruling* (Hung. Radio broadcast Mar. 8, 1992), translated in BBC SUMMARY WORLD BROADCASTS, Mar. 10, 1992.

⁶⁹ *Chairman of Constitutional Court Rules Out Revision of Previous Verdicts* (Hung. Radio broadcast Nov. 1, 1992), translated in BBC SUMMARY WORLD BROADCASTS, Nov. 6, 1992.

⁷⁰ *Three Years of the Constitutional Court*, MTI HUNG. NEWS AGENCY, Dec. 29, 1992.

⁷¹ *Id.*

⁷² *Constitutional Court Reelects Its President*, MTI HUNG. NEWS AGENCY, Mar. 22, 1993.

this situation has completely changed. With its rulings, the court has put clothes on the skeleton, and created links between constitutional rights and institutions. As a result of its three years work, it is now much easier to predict what will comply with the Constitution and what will violate it.⁷³

And, as the Hungarian News Agency noted, “Apart from some extremist reactions, all parties and political and social organizations have welcomed the resolutions the court has passed.”⁷⁴ Sólyom was very much the public face of the Court during his time as President. He explained decisions of the Court, lectured the Hungarian population on the proper meaning of the Constitution, and personified the role of constitutional guardian.

But the Court met its match in a pitched battle in 1995, when the Socialist/Liberal government came under pressure from the International Monetary Fund (IMF) to cut the state budget radically or run the risk of having its access to international loans cut off. The government of Socialist Prime Minister Gyula Horn, led by its photogenic, mustachioed Finance Minister Lajos Bokros, passed a severe austerity budget in spring 1995 that took aim at a variety of social safety-net programs.⁷⁵

The “Bokros package” was immediately challenged before the Constitutional Court, and the Court rushed to decide the constitutionality of the welfare cuts before they could go into effect. In a series of decisions starting on June 30, 1995, the Court declared that the principle of legal security guaranteed by the Constitution was violated by the economic plan.⁷⁶ Because the changes were instituted so quickly, giving those involved no time to adjust themselves to this

⁷³ *Constitutional Court Enters Fourth Year*, MTI HUNG. NEWS AGENCY, Apr. 30, 1993. The source of this quotation is the state news agency, which may cause some to distrust its political leanings in making this statement. But I lived in Hungary from 1994 to 1998, conducted many interviews with politicians, and read the daily press, and I can confirm that the state news evaluation was accurate in the mid-1990s. While there were some specific groups angered when their pet laws were struck down, all agreed that Constitutional Court decisions had to be followed, that it was important to Hungarian constitutional development to allow the Constitutional Court to elaborate what the Constitution required in this way, and that politicians who might advocate going around the decisions of the Constitutional Court were dangerous.

⁷⁴ *Id.*

⁷⁵ I have explored this conflict and the resulting opinions of the Hungarian Constitutional Court at some length in Scheppele, *Realpolitik Defense*, *supra* note 5, at 1941-49.

⁷⁶ On Social Security Benefits, Decision 43/1995 (Hung. Const. Ct. June 30, 1995), *translated in* CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY, *supra* note 29, at 322, 325.

radical change of fortune, the Constitutional Court held that the deepest welfare cuts had to be postponed.⁷⁷ Moreover, the Court argued, the Constitution required that a minimum income be guaranteed, even while the government would be permitted to gradually reduce some welfare payments.⁷⁸

Five days after the first decision, a public opinion poll found that eighty-nine percent of the public had heard of the decision and that overwhelming majorities—eighty-four percent of those who had voted for the parties in the government and ninety percent of those who had not—believed that the Court made the right decision in the austerity program cases.⁷⁹ But the government parties were angry and threatened to raise taxes in response to the Constitutional Court's decision.⁸⁰ When the government made a public statement criticizing the Court, the opposition parties joined unanimously in defending it.⁸¹ The Court continued to chop away at the Bokros package, eventually nullifying some 26 out of the 159 provisions of the law in 18 separate decisions, including many of its centerpiece elements.⁸² Eventually, Lajos Bokros threatened to resign from the government, saying that he could not work with the Constitutional Court always second-guessing him.⁸³ A few months later, Sólyom was reelected Court President by his fellow justices for the third time.⁸⁴

In the showdown between the government and the Court over the radical austerity package, the Court clearly won. But some started to grumble to the press that the Constitutional Court's power should be

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Poll results were reported in the *Magyar Hírlap* (Hung.), July 5, 1995.

⁸⁰ Miklós S. Gáspár, *Bokros Plan: Defeat Means More Cuts, Taxes*, BUDAPEST BUS. J., July 7, 1995.

⁸¹ As they stated:

The opposition parties participating in today's five-party consultations are unanimous in their rejection of the government statement criticizing the Constitutional Court in which the cabinet accused the Court of paralyzing the economic reforms.

The opposition parties consider the government statement published yesterday 14th September unacceptable.

Opposition Slates Government for Statement on Court Ruling (Hung. Radio broadcast Sept. 15, 1995), translated in BBC SUMMARY WORLD BROADCASTS, Sept. 18, 1995.

⁸² *Strong Constitutional Court Stands the Test*, MTI HUNG. NEWS AGENCY, June 20, 1996.

⁸³ Miklós S. Gáspár, *Bokros Resigns over Court Rulings, Horn Refuses*, BUDAPEST BUS. J., Nov. 27, 1995.

⁸⁴ *Sólyom Reelected as Constitutional Court President*, MTI HUNG. NEWS AGENCY, Feb. 19, 1996.

slashed.⁸⁵ The grumbling got so loud both from the governing parties and from the Independent Smallholders' Party (which had always been the most critical of the Court) that Albert Takacs, a constitutional lawyer close to the Court, said in an interview with the *Magyar Nemzet*, a center-right newspaper, that it would be "scandalous" if the Constitutional Court were abolished or reigned in.⁸⁶ Sólyom knew that the Bokros package decisions had been costly for the Court as politicians more openly criticized the Court after its controversial decision.⁸⁷

Sólyom once again took to the media to defend the Court from criticism. In late 1995, Sólyom gave several interviews to the press explaining that the Court had to guard the Constitution from political assault. To the *HVG*, Sólyom said that Court had to be as aggressive as it was because

it became obvious that rights and freedoms (*szabadságjogok*) may become tools in the hands of politicians, tools which they use accordingly for their own interests. Therefore, it becomes a vital necessity that there be a body which, in accordance with the higher duties of the state, acts as a guardian over basic rights and institutions.⁸⁸

To the *Magyar Hírlap*, a center-left daily with a large circulation, Sólyom argued that the Court was merely the mouthpiece of the Constitution itself and not an interested party in the daily operation of politics:

In the present situation, the requirement of constitutionalism may hurt other kinds of interests. The objective collision of interests and the constitution, which is a real and natural situation, should not be turned into an emotional issue. . . . I'm increasingly bothered by the difference in mentality between the government and the [Constitutional Court]. I'm worried that they receive our decisions exclusively through the thought

⁸⁵ *Strong Constitutional Court Stands the Test*, *supra* note 82.

⁸⁶ *Hungarian Press Review*, MTI HUNG. NEWS AGENCY, July 31, 1996.

⁸⁷ As was reported at the time:

Solyom feels the situation has been especially strained by the current government's attempts to reform the major social systems, which would have seriously curtailed existing rights within a short time. The [Constitutional Court] ruled citizens must be given adequate time to prepare for the changes and repealed several legal provisions endorsed by Parliament. The government criticised the [Constitutional Court] for "narrowing" its scope of activity in a statement which in Solyom's opinion, was unprecedented in the world. He believes the court's decision was in line with the Constitution.

Freedom of Expression—Constitutional Court, MTI HUNG. NEWS AGENCY, July 30, 1997.

⁸⁸ *Some of Us Share Frigyes Nagy's Dreams: Interview with László Sólyom, President of the Constitutional Court*, HVG, Dec. 23, 1995 (Réka Pigniczky trans.).

process of daily politics, on the basis of assumptions and in [a] bellicose manner. . . . But you must believe me, the [Constitutional Court] really doesn't know which pocket nor which hand belongs to whom⁸⁹

As criticism of the Court mounted after the Bokros package decisions extended from 1995 through the fall of 1996, the usual deal-making that had previously resulted in unproblematic elections of judges to the Constitutional Court broke down. In an unprecedented move, one of the judges who had been put forward by the parliamentary nominations committee went down in defeat.⁹⁰ The Constitutional Court was supposed to have eleven judges at full capacity at that point; it was unable to make an authoritative decision with fewer than eight. From this first hiccup in Court appointments, people—and more crucially, politicians—could start to see how the Constitutional Court could be weakened. The Court could be pushed down below the eight judges required to make decisions; the Court could be packed with judges who would not give trouble to the governing parties. Given that most of the constitutional justices, including Sólyom, had been elected in 1989 or 1990, the expiration of the original justices' nine-year terms was fast approaching. Once the parliamentary process for electing judges broke down the first time, there was a constant question of whether the Court would have enough judges to go on making decisions. Moreover, there was a clear question on the political table of whether the terms of the activist judges would be renewed.

Sólyom's term was scheduled to end in November 1998, along with the mandates of the other two justices still on the Court who had been elected in the first round of judicial appointments.⁹¹ The law regulating the Constitutional Court specified that the normal term of a justice was nine years, once renewable, provided that she had not

⁸⁹ Balázs Stépán, *There Is No Return from the Rule of Law (State): Interview with László Sólyom About the Procedures of the Constitutional Court*, MAGYAR HIRLAP (Hung.), Dec. 23, 1995 (Réka Pigniczky trans.).

⁹⁰ Log-rolling had been the most common method of allocating judicial appointments, so that virtually all parts of the Hungarian political spectrum were represented on the Court. In November 1996, however, the conservatives voted for a socialist judge expecting that their conservative judge would be voted through on the next round. The socialists, however, did not hold up their end of the deal and the conservative judge was defeated. This was widely considered scandalous, and it signaled the start of some real troubles at the Constitutional Court. Miklós S. Gáspár, *Socialists Break Promise To Approve Court Judge*, BUDAPEST BUS.J., Nov. 18, 1996.

⁹¹ *Constitutional Court Elects New President*, MTI HUNG. NEWS AGENCY, Nov. 24, 1998.

reached the age of seventy.⁹² Given that a second term was possible, it seemed clear that the justices who had not yet turned seventy expected that they would be reelected to the Court. Sólyom took the lead in arguing to the government and Parliament that the justices *should* be renewed, because otherwise virtually all of the experienced justices would have to step down within a short period, leaving the Court to absolute newcomers.⁹³ But in 1998, there was another general election, and once again the government changed hands. Sólyom negotiated first with the outgoing socialist government and then with the incoming center-right government of Prime Minister Viktor Orbán. Sólyom argued he should be reelected or, failing that, his term should be extended. When his reelection looked increasingly unlikely, Sólyom argued for an amendment to the Constitutional Court Act that would allow justices to sit for twelve years, without renewal.⁹⁴ Neither the outgoing government nor the incoming government ever made a decision on Sólyom's proposals; they simply failed to act. Without ever having a formal vote on his continued tenure because the parliamentary committee that had to nominate him failed to reach a decision, Sólyom had to step down.⁹⁵ He was one of five justices to leave the Court within the year. Two had retired when they hit the age of seventy, but three were simply never voted on when their terms came up for renewal.⁹⁶

During Sólyom's nine-year tenure, the Court had issued 1871 decisions and had a hand in virtually every major aspect of Hungary's transition to an independent democratic state.⁹⁷ But with a whimper rather than a bang, the activist Constitutional Court was transformed

⁹² The law provides that "[t]he Members of the Constitutional Court shall be elected for nine years"; that "[a]ny Member of the Constitutional Court may be reelected once"; and that "[t]he Member of the Constitutional Court who has turned 70 shall retire." Hungarian Constitutional Court Act, *supra* note 19, arts. 8(3), 15(3).

⁹³ I was still living in Budapest and had an office at the Court while these issues were debated. Court staff often winced as Sólyom made an increasing number of pitches to renew the terms of all of the justices whose terms were due to expire. Many felt that Sólyom demeaned the Court by making such openly political pleas to stay in office.

⁹⁴ Kim Lane Scheppele, *The New Hungarian Constitutional Court*, 8 E. EUR. CONST. REV. 81, 82 (1999), available at <http://www.law.nyu.edu/eecr/vol8num4/special/newhungarian.html> [hereinafter Scheppele, *New Constitutional Court*].

⁹⁵ *Hungarian Constitutional Court Reaches Minimum Size, Elects New Chairman* (Hungary TV1 broadcast Nov. 29, 1998), translated in BBC WORLDWIDE MONITORING, Nov. 30, 1998.

⁹⁶ Scheppele, *New Constitutional Court*, *supra* note 94, at 82.

⁹⁷ *Hungarian Constitutional Court Reaches Minimum Size, Elects New Chairman*, *supra* note 95.

by the public indecision of Parliament and the government. The activist judges were never rejected or even openly criticized. They were just not renewed.

János Németh, a judge elected to the Court in 1997, was elected as Court President by his fellow justices just as Sólyom's own mandate ended.⁹⁸ Németh had been a professor of law at the University of Budapest, where he had been the civil procedure teacher (and later friend) of Viktor Orbán, the new Prime Minister. Eventually, Parliament elected new justices to the Court to fill the spots left open by the departure of the original group of judges and the Court carried on. But its productivity fell sharply—in 1999, the Court issued only a little over fifty decisions, compared with the yearly average of more than two hundred decisions during the Sólyom Court.⁹⁹ And the early decisions showed a strong tendency to defer to the new government.¹⁰⁰

From having been a constant presence in Hungarian public life, the Constitutional Court nearly disappeared as a public institution. Sólyom virtually disappeared as well. He took up a guest professorship at the University of Cologne, but eventually returned to Budapest to teach at the new, private, Catholic law school, Péter Pázmány University.¹⁰¹ His public appearances were few and far between.

Nonetheless, Sólyom retained a certain positive image in the public mind. When the term of the Hungarian President was up in summer 2005, the parliamentary parties started scouting around to find someone to succeed President Ferenc Madl, who had announced that he would not run for another term. Unconventionally, a civil society group calling itself *Védegylet* (Protect the Future) formally nominated Sólyom for President,¹⁰² and this nomination was seized on as a good idea by the center-right political parties FIDESz (Hungarian Civic Alli-

⁹⁸ *Constitutional Court Elects New President*, *supra* note 91.

⁹⁹ Scheppele, *New Constitutional Court*, *supra* note 94, at 86.

¹⁰⁰ *Id.* at 82-85.

¹⁰¹ Office of the President of the Republic of Hungary, *supra* note 38.

¹⁰² *Védegylet* is a group dedicated to environmental causes, *see Védegylet*, Info in English, <http://www.vedegylet.hu/index.php?newlang=English> (last visited June 6, 2006), and Sólyom was one of its founding members. Since Sólyom had gotten his start in public life through working on environmental causes, it was not surprising that his return to private life would see him once again agitating on environmental issues. *Védegylet* took the rather surprising step of nominating him to be president of Hungary while the political parties dithered over their choices. Sólyom has always proudly said that he belongs to no political party (though he was in the founding circle of the MDF) and so it was entirely in keeping with his public image that he should be put forward by a nongovernmental organization rather than by a political party.

ance) and the MDF.¹⁰³ In addition to this organized support, a popularity poll conducted by FIDESz found that the most popular contender for national President was Madl, the current President. But just behind him was László Sólyom.¹⁰⁴

With this rather unusual beginning, the campaign for Sólyom's presidency was on. Rather than shrink back and let politics take its course, Sólyom was again actively before the media, campaigning to become President of the country, independently of any political affiliation. Here, too, he emphasized that the role of the President should be to model constitutional correctness:

I have made an important decision, I have been considering it for a long time, that the president, first and foremost, should show a moral example and demonstrate the right standard to the whole nation. . . . [I]t should be felt deep in one's heart, and then one will succeed. I could simply call it setting an example.¹⁰⁵

Sólyom, as presidential candidate, also explored the constitutional role of the President of the republic:

The constitution specifies a number of authorities ensuring considerable power for the president, especially in crisis situations. The president's authority might extend as far as dissolving the parliament, but he or she can also have a say in regular proceedings. For example, given the president's right to initiate legislation, he or she might submit a bill . . . if he or she has had enough of the morass in parliament. The president might also take part in political debates if necessary, and he or she is also entitled to speak in the parliament. The president might also veto bills

I just wanted to point out through all of this that the president has extensive scope for weighing things. If he or she wants to influence the course of events, he or she might choose to do so, though better not. It should be an exception when the situation gets truly carried away. In such cases, the president must remind politicians to get back to their senses. . . .

By the way, it is not a bad thing when the political parties are somewhat afraid of the president¹⁰⁶

¹⁰³ *Hungarian Opposition Party Names Presidential Candidate*, BBC MONITORING INT'L REP., May 27, 2005.

¹⁰⁴ *Id.*

¹⁰⁵ *Hungarian Opposition's Presidential Candidate Wants To Set Moral Example* (Kosuth Radio (Budapest) broadcast June 2, 2005), translated in BBC WORLDWIDE MONITORING, June 2, 2005.

¹⁰⁶ *Opposition Presidential Candidate Explains His "Activist" Approach*, NÉPSZABADSÁG (Budapest) (web site), June 1, 2005, translated in BBC WORLDWIDE MONITORING, June 3, 2005.

Sólyom's candidacy was defeated on the first round of parliamentary voting when some of his initial backers deserted him.¹⁰⁷ When Sólyom was finally elected in a second round of voting on June 7, 2005, the international media praised him as someone who laid "the foundations of democratic rules of law and the protection of civil liberties" and as "a calm, modest man, held in high moral esteem" as well as "an expert in international law and a humanist, who had fought to abolish [the] death penalty in Hungary."¹⁰⁸ All of the political parties, even those whose representatives in Parliament had voted for a candidate other than Sólyom, indicated their support for him and willingness to work with him.¹⁰⁹ The parliamentary fraction chair for the MDF, Ibolya Dávid, went further:

[A]ll of Hungarian society and not just MDF are winners today, . . . since the person who today became president has given 16 or 17 years of proof that he is the guardian of the constitution that today's Hungary sorely needs.¹¹⁰

And, to demonstrate that he still thought of himself as the guardian of the Constitution, Sólyom's first speech to Parliament after his election demonstrated just this commitment:

[T]he constitution regulates not only institutions and authorities, but primarily, and first and foremost, it declares moral values which determine the legal system of the Hungarian Republic and people's rights. One of my most important duties will be to safeguard these rights, with particular regard to the right to human dignity, the right to a humane life, and the freedom of expression.¹¹¹

Since Sólyom took office as President of the Republic of Hungary on August 5, 2005, he has repeatedly emphasized his connection with the Constitution and the importance of his office for guaranteeing the constitutional structure of Hungary. While the Constitutional Court was the guardian of the Constitution during his tenure as President of

¹⁰⁷ *Hungarian Parties Comment on Failed First Round of Presidential Voting* (Duna TV Satellite Service (Budapest) broadcast June 6, 2005), translated in BBC WORLDWIDE MONITORING, June 6, 2005.

¹⁰⁸ *New President a Democrat and Constitution-Maker*, MTI HUNG. NEWS AGENCY, June 7, 2005 (summarizing reports of the German News Agency (DPA) and French Press Agency (AFP)).

¹⁰⁹ *Sólyom Acceptable President, Say All Parties*, MTI HUNG. NEWS AGENCY, June 7, 2005.

¹¹⁰ *Id.*

¹¹¹ *Hungary's New President Pledges to Promote National Unity* (Hungary Television M2 Satellite Service broadcast June 7, 2005), translated in BBC WORLDWIDE MONITORING, June 7, 2005.

the Court, now the President of the country locates constitutional guardianship in his new position. In his inaugural address, Sólyom noted that the Hungarian Constitution starts with the guarantee that power belongs to the people and that “we, who are mandated to serve this, must fulfill this duty of ours in such a way that we must always keep in view the freedom, the freedom rights, of the people.”¹¹²

Already, Sólyom has indicated that he does not intend to be a passive President, but one who aggressively defends the Constitution. In December 2005, he sent back to Parliament for reconsideration a bill that would have allowed the political parties to use state-owned property for their party headquarters.¹¹³ And in March 2006, he rejected a law that would have postponed the realization of rights for disabled persons.¹¹⁴ Sólyom indicated his intent in the run-up to parliamentary elections in April 2006 to closely monitor the campaign to ensure that political parties did not put short-term popularity ahead of Hungary’s longer-term interests.¹¹⁵

What do Hungarians think of having such an aggressive President at the helm? In recent opinion polls, Sólyom has been by far the most popular politician, with fifty-nine percent of the socialists (who had not supported his election), sixty-four percent of the liberals (who had only reluctantly supported him) and seventy-one percent of FIDESz members (his core supporters) approving of his performance.¹¹⁶ By contrast, heads of the political parties contesting the election were supported by one-quarter or less of those from other parties.¹¹⁷ Only Sólyom has managed to unite the country behind his political stance. Perhaps his success consists precisely in his standing up for the Constitution and appearing not to be political at all.

¹¹² *Hungarian President’s Inauguration Speech Stresses Love of Homeland* (Duna TV Satellite Service (Budapest) broadcast Aug. 5, 2005), translated in BBC WORLDWIDE MONITORING, Aug. 5, 2005.

¹¹³ *President Rejects Bill on Parties’ Access to State-Owned Property*, MTI HUNG. NEWS AGENCY, Dec. 30, 2005.

¹¹⁴ *President Sends Back Disabled Amendment for MPs Reconsideration*, MTI HUNG. NEWS AGENCY, Mar. 2, 2006.

¹¹⁵ Sólyom said in his New Year’s 2006 address: “[T]he economy and generally everyday life does not exist in four-year terms. It follows from all this that politics should be conducted with a much longer perspective and by taking the interests of the country and now also Europe into consideration.” *Hungarian President’s New Year Address Stresses Need for Reforms*, BBC WORLDWIDE MONITORING, Jan. 3, 2006.

¹¹⁶ *Hungarian Opposition Politicians’ Popularity Falling—Poll*, BBC WORLDWIDE MONITORING, Feb. 28, 2006.

¹¹⁷ *Id.*

Through Hungary's first decade and a half after the fall of communism, László Sólyom has been the person who has most embodied the Hungarian Constitution in his own life, stance, and office. He was able to use his position as President of the Constitutional Court of Hungary to create the official public role of guardian of the Constitution by speaking for the Court and therefore speaking for the Constitution itself. He always couched his views not in personal terms but in constitutional terms, claiming to speak not for himself but for the greater constitutional commitments of the nation. While he initially portrayed his constitutional commitments as distinctly judicial ones, in which the Constitutional Court's role was firmly established as explaining (not inventing) what the Constitution said, he was able to carry this persona over into his role as President of the Republic of Hungary, where he was once again guardian of the Constitution. Sólyom has never been shy about defending the Constitution in public. He has given, and continues to give, frequent interviews to the media, has been out front in the public eye explaining the Constitution, hectoring Parliament and the government about their constitutional commitments, and has strategically deployed constitutional aggression to sustain his views in the public sphere.

It is hard to imagine a U.S. Supreme Court Chief Justice doing the things that Sólyom was able to do as Court President. For one thing, Sólyom more clearly spoke for the Court as an institution than can the U.S. Chief Justice, who has more publicly fractious colleagues. For another, the process of constitutional interpretation in Hungary can still be portrayed as the neutral enunciation of constitutional meaning that is already there, rather than as the development of controversial and contested interpretations of a text with structural ambiguities, as the U.S. Constitution now clearly is publicly seen as having. In Hungary, the construction of judicial meaning of the Constitution is more clearly an expert science with right answers than a politically charged act of interpretation. Sólyom was able to take advantage of this (or, perhaps more accurately, this was the way he successfully portrayed the process of constitutional decision making). And these things clearly bolstered his public popularity as Court President, to the point where he was able to translate these positive feelings into becoming the head of state of the republic. In the Hungarian public sphere, Sólyom is still the guardian of the Constitution and not a mere politician. He is still seen as standing above adversarial politics, protecting the Constitution's principles from partisan attack.

B. *Russian Phoenix: The Rise and Fall and Rise of Valerii Zorkin*

The “transition” from the Soviet Union to the Russian Federation was anything but orderly. In the mid-1980s, the Soviet Union had entered a period of *glasnost* (openness), in which conflicting political visions floated freely in the newly animated public sphere,¹¹⁸ the national political grip on the economy was loosened, law was reformed at a staggering rate, and the general secretary of the Communist Party, Mikhail Gorbachev, did not himself appear to believe in the strict communist ideology over which he allegedly presided.¹¹⁹

In August 1991, Gorbachev was on holiday when a group of anti-reform members of his cabinet, plus Gorbachev’s vice president, declared that Gorbachev was ill and temporarily incapable of serving as the Soviet President. The State Committee for the State of Emergency, as the group called itself, pushed the hapless and ineffective vice president into Gorbachev’s place. The August coup threw the country—and, in particular, its political elites—into disarray, but the coup plotters eventually found themselves unable to mobilize enough of the state to go along with them. Although the attempted coup failed, its near success revealed that Gorbachev’s center could not hold either. Gorbachev emerged from the coup both physically and politically disheveled, but he continued to attempt to keep the Soviet Union together as a single state. Despite his efforts, however, the Soviet Union fell in the fall of 1991. Perhaps more truthfully, it was pushed. Russian President Boris Yeltsin signed a deal with his counterparts from Belarus and Ukraine creating an alternative and much looser union, which spelled the end of the larger one.¹²⁰

¹¹⁸ Perhaps the most symbolic change from the standpoint of the development of constitutional law was the new public role played by Andrei Sakharov. Sakharov was a world-class physicist, but also a dissident. He had been a prominent advocate of a new constitution for the Soviet Union and had even written a draft of one. He had been banished to internal exile in Gorky and one of the indicators that the Soviet Union was changing came when a famous phone call from Mikhail Gorbachev allowed him to return to Moscow. Though he often went too far for Gorbachev, Sakharov’s draft constitution for the Soviet Union captured the popular imagination and gave Gorbachev’s own more modest constitutional proposals a sort of legitimacy. ROBERT AHDIEH, *RUSSIA’S CONSTITUTIONAL REVOLUTION* 24-25 (1997).

¹¹⁹ At the main Community Party Congress in 1988, Gorbachev announced that these reforms would proceed under the banner of the *pravovoe gosudarstvo*, literally “state of law,” though sometimes translated as “rule of law” and sometimes translated as “rule by law.” *Id.* at 24. In any event, given the purely instrumental conception of law that reigned during the Soviet period, Gorbachev’s attention to legality as a constraint was novel.

¹²⁰ *Id.* at 42-43.

The Russian Federation,¹²¹ the largest part of the former Soviet Union, was therefore rather abruptly born as an independent state, without a gestation period during which it might have developed a clear legal structure of its own. During the Soviet era, Russia had its own Constitution, a nominal state government, and a highly detailed internal federal structure, but these were all Potemkin institutions¹²²—more for show than for function. When the Russian Federation suddenly gained its independence, all of those institutions had to immediately bear the real weight of state power. Russia had followed the Soviet Union in changing its own political structures during the national reforms in 1990 and 1991,¹²³ but until the moment of independence, the constitutionally retooled institutions had never had to manage anything substantial. Suddenly they were thrust into the spotlight and had to perform as constitutional organs of power in what was officially (as well as functionally) a new state.

Carried over from the Soviet era, the Constitution of the Russian Federation had been amended often and substantially in 1990 and 1991. An office of the President, a newly constituted permanent Parliament with a speaker at its head, and a brand new Constitutional Court had been added, mirroring change at the national level. The Russian Constitutional Court was established by constitutional amendment in December 1990, and the Law on the Constitutional Court was passed by the new Parliament in July 1991.¹²⁴ The Court opened for business just as the country was unexpectedly sprung loose from the Soviet Union. Given the turbulence of the time, it is not surprising that this Court immediately became embroiled in political controversy.

¹²¹ For simplicity's sake, I will refer to independent Russia as the Russian Federation, even though its official legal title between 1991 and 1993 was the Russian Soviet Federative Socialist Republic. Russia took the legal name of simply "the Russian Federation" with the adoption of its new Constitution in 1993. But even before the legal name was changed with the 1993 Constitution, Yeltsin's speechwriters had already started calling the country the Russian Federation, or simply "Russia." ROBERT SERVICE, *A HISTORY OF TWENTIETH-CENTURY RUSSIA* 511 (1998).

¹²² The ever-amusing but insightful Cecil Adams inquired into the history of Potemkin villages, those façade-only constructions that appeared to be towns. As it turns out, they never existed the way that the legend indicates, but were probably fabricated as part of an anti-Potemkin public relations campaign launched by the Saxon envoy to the court of Catherine the Great. Cecil Adams, *The Straight Dope, Did "Potemkin Villages" Really Exist?* (Nov. 14, 2003), <http://www.straightdope.com/columns/031114.html>. The idea of a "Potemkin institution," however, has outlived any actually existing (or fictitious) Potemkin villages.

¹²³ AHDIEH, *supra* note 118, at 47.

¹²⁴ *Id.* at 78-79.

Yeltsin set about consolidating his newly won power in his newly independent country with a series of brash decrees. To vanquish his communist political opponents, he issued several edicts, starting in August 1991 and continuing through December 1991, suspending the Communist Party of the Russian Federation,¹²⁵ freezing the assets of the Communist Parties of both the Soviet Union and Russia,¹²⁶ and finally terminating the activity of both party wings.¹²⁷ To further centralize power, Yeltsin issued an edict on December 19, 1991, consolidating the police with the intelligence services.¹²⁸ All of these orders were challenged before the newly opened Russian Constitutional Court.

Valerii Zorkin, the new President of the new Constitutional Court, seemed an unlikely opponent to go up against Yeltsin at the height of his power. Yeltsin had won a contested, popular election to become President of the Russian Federation; Zorkin had been a quiet law professor without much public visibility before becoming President of the Court, a job one might reasonably have expected would amount to very little at the time Zorkin was elected to it. Yeltsin had been seen bravely standing on a tank, apparently in command of the demonstrations that the State Committee for the State of Emergency had failed to quell; Zorkin's primary audience before this point had been law students who knew full well that law was not where the power was in the Soviet state.

In fact, Zorkin had virtually no public profile at all in Soviet times. Coming from a small town in Russia's Far East, Zorkin had been admitted to the prestigious Moscow State University, where he did his first degree in legal studies.¹²⁹ His first doctorate (called a *Kandidat*) revealed his penchant for legal history, since he chose "Chicherin's Views on State and Law" as his dissertation topic.¹³⁰ Zorkin's second

¹²⁵ President of the Russian Federation, Edict No. 79, On the Suspension of Activity of the Communist Party of the RSFSR (Aug. 23, 1991).

¹²⁶ President of the Russian Federation, Edict No. 90, On the Property of the Communist Party of the Soviet Union (Aug. 25, 1991).

¹²⁷ President of the Russian Federation, Edict No. 169, On the Activity of the Communist Party of the CPSU and the CP RSFSR (Nov. 6, 1991).

¹²⁸ President of the Russian Federation, Edict No. 289, On the Establishment of the Ministry of Security and Internal Affairs of the RSFSR (Dec. 19, 1991).

¹²⁹ This and the details to follow in this paragraph are drawn from the Russian-only biography of Zorkin on the Russian Constitutional Court's website, <http://www.ksrf.ru/about/judge/ks/bio/zorkin.htm> (last visited June 6, 2006).

¹³⁰ This is actually a very interesting choice. Boris Chicherin was a nineteenth-century Russian liberal legal theorist and one of the very few Russian liberals whom it would have been possible for anyone in the Soviet period to study. As Andrzej Walicki

doctorate (called a doctor of sciences degree) further revealed his interest in legal theory, as he wrote on the topic of “Positivist Theory in Russian Law.” Rather than being given a faculty position at the more prestigious institutions of Moscow State University or the Institute of State and Law of the Russian Academy of Sciences, Zorkin instead toiled away as a professor in the department of constitutional law in the Academy of the Interior Ministry from 1979 to 1986, when he then went to work for the Higher Law School of the Interior Ministry, a correspondence school for police officials. The Interior Ministry was the part of the Soviet state charged with maintaining public order, and would have been an odd posting for someone who showed any signs of commitment to constitutionalism. It was also not the place from which one would expect a major legal thinker to spring.

But, once he became President of the Constitutional Court, Zorkin suddenly emerged as a strong voice in defense of the importance of constitutional standards. In its first ringing decision, announced on January 14, 1992, the Constitutional Court declared that the presidential edict unifying the state security ministry with the ordinary police was unconstitutional.¹³¹ As the Court announced, the constitutional right to create executive bodies lay not in the competencies of the President under the then-existing Russian Constitution, but with the Russian Parliament instead.¹³² Citing the provisions of

notes in his portrayal of Chicherin, “Soviet scholars . . . treat Chicherin with great respect, emphasizing his intellectual calibre and personal integrity, while at the same time regarding him as a staunch class enemy of progressive forces.” ANDRZEJ WALICKI, *LEGAL PHILOSOPHIES OF RUSSIAN LIBERALISM* 105 (1987). Zorkin’s choice of Chicherin could have very well presaged Zorkin’s own turn to liberalism when he became President of the Constitutional Court several decades later.

¹³¹ *In re* Edict No. 289, On the Establishment of the Ministry of Security and Internal Affairs of the RFSFR, VED. RSFSR, 1992, No. 6, Item 247, translated in 30 *STATUTES & DECISIONS* 9, 14-15 (May-June 1994). One note on the citation of Russian Constitutional Court cases: I will be using English-language citations throughout, so that they will be easier to find for the English-language reader. Fortunately, all decisions of the Russian Constitutional Court have been translated by Sarah J. Reynolds in the journal *Statutes and Decisions*. Reynolds’s translations are superb and the non-Russian-speaking reader loses nothing by relying on her versions of the decisions. To make the citations to Russian Constitutional Court decisions easier to understand in English, I have replaced their usual cumbersome case names (in which the above decision would be called “In the Case of the Verification of the Constitutionality of Edict No. 289 of the President of the RFSFR of 19 December 1991 ‘On the Establishment of the Ministry of Security and Internal Affairs of the RFSFR’”) with the simpler English “*In re*” I have also abbreviated the case names of these Russian decisions by mentioning only the first law reviewed in the decision, not the whole string of laws that the decision takes up, as is customary in the full citation.

¹³² *Id.* at 10.

the Russian Constitution that established the roles of Parliament and the President, the unanimous Court decision was signed by Zorkin.¹³³

But Zorkin did not just leave it at that. He took to the press to explain what the Court had done. In an interview with the Moscow newspaper *Komsomolskaya Pravda*, Zorkin indicated that a new Constitution was necessary to “save the President the trouble of issuing numerous decrees and directives,” but in the meantime, he warned that the existing Constitution should be “observed strictly.”¹³⁴

The Russian Constitution in those early days of Russian independence, amended though it was, created terrific trouble. Written at a time when no Constitution in the Soviet legal space mattered as a real legal document, and amended to mirror changes in the Soviet Union’s politics throughout Gorbachev’s legal reforms, the Russian Constitution created a formally weak executive and a formally strong Parliament.¹³⁵ As Russia emerged from the Soviet Union with Yeltsin at the helm, however, the actually existing state structure featured a strong President and a weak Parliament.¹³⁶ In short, the Constitution was being flouted every day, and the Constitutional Court was charged with enforcing the Constitution the country happened to have. This, as we will see, turned into a recipe for crisis.

After this first decision boldly striking down a presidential decree on the basis of the existing Constitution, Russian constitutional judges received death threats and security was tightened. But Zorkin contin-

¹³³ *Id.* at 15.

¹³⁴ Konstantin Katanyan, *There’s a Severe Court: The Most Constitutional Court*, KURANTY (Moscow), at 1, translated in RUSS. PRESS DIG., Jan. 15, 1992.

¹³⁵ The 1977 (Brezhnev) Soviet Constitution had been virtually copied by the Russian Federation. Since the breakup of the Soviet Union, however, the Russian Constitution had, of course, been heavily amended. For our purposes, the crucial part that remained the same was the recognition of the Supreme Soviet as the primary organ of state power. The Soviet version of that article, which the Russian Constitution copied, read:

- (1) All power in the USSR belongs to the people.
- (2) The people exercise state power through Soviets of People’s Deputies, which constitute the political foundation of the USSR.
- (3) All other state bodies are under the control of, and accountable to, the Soviets of People’s Deputies.

KONSTITUTSIIA SSR (1977) [KONST. SSR] [Constitution] art. 2 (USSR), available at http://www.oefre.unibe.ch/law/icl/r100000_.html.

¹³⁶ The President was able to gain power relative to the Parliament not only because he seized the power, but also because the Parliament gave it to him. In fall 1991, the Parliament gave Yeltsin emergency powers to rule by decree. Justin Burke, *Russia Defers Constitutional Debate*, CHRISTIAN SCI. MONITOR, Apr. 20, 1992, at 3. As we will see, he used these powers to the fullest.

ued to speak out about the importance of bringing the power of the President into line with the existing Constitution:

Well, my manner seems mild after years of teaching. . . . But I know I am tough inside. Toughness is essential. How can you afford to be mild when you are told that there is one law for the rich and another for the poor, that might goes before right? Such is my opponents' opinion of the Constitution. However imperfect or compromising it might be, it is this Constitution we must honour. There can be no bending the law to suit authority. . . . Montesquieu said that despotism is cutting down the tree in order to taste the fruit. A lot of hacking is going on in this country now. But one should not delude oneself about the fact that the president who won the general election has his mandate, but not an indulgence.¹³⁷

Unconstitutionality was clearly a problem throughout the new country in those early days. Numerous regions of the Russian Federation declared their independence, wrote constitutions inconsistent with the federal one, and threatened to secede. The Russian Constitutional Court was drawn into the maelstrom of competing sovereignties when it was called upon to decide whether a number of these secessionist moves were constitutional. In March 1992, the Constitutional Court held that Tatarstan could not remove itself from the authority of the government of the Russian Federation.¹³⁸ When Tatarstan proceeded to prepare to carry out the independence referendum that the Constitutional Court had deemed unconstitutional, Zorkin called a news conference to warn Tatarstan not to ignore the Constitution:

The forcefulness with which those leaders seek to plunge their peoples into confrontation with Russia, with the Federation, and want to destroy the effects of Russian laws could lead to grave consequences. They are cutting off the very bough on which they are sitting.¹³⁹ They are pushing people into the abyss of lawlessness and civil war.

Tatarstan paid no attention to either Zorkin or the decision of the Constitutional Court and held its referendum anyway.¹⁴⁰ Worse yet, other republics followed in this "parade of sovereignties," ignoring the

¹³⁷ Vladimir Orlov, *Valery Zorkin: "Russia's President Has His Mandate, Not an Indulgence,"* MOSCOW NEWS, Jan. 30, 1992, Personalities, at 5.

¹³⁸ *In re* the Declaration of State Sovereignty of the Republic of Tatarstan et al., VED. RSFSR, 1992, No. 13, Item 671, translated in 30 STATUTES & DECISIONS 32, 43-44 (May-June 1994).

¹³⁹ Stanislav Oganyan, *How Close Is Russia to Breaking Up?*, PRAVDA (Moscow), Feb. 21, 1992, at 2, translated in CURRENT DIG. POST-SOVIET PRESS, Mar. 25, 1992, at 3.

¹⁴⁰ Steven Erlanger, *Tatars Vote on a Referendum All Agree Is Confusing*, N.Y. TIMES, Mar. 22, 1992, at A8.

Constitutional Court and, for that matter, the Constitution as well.¹⁴¹ Zorkin again warned all parties to follow the law or state force would be forthcoming:

If the state is falling apart but would like to preserve itself, to become a rule-of-law state and to protect human rights on its territory, then it has both moral and legal grounds to defend its right to existence as well. Any state is built on the foundation of not only law, but also force combined with law. And the actions of the state should be adequate to the existing situation. Any other line of conduct turns it from a rule-of-law state into a country of rampant anarchy and discord, ruled by gangs of bandits competing for power.¹⁴²

But the Russian state under President Boris Yeltsin was not listening to the Constitutional Court either. Zorkin warned on the liberal television program *Itogi* that the country was in danger of “disintegrat[ing] before everyone’s eyes” because of secessionist movements, economic failures, the encroachment of the mafia, the continuing impoverishment of the people, and the involvement of the army in political processes.¹⁴³ He also gave an interview to *Komsomolskaya Pravda*, pointing to the failure of public officials to “fulfill their duty for the protection of the country’s Constitutional order” and threatening that the Constitutional Court would take up the question of whether public officials’ failure to act conformed with the Russian Constitution.¹⁴⁴ Lest the implications of this for the government be unclear, Zorkin wrote in the journal *Kuranty* that high officials would be subject to impeachment proceedings in the Constitutional Court if they failed to perform their duties.¹⁴⁵

That said, Zorkin never made himself out to be different from those he judged. He publicly acknowledged that he had remained a member of the Communist Party until October 30, 1991, and that he had never been a dissident. He explained: “We weren’t all Sakharovs. . . . Anyway, I have no past work for which I should feel

¹⁴¹ *In the Unity of Law and Force*, OFFICIAL KREMLIN INT’L NEWS BROADCAST, Apr. 20, 1992.

¹⁴² *Id.*

¹⁴³ *TV Programme Itogi Reviews Weekly Events*, ITAR-TASS, June 29, 1992.

¹⁴⁴ Y. Kozyreva & L. Nikitinsky, *Dusk-Time Telephone Call to Valery Zorkin*, KOMSOMOLSKAYA PRAVDA (Moscow), June 27, 1992, at 1, translated in RUSS. PRESS DIG., June 27, 1992.

¹⁴⁵ Valery Zorkin, *The Metastasis of Lawlessness Threatens Russia with Death*, KURANTY (Moscow), June 30, 1992, at 1, translated in RUSS. PRESS DIG., June 30, 1992.

ashamed. We all moved through this system, each doing it in his own way.”¹⁴⁶

In summer and fall 1992, the Constitutional Court made the spectacular move of convening a public trial on the constitutional challenges to Yeltsin’s decrees banning the Communist Party.¹⁴⁷ Yeltsin’s fall 1991 decrees had put both the Soviet and Russian Communist Parties out of business. Pleasantly surprising the Kremlin, however, the Constitutional Court agreed to hear a companion case brought by Yeltsin, along with the Communist Party challenges to Yeltsin’s decrees. The companion case raised the question of whether the Communist Parties had engaged in anticonstitutional action.¹⁴⁸ The record of what the Communist Party had done would therefore be made public simultaneously with the record on whether Yeltsin’s decrees followed the Constitution. As Princeton Professor Stephen F. Cohen would say, though, in describing what was at stake in this trial: “this is one wing of the Communist Party against another.”¹⁴⁹

Throughout the summer and fall of 1992, the Constitutional Court held public hearings in the Communist Party case, exposing aspects of Russia’s past and present. The testimony was gripping, though it was hard for Zorkin, as the presiding judge in the hearing, to keep everything within legal bounds.¹⁵⁰ As the past poured out in

¹⁴⁶ Steven Erlanger, *Russian Court Weighs Communist Party’s Legality*, N.Y. TIMES, July 8, 1992, at A8.

¹⁴⁷ The trial was spectacular because the Constitutional Court brought into open court some of the deepest secrets of the Soviet times. But, perhaps surprisingly, though the trial was of great interest to the political elites for whom the future shape of Russian politics stood in the balance, the trial generated surprisingly little public attention. “On most days the courtroom was all but empty, and none of the commentaries in the press ever treated it as the great trial of Communism that Mr. Yeltsin’s side wanted.” Serge Schmemmann, *Yeltsin’s Ban on Communists Upheld*, N.Y. TIMES, Dec. 1, 1992, at A8.

¹⁴⁸ Guy Chazan, *Russian Court To Put Communist Party on Trial*, UPI, May 26, 1992.

¹⁴⁹ Erlanger, *supra* note 146, at A8. Cohen’s comment makes more sense if one realizes that virtually all of the major players in this dispute had been members of the Communist Party up until, at a minimum, the year before. Yeltsin had won the Russian presidency in a contested election—in which all those eligible to contest the election were Communists. The first batch of Constitutional Court judges had been elected to the Court before the Soviet Union fell, and were nearly all party members at the time of their election. (The one exception was Tamara Morshchakova, who had managed to never formally join the party though she had been active in the Young Communist League. Lyubov Tsukanova, *Tamara Morshchakova: A Judge from the Faction of Non-Party People*, NEW TIMES, Apr. 2006, available at http://www.newtimes.ru/eng/detail.asp?art_id=272.) Those opposed to Yeltsin’s decree were also party members, though perhaps the only ones still claiming that mantle at the time of the trial.

¹⁵⁰ As one commentator for the newspaper *Izvestia* noted:

historic fashion in the Constitutional Court's hearing room, however, Zorkin entered a standoff with former Soviet President Mikhail Gorbachev over whether Gorbachev would testify. Zorkin insisted that Gorbachev's testimony was necessary in order to determine whether the Communist Party of the Soviet Union (CPSU) was a political party or just another name for the Soviet state structure itself. Gorbachev's testimony was also important for sorting out whether state funds were used for party purposes, in order to determine the ownership structure of party property.¹⁵¹ Gorbachev refused to come to the Court, even if he were "brought in the court-room in handcuffs."¹⁵² To this, Zorkin replied:

[Gorbachev] should not have said that. It is a challenge not only to the Constitutional Court but to public opinion as well. Essentially, it is a challenge to the whole of Russian society which established the Constitutional Court as an independent body of power. . . . Generally speaking, I wonder how the man who had once proclaimed a policy of building a law-governed state, could say such a thing.¹⁵³

Gorbachev responded to the Court's subpoena with an open letter in the *Komsomolskaya Pravda*, in which he claimed that the Court "has become a hostage of political confrontation."¹⁵⁴ Zorkin responded by asking the Russian government to prevent Gorbachev from traveling abroad, which it did.¹⁵⁵ Calling himself a "refusenik," Gorbachev shot back: "The Constitutional Court is supposed to analyze legal docu-

In the courtroom itself, in newspapers and on television, it has been constantly stressed that the trial must be exclusively a legal proceeding and in no way a political trial; with increasing hopelessness, presiding judge Valery Zorkin has tried to reason with the witnesses: Talk about the facts that are known to you, don't get into public-affairs debates. It has all been in vain: It has not been possible to keep the hearing of the "CPSU case" within strictly legal bounds. And it won't be possible in the future—this was predicted from the very beginning, and everything has indeed turned out that way. Moreover, in my opinion, the trial has gone beyond political bounds as well. When the "President's side" started testifying, when victims of the regime that the Party installed in the Land of Soviets began to take the stand, the trial took on a pronounced moral tinge.

Yury Feofanov, *The Victims Repent, The Butchers Are Defended*, IZVESTIA (Moscow), Aug. 4, 1992, at 2, translated in CURRENT DIG. POST-SOVIET PRESS, Sept. 2, 1992, at 24.

¹⁵¹ Daniel Sneider, *Gorbachev Defies Russian Court*, CHRISTIAN SCI. MONITOR, Oct. 6, 1992, at 5.

¹⁵² Konstantin Katanyan, *When in Constitutional Court—Watch Your Tongue*, KURANTY (Moscow), Sept. 26, 1992, at 2, translated in RUSS. PRESS DIG., Sept. 26, 1992.

¹⁵³ *Id.*

¹⁵⁴ *Gorbachev Cites "Moral Reasons" for Not Testifying in Russian Case*, ST. LOUIS POST-DISPATCH, Oct. 4, 1992, at 11D.

¹⁵⁵ Sneider, *supra* note 151, at 5.

ments for conformity with the Constitution. But what is the Court doing today? They are concerned with history. . . . This is not a Constitutional Court, this is a trial seeking political goals.”¹⁵⁶

Zorkin dug in his heels on the Gorbachev matter, and the issue of compliance with the subpoena to testify before the Constitutional Court turned into a personal spat. Zorkin insulted Gorbachev’s competencies as a lawyer and indicated that he felt Gorbachev was holding out against the Court because “[h]e has been left without roles in this state.”¹⁵⁷ Zorkin’s descent to the level of personal insult caused finger wagging in the press: “A rabid opponent of turning the CPSU hearings into a political process, . . . Valery Zorkin has himself succumbed to the temptation of entering into polemics with Gorbachev, which is not juridical by any standard.”¹⁵⁸ Writing in the *Nezavisimaya Gazeta*, defense counsel Abram Move challenged whether Zorkin should continue to serve as a judge in the case, given that Zorkin had personally insulted a potential witness.¹⁵⁹

Gorbachev’s refusal to testify, however, also generated some support for the Court in the media:

Gorbachev has put the Constitutional Court in a position that offers absolutely no way out. If the court shows leniency toward a blatant violator of the law, a monstrous precedent will be established. As one of the participants in the trial justly commented, “Tomorrow Khasbulatov [the speaker of the parliament] will refuse to come, the next day Yeltsin, and a week after that, Uncle Vasya from the bakery.”¹⁶⁰

Finally, however, it was Zorkin who backed down in the crisis, saying that “[i]n view of the ex-president’s position and attitude to the Court, we have decided that he cannot give testimony which could help us establish the truth.”¹⁶¹ The images of both Zorkin and the Court were tarnished in this episode, however. While Zorkin had

¹⁵⁶ *How I Failed To Get Clearance To Travel Abroad: Interview with Mikhail Gorbachev*, OFFICIAL KREMLIN INT’L NEWS BROADCAST, Oct. 7, 1992.

¹⁵⁷ Yuri Aidinov, *Valery Zorkin: Gorbachev Has Been Left Without Roles in This State*, VECHERNYAYA MOSKVA (Moscow), Oct. 20, 1992, at 1, translated in RUSS. PRESS DIG., Oct. 20, 1992.

¹⁵⁸ *Id.*

¹⁵⁹ Abram Move, *The Constitutional Court and Mikhail Gorbachev*, NEZAVISIMAYA GAZ. (Moscow), Oct. 27, 1992, at 1, translated in CURRENT DIG. POST-SOVIET PRESS, Nov. 25, 1992, at 26.

¹⁶⁰ Sergei Parkhomenko, *Constitutional Court: Will We Trade Gorbachev for Honecker?*, NEZAVISIMAYA GAZ. (Moscow), Oct. 8, 1992, at 1, translated in CURRENT DIG. POST-SOVIET PRESS, Nov. 4, 1992, at 22.

¹⁶¹ Boris Slavin, *Third Power Suggests “Round Table,”* PRAVDA (Moscow), Nov. 11, 1992, at 2, translated in RUSS. PRESS DIG., Nov. 11, 1992.

earned praise for the professional way he handled this delicate case in the formal hearings, the episode with Gorbachev showed that Zorkin was sometimes thin-skinned and not entirely judicial in his manner when challenged.

The Constitutional Court made its decision in the CPSU case on November 30, 1992.¹⁶² Surprising everyone in a country in which politics had rarely before been constrained by law, the Court failed to come down all on one side. First, the Court broadly upheld Yeltsin's decrees banning the activities of the core organizations of both the Russian and Soviet Communist Parties.¹⁶³ But, the Court said, handing a partial victory to the Communists, the President could not ban the local organizations of the Communist Party that gathered as free social associations.¹⁶⁴ The Court also broadly upheld Yeltsin's freeze on the property of the Communist Parties.¹⁶⁵ But, the Court said, balancing Yeltsin's victory with a ruling beneficial to the Communists, the state could not just seize the property, whose ownership status was entangled in complicated ways between the state and the parties as social associations.¹⁶⁶ To sort out these property claims, the parties would have to go to the *arbitrazh* courts and untangle the claims one by one.¹⁶⁷ Avoiding the question of whether the Communist Party of the Soviet Union had been engaged in anticonstitutional activity while it existed, the Court said it did not have to address the issue since the party had been dissolved with the deconstruction of the Soviet Union.¹⁶⁸

Yeltsin won in part and lost in part. He was able to get rid of the Soviet-era party structures, but was unable to prevent the very same

¹⁶² *In re* Edict 79, On the Suspension of the Activity of the Communist Party of the RSFSR, Edict 90, On the Property of the CPSU and the Communist Party of the RSFSR, and Edict 169, On the Activity of the CPSU and the Communist Party of the RSFSR et al. [hereinafter *CPSU Case*], VED. RF, 1992, No. 14, Item 400, translated in 30 STATUTES & DECISIONS 8 (July-Aug. 1994). The decision was announced from the bench without a written opinion to distribute to the press. Zorkin said at the time that the opinion itself would be distributed in two weeks. Schmemmann, *supra* note 147, at A8.

¹⁶³ *CPSU Case*, *supra* note 162, at 38-42.

¹⁶⁴ *Id.* at 39.

¹⁶⁵ *Id.* at 39-40.

¹⁶⁶ *Id.*

¹⁶⁷ *Arbitrazh* courts in the Soviet Union used to be the courts that handled economic disputes under the various five-year plans. In post-communist Russia, they became the courts that handled property and contract issues among corporate bodies. Hendley, *supra* note 16, at 93-94.

¹⁶⁸ *CPSU Case*, *supra* note 162, at 42.

rank-and-file members from starting new parties on new constitutional terms. He was not allowed to seize Communist Party property indiscriminately, but rather had to wait until the *arbitrazh* courts sorted out the complex series of property claims. Perhaps most importantly, the Court demonstrated a careful and, above all, highly legal approach to resolving these most contentious of issues.

Zorkin had made the public announcement of the decision in the CPSU case, and the reactions were generally positive. Yeltsin's representative said that the decision was a "stabilizing factor and a compromise On the whole, the decision satisfies us."¹⁶⁹ The Communists declared victory as well: "The decision is not a bad one. . . . It gives the party a chance to revive."¹⁷⁰ Though Zorkin had shown fits of pique during the trial and had come under public criticism, the decision was praised in the end as a constitutional and thoroughly legal judgment. The Court appeared to be the guardian of the Constitution and had, surprising many, issued a judicious, carefully crafted ruling that did not just cave in to political expediency.

While the CPSU case was pending, however, other constitutional trouble was brewing. An impetuous Yeltsin, with his first Prime Minister Yegor Gaidar, pushed through economic reforms using presidential decrees and therefore bypassing Parliament. Price liberalization came in January 1992.¹⁷¹ The ruble was allowed to float in July 1992. Inflation for the year shot up to an unbelievable 2000%.¹⁷² Mass poverty set in quickly.

All of this was happening while the "parade of sovereignties" continued, as more and more of Russia's regions were declaring independence, claiming they had no need to pay attention to the center. Not just Tatarstan, but Chechyna, Bashkortostan, Buryatia, Karelia, Komi, Sakha, and Tuva also declared that their laws would take precedence over the those of the center,¹⁷³ despite the Constitutional Court's explicit ruling on this point in the Tatarstan referendum case.

Instead of working with Parliament, Yeltsin decided to wage his own war against its leaders. The Supreme Soviet, the sleeker executive committee of the unwieldy Congress of People's Deputies, was chaired by Ruslan Khasbulatov, who had generally opposed Yeltsin's increas-

¹⁶⁹ Guy Chazan, *Court: Yeltsin Acted Properly in Outlawing Communist Party*, UPI, Nov. 30, 1992 (quoting Mikhail Fedotov, a lawyer for Yeltsin's team).

¹⁷⁰ *Id.* (quoting Yuri Ivanov, a Communist Party lawyer).

¹⁷¹ SERVICE, *supra* note 121, at 509-10.

¹⁷² Scheppele, *Realpolitik Defense*, *supra* note 5, at 1950.

¹⁷³ SERVICE, *supra* note 121, at 521.

ingly high-handed manner of governing.¹⁷⁴ Parliament responded to what it saw as Yeltsin's arrogant leadership by proposing Yeltsin-limiting amendments to the creaky once-Soviet, now-Russian Constitution.¹⁷⁵ By the end of 1992, the Constitution had been amended more than four hundred times; it was hard for anyone to find a copy of the current text,¹⁷⁶ let alone discern what all of the changes meant. Obviously, this made it harder for the Court to go on interpreting the Constitution as it was written.

During the progressive deterioration of relations between the President and Parliament that occurred throughout 1992, the Constitution became the territory on which the incipient war between the two institutions was staged. Starting before the Soviet Union crumbled, the Constitutional Commission of the Supreme Soviet had been fumbling for years with proposals for a new constitution. Drafts emerged from the constitutional commission in November 1990, October 1991, and February 1992. Although each one proposed a mixed presidential-parliamentary system, each successive draft gave more powers to Parliament.¹⁷⁷ Yeltsin, who wanted a strongly presidentialist constitution, objected and presented his own constitutional draft in Novem-

¹⁷⁴ The general view is that Khasbulatov opposed Yeltsin's economic reforms. SERVICE, *supra* note 121, at 521-22. But speeches made by Khasbulatov demonstrate that he had supported the general thrust of the reforms:

The present situation in the country is extremely difficult. Moreover, it is becoming ever tenser. It would be wrong to say that there is general understanding and acceptance of all of our major measures in the political, economic, social, international and other spheres. It is necessary for everybody to think of ways of reaching consensus in our Russian society. And on the basis of this consensus a kind of an unwritten social contract could be concluded, which would naturally preclude any actions disrupting the drastic economic reforms. . . . There can be no return to the past, to the old ways.

Ruslan Khasbulatov, Chairman, Supreme Soviet of the Russian Federation, Statement at a Congress of Private Farmers, in OFFICIAL KREMLIN INT'L NEWS BROADCAST, Feb. 5, 1992. He repeated these affirmations several months later:

At its last session the Supreme Soviet adopted about 150 pieces of legislation which provide the legislative framework for a market economy. The coming session is expected to pass almost twice as many. Differences with the government are over particulars, over details, and not over substance because nobody in Parliament opposes a transition to the market economy.

"*This Country Won't Survive Another Dictatorship*": Interview with Russian Parliament Speaker Ruslan Khasbulatov, OFFICIAL KREMLIN INT'L NEWS BROADCAST, Nov. 24, 1992 [hereinafter *Khasbulatov Interview*]. Khasbulatov did oppose executive centralization of power, which turned out to be the crucial issue in the fight that followed, as the rest of this section will show.

¹⁷⁵ This process came to a head in December 1992, as we will see below.

¹⁷⁶ AHDIEH, *supra* note 118, at 50-51.

¹⁷⁷ *Id.* at 52.

ber 1991,¹⁷⁸ renewing his plea at strategic intervals in 1992. In April 1992, for example, he returned to Parliament to present his argument for stronger executive power: "Without a powerful executive branch there can be no reforms, order, nor a statehood befitting Russia, its history and its traditions."¹⁷⁹ Yet Yeltsin gave strong approval for the Constitutional Court to play a mediating role as the new constitution was worked out: "In the existing situation I think it necessary that the Constitutional Court should play a more active role in building relationships between the executive and the legislative branches of power. The authoritative view of the Court could remove many problems and avert many conflicts."¹⁸⁰

In the meantime, however, Khasbulatov urged support for the constitutional commission's draft, which provided for a parliamentary system that would have a President as a mere figurehead.¹⁸¹ The Supreme Soviet avoided voting on the constitution at all in the spring, so the matter was drawn out into the fall.¹⁸²

The Communist Party case before the Constitutional Court was settled on the eve of the predictably contentious fall meeting of the Congress of People's Deputies. The Congress was convened with the issue of constitutional reform prominently on the table. Taking the floor before the delegates, Zorkin spoke with great urgency in light of the economic chaos, national deconstruction, and constitutional uncertainty all around:

We [the Constitutional Court] have the right to warn you that the Constitution is being violated by both branches, by their various representatives. . . . We urge you: come to your senses. While you are arguing here and while power is losing its efficiency, another kind of power may arise out there. . . . Esteemed People's Deputies, you are putting the Constitutional Court in a hopeless situation. . . . Either you revise the Constitu-

¹⁷⁸ *Yeltsin Presents Draft Constitution*, TASS WORLD SERVICE, Nov. 2, 1991, translated in BBC SUMMARY WORLD BROADCASTS, Nov. 4, 1991.

¹⁷⁹ Boris Yeltsin, President, Speech to Congress, in OFFICIAL KREMLIN INT'L NEWS BROADCASTS, Apr. 21, 1992.

¹⁸⁰ *Id.*

¹⁸¹ *Speech By Khasbulatov Urges Deputies To Adopt Draft Constitution* (Russia's Radio broadcast Apr. 17, 1992), translated in BBC SUMMARY WORLDWIDE BROADCASTS, Apr. 20, 1992. During his speech, Khasbulatov lectured the Supreme Soviet on the details of a parliamentary system in the manner of a political scientist explaining the very basics of a particular form of national government. The role of the president, however, was clearly minimal in Khasbulatov's scheme. *Id.*

¹⁸² Burke, *supra* note 136, at 3.

tion and we will defend a new Constitution, or work for the enforcement of the present Constitution.¹⁸³

Zorkin's plea went unheeded, though the influential newspaper *Kommersant* wrote that "[t]he unexpected speech by the head of the third branch of power . . . was taken by the Congress as a 'desperate cry of the constitutional soul.'" ¹⁸⁴

Before the Congress began its meeting, however, Khasbulatov had indicated that he thought the President's proposals would bring Russia to "another dictatorship."¹⁸⁵ Yeltsin appeared before the Congress and thundered, "I'm convinced that the passage of these amendments [those supported by Khasbulatov] will do direct damage to Russia, disorganize the work to transform the country, destabilize the situation, rather than correct it."¹⁸⁶ In the end, the amendments that would have stripped the President of most of his powers failed by only "a few votes" out of the 1041-member body.¹⁸⁷ In the Congress, then, Yeltsin's majority was highly precarious.¹⁸⁸

Stung by his losses and the fragile nature of his victories, Yeltsin called for a referendum to let the people decide which branch should have the most power.¹⁸⁹ He once again appeared before the Congress of People's Deputies to lay down the gauntlet, accusing Khasbulatov personally of

cheap populism and outright demagogue [sic], disorganization of complicated reforms and finally revival of the old Soviet totalitarian communist system cursed by the people of Russia and rejected by the international community. This is not even a way back, it's a way to nowhere. It's a pity that the leader of this course which leads nowhere has become

¹⁸³ Valerii Zorkin, Chairman of the Constitutional Court of Russia, Speech at the 7th Congress of People's Deputies, in OFFICIAL KREMLIN INT'L NEWS BROADCAST, Dec. 2, 1992.

¹⁸⁴ Nika Stark, *The President Was the First To Speak*, KOMMERSANT (Moscow), Dec. 2, 1992, at 9, translated in RUSS. PRESS DIG., Dec. 2, 1992.

¹⁸⁵ *Khasbulatov Interview*, supra note 174.

¹⁸⁶ Boris Yeltsin, Russian Federation President, Speech at the 7th Congress of People's Deputies, in OFFICIAL KREMLIN INT'L NEWS BROADCAST, Dec. 4, 1992.

¹⁸⁷ Celestine Bohlen, *Yeltsin Survives Parliament Tests by Hair's Breadth*, N.Y. TIMES, Dec. 6, 1992, at A1.

¹⁸⁸ Yeltsin was not able to obtain parliamentary confirmation of his proposed prime minister, Yegor Gaidar. Gaidar had been associated with the shock therapy that resulted in hyperinflation. This refusal of his preferred prime minister was, for Yeltsin, the "final straw." Michael Dobbs, *Yeltsin Challenges His Foes in Congress, Calls for Referendum*, WASH. POST, Dec. 11, 1992, at A1.

¹⁸⁹ Ivan Ivanov & Sergei Podyapolsky, *Yeltsin Calls for Nationwide Referendum*, ITAR-TASS, Dec. 10, 1992.

the chairman of the Supreme Soviet of the Russian Federation—Ruslan Khasbulatov.¹⁹⁰

Khasbulatov, in anger, submitted his resignation on the spot and stormed out.¹⁹¹ Later, only slightly more calmly, Khasbulatov suggested that the Kremlin be shut down and turned into a museum.¹⁹² The Congress of People's Deputies then voted to have a counter-referendum to Yeltsin's, which would call for early elections for both the presidency and the Congress.¹⁹³

Valerii Zorkin jumped into the escalating political crisis and name-calling, ordering that if Yeltsin and Khasbulatov did not stop fighting, he would initiate impeachment proceedings¹⁹⁴ against both of them in the Constitutional Court.¹⁹⁵ To thunderous applause before the Congress of People's Deputies, Zorkin proposed that the two

¹⁹⁰ Boris Yeltsin, Russian Federation President, Speech to the 7th Congress of RF People's Deputies, in OFFICIAL KREMLIN INT'L NEWS BROADCAST, Dec. 11, 1992.

¹⁹¹ *Id.*

¹⁹² *Yeltsin on Collision Course with MPs*, TORONTO STAR, Dec. 10, 1992, at A1.

¹⁹³ Dobbs, *supra* note 188, at A1.

¹⁹⁴ At that time, the Constitutional Court Act permitted the Constitutional Court to take up constitutional matters on its own initiative, including initiating the findings that would give rise to impeachment proceedings:

The RSFSR Constitutional Court shall render findings at the request of the RSFSR Congress of People's Deputies, the RSFSR Supreme Soviet or the Presidium of the RSFSR Supreme Soviet, and also of the higher organs of state power of the republics within the RSFSR . . . on conformity with the RSFSR Constitution of acts and decisions by the RSFSR President, and also of other senior persons in office of the RSFSR and the republics within the RSFSR, where, according to the RSFSR Constitution, unconstitutionality of their acts and decisions serves as ground for their dismissal or setting in motion of other special mechanism on their responsibility

The RSFSR Constitutional Court shall have the right to render findings . . . on its own motion.

Decree of the RSFSR Congress of People's Deputies Enacting the RSFSR Constitutional Court Act art. 74.1(1), subsec. 2 (July 12, 1991) (LEXIS, SovData DiaLine—SovLegisLine Library).

¹⁹⁵ Zorkin declared:

[A]s you can see, we are confronted with a profound crisis of the constitutional system. Unfortunately, the legislative and the executive branches have failed to reach common ground to achieve compromise. Under these circumstances, in this crisis situation, confronted with the threat of disintegration of the Russian statehood, the Constitutional Court demands from the legislative and the executive branches . . . to achieve a compromise as a matter of utmost urgency.

Valery Zorkin, Chairman of the Russian Federation Constitutional Court, Speech to the 7th Congress of People's Deputies, in OFFICIAL KREMLIN INT'L NEWS BROADCAST, Dec. 10, 1992.

sides begin roundtable talks with Zorkin himself as the moderator.¹⁹⁶ Convening the two sides over that weekend, Zorkin succeeded in getting them both to call on their supporters to refrain from violence or mass actions and to pledge in public to follow the Constitution.¹⁹⁷ By late Saturday, Zorkin had presided over a compromise acceptable to all. Yeltsin agreed to withdraw his proposed referendum and to stop insisting on Gaidar as the lone candidate for Prime Minister; the Congress of People's Deputies agreed not to hold its planned votes to strip the executive branch of power; and a referendum on a new Constitution would be held in April 1992. After the Congress of People's Deputies voted overwhelmingly in favor of this compromise, Khasbulatov and Yeltsin shook hands.¹⁹⁸ The role of Valerii Zorkin in brokering this deal was clear to all, as he was the one who read the final agreement to the Congress of People's Deputies, ending the dangerous standoff.¹⁹⁹

At the time, there was general praise for Zorkin's role in the crisis. Sergei Kovalev, a former dissident, said that Zorkin bent "some lesser laws in the name of a greater legality."²⁰⁰ Oleg Rumyantsev, senior secretary of the Supreme Soviet's Constitutional Commission, said that Zorkin's role was crucial to the success of the meeting before the Congress, as "the Constitutional Court promotes the strengthening of political stability in society."²⁰¹ Russian political columnist Tomas Kolesnichenko said, "Zorkin is a national hero now. . . . Many people

¹⁹⁶ *Id.*; *Yeltsin on Collision Course with MPs*, *supra* note 192, at A1.

¹⁹⁷ Andrey Naryshkin, *Yeltsin, Congress Appeal To Refrain from Violence*, TASS, Dec. 11, 1992.

¹⁹⁸ *Kremlin Compromise Breaks Political Deadlock*, UPI, Dec. 12, 1992.

¹⁹⁹ As a *New York Times* article explained the next day:

The deadlock was broken when Chief Justice Zorkin, declaring that it was the duty of the Judicial Branch to prevent the collapse of constitutional order, summoned both sides to negotiations under his aegis.

The original interpretation of his powers by Mr. Zorkin raised some eyebrows, but even skeptics agreed that in the chaos of Russia's politics, where the principle of legality is tenuous and the separation of powers indistinct, the Chief Justice played a critical role.

Serge Schmemmann, *Yeltsin Bargains with Congress, Reducing Pressure at the Meeting*, N.Y. TIMES, Dec. 13, 1992, § 1, at 1.

²⁰⁰ Serge Schmemmann, *Russia's Parliament Hesitates Between Law and Power*, N.Y. TIMES, Dec. 13, 1992, § 4, at 2.

²⁰¹ Ivan Lebedev, *Russian MP Comments on Results of the 7th Congress*, TASS, Dec. 16, 1992.

saw him as the savior of the nation.”²⁰² The weekly magazines *New Times* and *Stolitsa* both put Zorkin on their covers.²⁰³

Even American observers were impressed. Writing in the *Washington Post*, Russia expert William Taubman said that Zorkin “destroyed the separation of powers in order to save it.”²⁰⁴ The *New York Times* editorialized on how surprising it was that a “democratic temperament” had emerged in Russia. The editorial credited Valerii Zorkin with the transformation, calling him “Russia’s answer to Chief Justice John Marshall.”²⁰⁵

On December 29, 1992, Zorkin became the first winner of the National Accord Prize, awarded by *Komsomolskaya Pravda* and a nongovernmental organization, called the Committee for National Accord, for his work at the Congress of People’s Deputies.²⁰⁶ Along with the now extremely popular Zorkin, the Constitutional Court as a whole also came into positive public view. In a little over a year, fully 17,000 petitions had come to the Court, asking it to rule on various matters.²⁰⁷ Both Zorkin and the Court were riding high.

But Yeltsin and Khasbulatov were bound by the Zorkin-brokered agreement only for a short time. On January 15, 1993, Khasbulatov fired off a missive to Yeltsin, notifying him that all of his recent presidential decrees were void because the emergency powers under which he had authorized these decrees had expired on December 1.²⁰⁸ Yeltsin returned the favor by insisting that the April 11 referendum include only the question he had wanted all along—whether the presidency or the Supreme Soviet should be the most powerful state institution.²⁰⁹ The parliamentary committee charged with coming up with the wording for the referendum was hopelessly deadlocked. The

²⁰² James P. Gallagher, *The Fate of Reform Falls to Yeltsin’s Foes*, CHI. TRIB., Dec. 20, 1992, at C1.

²⁰³ Gerald Nadler, *Russian Judge Tells Yeltsin, Foe To Quit Fighting*, WASH. TIMES, Jan. 28, 1993, at A7.

²⁰⁴ William Taubman, Op-Ed., *Russia’s Fumbling Fathers*, WASH. POST, Dec. 20, 1992, at C7.

²⁰⁵ Editorial, *A Russian Democrat*, N.Y. TIMES, Dec. 18, 1992, at A38.

²⁰⁶ The prize was given for “important civic steps helping overcome confrontation, inter-ethnic, social and political conflicts.” Tamara Invanova, *National Accord Prize To Be Given to Zorkin*, TASS, Jan. 29, 1993.

²⁰⁷ Alexander Krasulin, *Badinter Meets Judges of the Russian Constitutional Court*, TASS, Feb. 4, 1993.

²⁰⁸ Vera Kuznetsova, *President Concentrates on Referendum*, NEZAVISIMAYA GAZ. (Moscow), Feb. 5, 1993, at 1, translated in RUSS. PRESS DIG., Feb. 5, 1993.

²⁰⁹ Justin Burke, *Russians Spar over Form of Government*, CHRISTIAN SCI. MONITOR, Jan. 19, 1993, at 3.

Moscow Times editorialized about a “Referendum in search of a question.”²¹⁰

With the referendum’s content undecided, Khasbulatov insisted on adding his preferred question to the referendum: whether immediate elections should be called for both the presidency and Parliament. Then, he said that Yeltsin’s office should be abolished. Next, Khasbulatov opposed any referendum at all. Finally, he maintained that Yeltsin should resign if less than fifty percent of voters took part in the referendum, as the referendum was Yeltsin’s idea.²¹¹ December’s agreement was starting to look more like a temporary cease-fire than a permanent resolution. Both Yeltsin and Khasbulatov had returned to their original positions and to trading insults.

Rather than insisting that the December compromise be strictly adhered to, Zorkin called a press conference to urge all parties to give up the April referendum.²¹² Zorkin later said that he had never believed that a Constitution could be prepared for a vote so soon when he mediated the December agreement between Yeltsin and Khasbulatov.²¹³ Moreover, the time was not right for a referendum, he thought:

Why should we test a sick society with this referendum? . . . A well-fed people may be asked to join the Maastricht Treaty (to unite Europe). But an attempt to confront a hungry people with a decision on constitutional principles, I am afraid, may be misunderstood and used by extremist forces.²¹⁴

Since the referendum had originally been Yeltsin’s idea, Yeltsin did not take kindly to the suggestion that he abandon it. But faced with experts warning him that the referendum might fail for lack of turnout, which would make Yeltsin appear to be the loser, he eventually agreed with Zorkin that the constitutional referendum should be postponed.²¹⁵

As would become the signature feature of this battle, though, no sooner had Yeltsin agreed to give up the referendum than he changed his mind. This riled up Khasbulatov to talk again about his proposal

²¹⁰ Gerald Nadler, *Outcome Appears Uncertain in Yeltsin-Parliament War*, WASH. TIMES, Jan. 21, 1993, at A7.

²¹¹ Richard Boudreaux, *Yeltsin Retreats from Move To Bolster His Power*, L.A. TIMES, Feb. 10, 1993, at A4.

²¹² Nadler, *supra* note 203, at A7.

²¹³ Richard Boudreaux, *Russia’s Top Judge Stars in Historic Role*, L.A. TIMES, Feb. 9, 1993, at A1.

²¹⁴ *Id.*

²¹⁵ Boudreaux, *supra* note 211, at A4.

for immediate elections, which further spurred Yeltsin to insist upon offering referendum voters the stark choice between the President and Parliament—and the two continued their mutual sniping for another month. Finally, in early March, Yeltsin started hinting darkly at declaring a state of emergency to put the conflict to rest.²¹⁶ Khasbulatov responded by having the Supreme Soviet call a meeting of the full Congress of People's Deputies to push forward constitutional change.²¹⁷ A serious crisis loomed again.

As the constitutional tension deepened, the Constitutional Court issued a report that the President had earlier asked it to write on the state of constitutionality in Russia. The text of the report was printed in the newspapers, and it identified serious threats to Russia's constitutional order. First among them was the looming confrontation between the legislature and the executive, something the report attributed to both branches' failure to operate on the basis of separation of powers.²¹⁸ The routine violation of human rights was another area of concern for the Court.²¹⁹ Federal relations were deteriorating and laws were contradictory.²²⁰ The Constitutional Court was overburdened with work and so could not review all petitions claiming unconstitutionality of state practices and laws.²²¹ In short, it was not a happy report.

Against this background, the Congress of People's Deputies was convened on March 10, and Khasbulatov addressed the group with a diatribe against Yeltsin.²²² Zorkin addressed the Congress of People's Deputies on March 11, urging all sides to follow the Constitution.²²³

The Congress moved toward constitutional change by voting on resolutions to amend the Constitution. And Yeltsin lost on all of the issues he cared about. The April referendum was cancelled by the

²¹⁶ Olivia Ward, *Yeltsin Hints at Emergency Rule*, TORONTO STAR, Mar. 3, 1993, at A14.

²¹⁷ Serge Schmemmann, *Russian Congress Will Meet for Showdown with Yeltsin*, N.Y. TIMES, Mar. 6, 1993, § 1, at 5.

²¹⁸ CONSTITUTIONAL COURT, REPORT TO RUSSIAN FEDERATION SUPREME SOVIET ON THE STATE OF CONSTITUTIONAL LEGALITY IN THE RUSSIAN FEDERATION (Mar. 5, 1993), reprinted in ROSSISKAYA GAZ., Mar. 11, 1993, translated in BBC SUMMARY WORLD BROADCASTS, Mar. 18, 1993.

²¹⁹ *Id.* § 2.

²²⁰ *Id.* §§ 3-4.

²²¹ *Id.* § 5.

²²² Andrew Higgins, *Yeltsin Duels for Power in Moscow*, INDEPENDENT (London), Mar. 11, 1993, at 1.

²²³ Gennady Talalayev, *Chairman of Constitutional Court Calls for Accord*, TASS, Mar. 11, 1993.

Congress; the body also voted to strip the presidency of much of its power.²²⁴ Yeltsin stormed out, threatening to take his case directly to the people over the heads of the Congress. In his view, the referendum was on, no matter what the Congress of People's Deputies wanted. One of Yeltsin's advisors, Sergei Shakhrai, warned darkly that "[w]e are on the verge of unpredictable events."²²⁵

Zorkin left for the United States, where he had long-planned meetings with American leaders. While there, he gave a press conference in Washington, defending the active role of the Court in mediating between the two hostile branches of government:

When we try to decipher that provision relating to the constitutional court which is contained in our constitution to the effect that this is the supreme organ of judiciary, called upon to defend the constitutional system, I hope and believe that perhaps our posterity will not judge us very harshly for the fact that we have tried to interfere into this argument between the two powers. We have done and are doing so not in order to take power away from them, but in order to make it stronger and active, operable.²²⁶

After the Congress of People's Deputies had adjourned, and while Zorkin was still in Washington, Yeltsin's advisors began urging the President to take "extremely tough measures" to preserve his powers.²²⁷ Hearing of a rumored presidential declaration of emergency, Zorkin returned early to Russia to announce his opposition to any such measures.²²⁸ In business as usual, however, the Constitutional Court met on March 19 and voided twenty-seven decrees made by Khasbulatov and the Supreme Soviet that ran counter to Yeltsin's reforms in the run-up to the crisis.²²⁹ Yeltsin, however, was not appeased by the Court's blow to his rival.

²²⁴ Serge Schmemmann, *Russian Legislature Votes To Reduce Yeltsin's Powers and Assume Dominant Role*, N.Y. TIMES, Mar. 12, 1993, at A1.

²²⁵ Margaret Shapiro, *Congress Curbs Yeltsin's Power*, WASH. POST, Mar. 13, 1993, at A1.

²²⁶ Valery Zorkin, Russian Supreme Court, Remarks at the National Press Building, in FED. NEWS SERVICE, Mar. 15, 1993.

²²⁷ Margaret Shapiro, *Key Advisers Press Yeltsin To Declare Presidential Rule*, WASH. POST, Mar. 17, 1993, at A29.

²²⁸ Gerald Nadler, *Russian Judge Opposes Yeltsin on Direct Rule*, WASH. TIMES, Mar. 20, 1993, at A7.

²²⁹ Alexander Balashov & Anton Antonov-Ovseyenko, *Court Repeals 27 Decrees by Speaker*, KOMMERSANT (Moscow), Mar. 20, 1993, at 3, translated in RUSS. PRESS DIG., Mar. 20, 1993. For the Court decision itself, see *In re Decree of the Presidium of the Supreme Soviet, On the Social Protection of the Population and on Putting in Order*

Yeltsin appeared on television to declare a state of emergency on Saturday night, March 20, 1993. He assumed the powers to rule by decree, and he called for a referendum on his powers to be held on April 25. While he did not dissolve Parliament, he ordered it not to violate his decrees.²³⁰ The television broadcast, unaccompanied as it was by any written decrees that might have explained the legal basis for his announcement, caused the other branches of power to spring into action to attempt to stop Yeltsin from plunging into the constitutional abyss.

The Presidium of the Supreme Soviet met that night and declared that Yeltsin was "trying to establish a dictatorship."²³¹ Previously loyal Vice President Aleksander Rutskoi went over to the side of Parliament in the crisis. Shortly after midnight, Rutskoi appeared at the White House, the office building of the Russian Parliament, to say that he was refusing to co-sign Yeltsin's decrees because they were unconstitutional. Some parliamentary leaders also appeared in front of the White House to protest Yeltsin's actions. And standing alongside Rutskoi and the parliamentary leaders on the steps of the White House the night that Yeltsin claimed the right to govern alone was Valerii Zorkin.²³²

As it turns out, Zorkin had heard about the declaration of emergency before it was made. He had called an emergency session of the Constitutional Court earlier in the day to consider the matter. The Court had sent Yeltsin a letter before his television broadcast, urging him not to take up presidential rule. But Yeltsin had not answered.²³³ Instead, Yeltsin made his drastic announcement on a Saturday night, when newspapers and news departments of television stations were closed for the weekend.

Once the emergency had been formally announced, Zorkin left the Constitutional Court building, where he had been meeting with his colleagues, and came to the steps of the White House where he symbolically joined forces with Rutskoi (now a refugee from the executive branch) and the parliamentary deputies. "The president has assumed the role of an absolute ruler," Zorkin said at the White

the Regulation of Price Formation for Individual Types of Output et al., VED. RF, 1993, No. 15, Item 536, translated in 30 STATUTES & DECISIONS 75 (July-Aug. 1994).

²³⁰ Richard Boudreaux, *Yeltsin Moves To Rule by Decree*, L.A. TIMES, Mar. 21, 1993, at A1.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

House. "This is an attempt at *coup d'état*. . . . It is regrettable and tragic."²³⁴

The next day, Parliament went into special session, voting Sunday afternoon to formally ask the Constitutional Court to rule on the constitutionality of Yeltsin's declaration of emergency. Parliament indicated that, if the Constitutional Court found against Yeltsin, Parliament would move to impeach him, as allowed by the Constitution.²³⁵

The Constitutional Court continued crisis deliberations, meeting all Sunday night before breaking up on Monday morning at 7 a.m. It did not immediately make a ruling, perhaps knowing that finding against Yeltsin would almost surely push the Supreme Soviet to initiate impeachment proceedings. That could only make things worse. Anticipating that the Court would rule against Yeltsin, however, some of Yeltsin's aides began a press campaign to say that Zorkin had already chosen sides and that the outcome of the Court's deliberations could not possibly be fair.²³⁶

For his part, Zorkin went before the press on Monday and indicated that he was speaking on behalf of the whole Court and not just for himself. Surely, the Court had the right to look into the decrees, he said, even though it had not received any copies of them; Yeltsin had ignored all requests to provide any of the emergency decrees to the Court. These decrees, Zorkin pointed out, "contained several items which, to put it mildly, are not in the Constitution and the law on the Constitutional Court."²³⁷

While public officials and political commentators had praised Zorkin during his earlier successful mediation, a chorus of commentators now denounced him as one-sided and closed-minded.²³⁸ Some described him as emotional and incapable of being impartial, seeming to have already publicly chosen sides by appearing at the White House

²³⁴ *Id.*

²³⁵ Margaret Shapiro & Fred Hiatt, *Crisis in Moscow: Russian Legislature Moves Against Yeltsin*, WASH. POST, Mar. 22, 1993, at A1.

²³⁶ Serge Schmemmann, *Top Russian Jurist Urges Compromise*, N.Y. TIMES, Mar. 23, 1993, at A1.

²³⁷ *Id.*

²³⁸ Even the *New York Times*, which had editorialized so exuberantly in Zorkin's favor a few short months before, ran a story that explained: "Appointed by democrats to uphold the Constitution and the law against Communist arbitrariness, Mr. Zorkin and his colleagues on the court now find themselves defending that Constitution against democrats who rejected it as a hostile obstacle to progress." *Id.*

on Saturday night.²³⁹ Perhaps Zorkin was also tired, because the Constitutional Court had met through all of Sunday night and headed into an all-night session on Monday as well.²⁴⁰ By daytime Monday, casting off the criticism, Zorkin pleaded for Yeltsin and Parliament to reach an agreement among themselves.²⁴¹ His tone sounded almost desperate. Speaking directly to Yeltsin, who still was not returning Zorkin's phone calls, Zorkin publicly begged:

Boris Nikolayevich, think, we are all people, Russians, perhaps you have made a mistake, perhaps a catastrophic mistake. But tell the parliamentarians this; after all, they are also Russians. Perhaps there is a chance, after all, in the final analysis, jointly to turn away the development of Russia from a catastrophe to a consensus.²⁴²

There was no answer from Yeltsin.

The Constitutional Court issued its decision on Tuesday, ruling against Yeltsin's seizure of powers with a vote of ten to three. Zorkin wrote for the majority in finding that Yeltsin's television address violated the Constitution:

The Constitution and legislation of the Russian Federation do not provide for the possibility of the introduction of a special procedure for administration. . . . While giving assurances that the work of the representative bodies of power of Russia is not being suspended, the President nonetheless announced a change in the division of competence among the federal bodies of power [which is] embodied in the Constitution.²⁴³

The Court declared that Yeltsin's unilateral decision to go forward with a referendum was also contrary to the Constitution, which outlined different procedures for calling referenda.²⁴⁴ Yeltsin's loss was complete, though the Court indicated that it shared Yeltsin's sense

²³⁹ David Hearst, *Hot Words from the Bench, Cool Nerves in the Barracks*, GUARDIAN (London), Mar. 23, 1993, at 11.

²⁴⁰ It is quite striking in the press coverage of these events that no constitutional judges other than Zorkin were ever as visible as Zorkin before the Court struck down Yeltsin's emergency pronouncements.

²⁴¹ George Rodrigue, *Judge Urges Yeltsin To Accept Compromise*, DALLAS MORNING NEWS, Mar. 23, 1993, at A1.

²⁴² *Speech by Constitutional Court Chairman: Yeltsin's Actions Unconstitutional* (Russia TV broadcast Mar. 21, 1993), translated in BBC SUMMARY WORLD BROADCASTS, Mar. 23, 1993.

²⁴³ *In re* President Yeltsin's Address to the Citizens of Russia, VED. RF, 1993, No. 13, Item 466, translated in 30 STATUTES & DECISIONS 86, 88-89 (July-Aug. 1994) (alteration in original).

²⁴⁴ *Id.* at 89.

both of constitutional impasse and of the need to have a new constitution.

At this point, however, the judges of the Court split in public. Justice Ernst Ametistov, who had been publicly silent until this point, openly broke with the Court's majority. In an interview, Ametistov announced, "[t]o my mind, the chairman of the court and the judges who took his side violated the constitution even before the decision was handed down this morning."²⁴⁵ Though Zorkin had said on Monday that he spoke for the whole Court, Ametistov said he had never been consulted. Later in the week, Ametistov wrote in the journal *Kuranty* that the Court did not have jurisdiction to rule on a television broadcast and that Zorkin had violated the Constitutional Court Act by making public statements on a case before it was decided.²⁴⁶ On Thursday, another judge of the Court, Justice Tamara Morshchakova, explained her dissent from the Court's ruling on Yeltsin's television address by saying that the Court's decision had been more political than legal.²⁴⁷

With the Court openly divided, political officials on Yeltsin's side of the question joined in attacking both the Court in general and Zorkin in particular for not being impartial.²⁴⁸ Yeltsin supporters, gathered in a downtown movie theater, yelled "Down with Zorkin!" after the Deputy Prime Minister told the crowd that "[u]nfortunately, the Constitutional Court has gone into politics."²⁴⁹ Yeltsin's Justice Minister, however, stepped down in the midst of the crisis, signaling that not everyone was unified within presidential circles.²⁵⁰

Even the Western media turned on Zorkin and the Court. The *Washington Post* wrote, "Russia's Constitutional Court . . . is far from the apolitical body its name might suggest."²⁵¹ The *New York Times* described the Constitutional Court as "a young court with untested powers" that had "decided on this crucial issue without hearing any argu-

²⁴⁵ Paule Robitaille, *Dissenting Judge Rejects Court Ruling*, UPI, Mar. 23, 1993.

²⁴⁶ Ernst Ametistov, *Dissenting Opinion*, KURANTY (Moscow), Mar. 26, 1993, at 1, translated in RUSS. PRESS DIG., Mar. 26, 1993.

²⁴⁷ *Supreme Soviet Hears Criticism of Constitutional Court's Decision* (Russia TV broadcast Mar. 25, 1993), translated in BBC SUMMARY WORLD BROADCASTS, Mar. 27, 1993.

²⁴⁸ *Id.*

²⁴⁹ Richard Boudreaux, *Top Russian Court Rules Yeltsin Act Unconstitutional*, L.A. TIMES, Mar. 23, 1993, at A1.

²⁵⁰ Rodrigue, *supra* note 241, at A1.

²⁵¹ Margaret Shapiro, *Constitutional Court Plays a Political Role*, WASH. POST, Mar. 23, 1993, at A23.

ments from lawyers or having any briefs before it.”²⁵² The *Boston Globe* published an interview with Ametistov in which he claimed that his colleagues on the bench were influenced by “old Communist ideology.”²⁵³

Zorkin took to the Russian media to press his own point of view, as he had done so often before in times of crisis. In an interview with *Komsomolskaya Pravda*, he said that the Court had not demanded Yeltsin’s resignation, and that both the President and Parliament needed to work together to end the crisis.²⁵⁴ Another judge on the Court who sided with Zorkin, Justice Nikolai Vedernikov, gave an interview to the *Chicago Tribune* in which he defended the Court’s decision and declared rather graphically that “Yeltsin is urinating on democracy!”²⁵⁵

After the Court decision was announced, the Supreme Soviet started impeachment proceedings against Yeltsin by calling another emergency session of the Congress of People’s Deputies. It based its case for impeachment on the Constitutional Court decision that found Yeltsin’s Saturday night pronouncements unconstitutional. The eventual vote for impeachment, which would require two-thirds of the Congress, was likely to be close. It could not, however, be ruled out.²⁵⁶

By Wednesday of that tense week, Yeltsin showed some signs of backing down. He finally issued a formal decree to back up his Saturday television announcement. The decree called for a referendum, but did not mention the “special powers” he had claimed Saturday night.²⁵⁷ Actually, in the end, the decree did not contain any of the measures to which the Court had objected.²⁵⁸ Yeltsin then sent a memorandum to the Supreme Soviet making reasonable arguments on behalf of the referendum, and Khasbulatov refrained from making belligerent noises.²⁵⁹

²⁵² Serge Schmemmann, *Crisis in Moscow: Yeltsin and Rivals Are in a Standoff in Power Struggle*, N.Y. TIMES, Mar. 24, 1993, at A1.

²⁵³ Fred Kaplan, *Russian Judge Says Court Tilts to Right*, BOSTON GLOBE, Mar. 26, 1993, at 23.

²⁵⁴ A. Afansayev, *Valery Zorkin: “I Am a Judge, Not a Politician,”* KOMSOMOLSKAYA PRAVDA (Moscow), Mar. 24, 1993, at 1, translated in RUSS. PRESS DIG., Mar. 24, 1993.

²⁵⁵ Howard Witt, *Inside the Russian Court*, CHI. TRIB., Mar. 24, 1993, at 1.

²⁵⁶ Serge Schmemmann, *Crisis in Moscow: Compromise or No, Rivals of Yeltsin Still Seek Ouster*, N.Y. TIMES, Mar. 25, 1993, at A1.

²⁵⁷ *Id.*

²⁵⁸ Serge Schmemmann, *Speaker in Russia Now Voicing Doubt on Yeltsin Ouster*, N.Y. TIMES, Mar. 26, 1993, at A1.

²⁵⁹ *Id.*

When the Congress of People's Deputies met in an emergency session on Friday, Zorkin addressed the group. Defending the decision of the Constitutional Court to take up Yeltsin's television speech and to rule its primary elements unconstitutional before the decrees were finalized, Zorkin called on the Congress to be reasonable and to take "responsibility for the destiny of the country."²⁶⁰ He offered a ten-point program that reaffirmed constitutional principles, while listing a variety of problematic constitutional provisions, particularly those involving separation of powers and federalism. But first, Zorkin said, there should be new elections and a moratorium on constitutional amendments until after the elections could be held.²⁶¹ Khasbulatov started to back down too, and went on television Friday night to say that he "didn't summon the Congress to fire anyone."²⁶²

By the end of week, Yeltsin appeared before the Congress of People's Deputies with a resolution that spread the blame for the crisis:

Unfortunately, young statehood resulted in violations of the Constitution by the Supreme Soviet, the government, the President and the Constitutional Court. It is not just to accuse only the President. . . . All the three power branches allowed the crisis, they must be responsible for it.²⁶³

He proposed that the Supreme Soviet take into account the report that the Constitutional Court had issued just before the crisis began, the report about the state of constitutionality in Russia. Yeltsin also said that he would elaborate within the week on measures that all three branches could agree upon.²⁶⁴

What might one make of the crisis of the week of March 20, 1993? Some interpreted it as a clever device through which Yeltsin was able to determine who was really on his side and who was his enemy. Others thought it showed Yeltsin's weakness and impatience. Still others thought that Yeltsin had been merely reading aloud something his aides shoved before him that Saturday night on television.²⁶⁵ People were inclined to be forgiving.

²⁶⁰ Valery Zorkin, Chairman, Constitutional Court, Speech at the 9th Extraordinary Congress of People's Deputies, in OFFICIAL KREMLIN INT'L NEWS BROADCAST, Mar. 26, 1993.

²⁶¹ *Id.*

²⁶² Schmemmann, *supra* note 258, at A1.

²⁶³ *Yeltsin Addresses Ninth Congress*, TASS, Mar. 28, 1993.

²⁶⁴ *Id.*

²⁶⁵ Mark Frankland, *Dread Spectre of Civil War*, OBSERVER (London), Mar. 28, 1993, at 25.

Not so for Zorkin. Perhaps the most important legacy of that difficult week was that Zorkin had been baited, and he bit. One commentator said that Zorkin had appeared that week to be “on the edge of breakdown.”²⁶⁶ A “Muscovite” was quoted as saying that Zorkin had reacted “with the hysterics of an abandoned wife.”²⁶⁷ Yeltsin’s entourage was delighted. Said one Yeltsin advisor, “[w]e don’t really have a Constitutional Court anymore. It has descended to cheap politics and no longer has the right to deliver rulings.”²⁶⁸

By the end of the week, the Congress of People’s Deputies had agreed to a national referendum on whether the public had faith in Yeltsin, just as Yeltsin had wanted all along. But the proposed referendum also included the question that *Khasbulatov* had wanted to ask all along: was the public ready to hold early elections for the President and the Congress?²⁶⁹

On March 31, Yeltsin asked the Constitutional Court to rule on the constitutionality of the Congress’s attempt to impeach him the previous week. The grounds for Yeltsin’s petition? The Congress had started impeachment proceedings based on the Constitutional Court’s judgment that Yeltsin had unconstitutionally seized power through special administrative measures, when in fact he had not actually done so.²⁷⁰ Though Yeltsin appealed to the Court as if all were forgotten, his petition highlighted how ridiculous the Court appeared for having declared unconstitutional something Yeltsin was now asserting had never been real.

The polls reflected how polarized the public had become during this week of crisis and how far Zorkin’s popularity had fallen because of it. While half of those polled said they trusted Yeltsin after this episode, only two percent said they trusted Zorkin. Fully one quarter, however, said they had no trust in anyone in national leadership.²⁷¹ Some prominent politicians on Yeltsin’s side of the conflict—including presidential advisor Sergei Shakhrai and St. Petersburg

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Celestine Bohlen, *Russian Congress Agrees To Hold Referendum on the Nation’s Rule*, N.Y. TIMES, Mar. 30, 1993, at A1.

²⁷⁰ *Yeltsin Asks Constitutional Court To Examine the Legality of Attempt at Impeachment*, ITAR-TASS, Mar. 29, 1993, translated in BBC SUMMARY WORLD BROADCASTS, Mar. 31, 1993.

²⁷¹ Vassili Kononenko, *Executive Prepares Its Own Questions for Referendum*, IZVESTIA (Moscow), Mar. 31, 1993, at 1-2, translated in RUSS. PRESS DIG., Mar. 31, 1993.

Mayor Anatoly Sobchak—called for the abolition of the Court.²⁷² Even the Petersburg Memorial Society’s Human Rights Commission called on Zorkin to resign.²⁷³

At a roundtable discussion at the Russian Press Ministry, Constitutional Court justices Nikolai Vitruk, Ernst Amestistov, Tamara Morshchakova, Gadis Gadzhiev, and Boris Ebzeyev attempted to defend the institution of the Constitutional Court even though “individual Judges may be bad.” They agreed in public that Zorkin had violated the law himself on several occasions.²⁷⁴ Rumors circulated that Zorkin had been bought off to support Khasbulatov and the Supreme Soviet in the crisis by receiving three apartments from the parliamentary speaker, something Zorkin always forcefully denied.²⁷⁵ With public opinion, prominent politicians, and even his own colleagues deserting him, Zorkin was reeling from the effects of the faux emergency that he had sincerely believed was real.

Zorkin responded as usual—by holding a major press conference to defend himself and by presenting himself as the guardian of the Constitution:

The Constitutional Court is defending the President, just as it is defending parliament[arian]s, but only insofar as they remain the lawful President of Russia and the lawful Parliament of Russia. Any other way is closed to the Constitutional Court But I would like you to understand our position. . . . The unilateral withdrawal from a social contract, of constitutional compromise means that all the parties to this process become free from their pledges. There can be no doubt about what this holds in store for us. It will be an explosion, a catastrophe.²⁷⁶

²⁷² Alexander Balashov, *Judges Disagree with Their Chairman on Many Issues*, KOMMERSANT (Moscow), Apr. 7, 1993, at 12, translated in RUSS. PRESS DIG., Apr. 7, 1993.

²⁷³ Yuliya Kantor, *Memorial Society Calls for Chief Justice Resignation*, ITAR-TASS, Apr. 10, 1993.

²⁷⁴ Balashov, *supra* note 272.

²⁷⁵ Vice President Alexander Rutskoi defended Zorkin against this slander:

I know Valery Dmitriyevich Zorkin perfectly well. It is a flagrant lie that Khasbulatov gave him three flats. I visited Valery Dmitriyevich at home, he does not have three flats. He is an intellectual to the marrow of his bones. He will not kill a fly. He is a dedicated believer. I am serious about it. He went to church even when a student, and he goes to church every Sunday. He observes all the fasts. You cannot expect any nasty things from him.

Alexander Rutskoi: *“I’ve Seen a Great Deal in This World and Something in the Nether World,”* KOMSOMOLSKAYA PRAVDA (Moscow), translated in OFFICIAL KREMLIN INT’L NEWS BROADCAST, Apr. 20, 1993.

²⁷⁶ Valery Zorkin, Chairman, Russian Federation Constitutional Court, Speech at International Press Center, in OFFICIAL KREMLIN INT’L NEWS BROADCAST, Apr. 8, 1993. Note how Zorkin continually used “we” in his speeches to refer to the fact that he was

In response to questions, Zorkin replied: "If there is a unilateral attempt to destroy the Constitution, we will resist it."²⁷⁷

And he responded to a question about his own involvement in politics with his own rhetorical questions:

[W]ho has involved us in this politicized process? Have we ourselves jumped into it recklessly, as into a whirlpool, or have we realized that the sides cannot come to terms and emerge onto a peaceful and civilized road? Should we have kept silent in such a situation? Moreover, in December, if you remember, the two sides themselves appealed to us. . . . We are defending constitutional space for politics.²⁷⁸

But which Constitution? As the political debate intensified throughout 1993, the object of dispute was increasingly the Constitution itself. The existing one established Parliament as the supreme power in the Russian state; Yeltsin and his entourage eagerly wanted the President to dominate Parliament. Zorkin, perhaps surprisingly, consistently defended the idea of a presidential republic under a new Constitution,²⁷⁹ even though he was generally seen as being opposed to Yeltsin after the March crisis.

As the widely disputed referendum approached in April, the Supreme Soviet changed the ground rules for this public vote, making it much harder for Yeltsin's side to prevail. The new rules required Yeltsin to gain the support not just of half of those who voted, but half of the whole electorate, whether voting or not. The Constitutional Court decided that these new rules were unconstitutional in a decision that favored Yeltsin.²⁸⁰ When the referendum was finally held at the end of April, 59% indicated their confidence in Yeltsin, 54% approved his economic policies, 49% wanted an early presidential election, and 67% wanted an early parliamentary election. Turnout was estimated at a surprising 65.7%.²⁸¹

speaking for the Court. Whether the Court thought he was speaking for all of the judges increasingly came into question, as we will see.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ Tamara Zamayatina, *Russia Must Become a Presidential Republic—Zorkin*, ITAR-TASS, Apr. 15, 1993.

²⁸⁰ *In re* Congressional Decrees on the All-Russian Referendum et al., VED. RF, 1993, No. 18, Item 653, translated in 30 STATUTES & DECISIONS 39 (Sept.-Oct. 1994); Andrew Higgins, *Court Ruling Boosts Yeltsin's Hopes in Poll*, INDEPENDENT (London), Apr. 22, 1993, at 10.

²⁸¹ *Yeltsin Opponents Move To Discredit Vote Results*, HOUSTON CHRON., Apr. 27, 1993, at A1.

Yeltsin, feeling vindicated by the strong support in the referendum, threw down the gauntlet to Parliament, by claiming (through a spokesman) that he was prepared to “implement the will of the people in full,” a move interpreted as meaning that Yeltsin felt free to ignore Parliament and therefore the Constitution.²⁸² The irrepressible Zorkin announced that Russia was in the grips of radicalism because both sides in the constitutional crisis believed, “I come to power and destroy you.” He called for compromise between Yeltsin and Parliament in considering a new constitution.²⁸³ When Yeltsin proposed having a constitutional assembly draft a new constitution in the summer, Zorkin attacked the proposal and insisted on maintaining compliance with the methods for changing the Constitution that were specified in the existing one: either adoption by the Supreme Soviet and the Congress of People’s Deputies or adoption by a national referendum.²⁸⁴

Yeltsin ignored Zorkin’s calls to draft a new Constitution only in the way permitted under the existing constitution, and instead convened a 762-member constitutional drafting assembly in June. Though the assembly gave every appearance of being representative, bringing together Russians from all of the regions (save Chechnya) and from a wide variety of walks of life, all of the members of the constitutional assembly were in fact hand-picked by Yeltsin.²⁸⁵ When Khasbulatov tried to address the assembly, he was blocked from speaking by Yeltsin’s supporters and angrily stormed out.²⁸⁶ “We are on the road to dictatorship,” said Khasbulatov.²⁸⁷ “What we have seen is how a court crowns a king,” said Zorkin,²⁸⁸ adding that there was an “evil spirit” hovering over the constitutional assembly on the opening day.²⁸⁹ Even so, given that he had always supported presidentialism over parliamentarism in his public speeches, Zorkin then said he

²⁸² David Hearst, *Yeltsin Claims Poll Is Vote for Reform*, GUARDIAN (London), Apr. 28, 1993, at 10.

²⁸³ Nikolai Kishkin, *Valery Zorkin: “Radicalism Hinders Society,”* TRUD (Moscow), May 15, 1993, at 1, translated in RUSS. PRESS DIG., May 15, 1993.

²⁸⁴ Sergei Obukhov, *Valery Zorkin: “A Law Made in an Unconstitutional Field Will Not Lead to National Accord,”* ROSSIISKAIA GAZ., May 18, 1993, at 2, translated in RUSS. PRESS DIG., May 18, 1993.

²⁸⁵ AHDIEH, *supra* note 118, at 57-58.

²⁸⁶ Daniel Sneider, *Yeltsin Harks Back to Czars in Bid To Recast Government*, CHRISTIAN SCI. MONITOR, June 7, 1993, at 3.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ Yuri Feofanov, *Judges in Gowns and Judges in Jackets*, IZVESTIA (Moscow), June 17, 1993, at 5, translated in RUSS. PRESS DIG., June 17, 1993.

backed Yeltsin's call for a strong presidency in the new constitution, as long as it was not "dictatorial."²⁹⁰

Fed up with Zorkin's public commentaries from the March crisis onward, however, other constitutional judges rebelled and Yeltsin, seeing Zorkin weakened, moved in to discredit him. Justice Nikolai Vitruk called upon Zorkin to resign, saying that if Zorkin did not, Vitruk would leave the Court himself.²⁹¹ Intensifying public impressions of the split within the Court, a document was leaked from the Kremlin during this period, indicating that the President's office was handicapping its chances with the Court by assessing the political leanings of the individual judges and perhaps leaning on the judges themselves.²⁹² Yeltsin blocked Zorkin's entrance to his state-provided summer house (*dacha*) and took away his privilege to use a state-provided car.²⁹³ Yeltsin even ordered the government security service to stop guarding the Court.²⁹⁴ Hints circulated in the Russian media that "compromising material about most of the judges" existed.²⁹⁵ Rumors that the Kremlin was trying to stage a "palace revolution" by replacing Zorkin as President of the Court with Tamara Morshchakova, one of the judges who had supported Yeltsin in the March 20 crisis, were persistent.²⁹⁶ But nothing happened. In despair, Justice Anatoly Kononov told *Megapolis-Express*: "The Court has lost its juridical men-

²⁹⁰ *Court Chief Gives Yeltsin an Unexpected Boost*, L.A. TIMES, June 8, 1993, at A8.

²⁹¹ Guy Chazan, *Russian Chief Justice, Parliament Speaker Attacked by Colleagues*, UPI, June 8, 1993.

²⁹² A transcript of a conversation allegedly held among Yeltsin's advisors in late April was conveniently leaked to *Pravda* for publication on June 10. It said, mentioning by name a number of justices on the court:

[Mikhail] Barsukov [Yeltsin confidante]: "Opposition to Zorkin on the Court is growing. We can count on Oleinik. Kononov should be monitored, although he is a leftist. Support the Zorkin-Vitruk confrontation. Think about Seleznev."

[Sergei] Filatov [Yeltsin's chief of staff]: "I met with Ametistov. He is ours. Morshchakova is wavering. As for Kononov, he is with us."

Anna Ostapchuk, *The Judicial Shrine May Be Turning into a Party Cell*, NEZAVISIMAYA GAZ. (Moscow), June 16, 1993, at 1, translated in *What Does Constitutional Court's Split Mean?*, CURRENT DIG. POST-SOVIET PRESS, July 14, 1993, at 13, 15.

²⁹³ Guy Chazan, *Yeltsin Boots Top Judge out of His Dacha*, UPI, June 11, 1993.

²⁹⁴ *Valery Zorkin Prevented from Quiet Life and Work*, VECHERNYAYA MOSKVA (Moscow), June 11, 1993, at 1, translated in RUSS. PRESS DIG., June 11, 1993.

²⁹⁵ Vladimir Orlov, *An Open Finale to the Drama on Ilyinka Street*, MOSKOVSKIYE NOVOSTI (Moscow), June 20, 1993, at A9, translated in *What Does Constitutional Court's Split Mean?*, *supra* note 292, at 14. Ilyinka Street is the address of the Constitutional Court.

²⁹⁶ Vladimir Orlov, *President vs Parliament: Last Battle Tactics*, MOSCOW NEWS, Aug. 20, 1993, at 34.

tality. Under the circumstances, the best thing for all of us to do would be to tender our resignations at once.”²⁹⁷

Throughout the summer as the constitutional assembly worked toward a new constitution, however, the Constitutional Court stayed in place and continued its work of reviewing constitutional petitions under the existing constitution. Members of the Court, and the Court as a whole, submitted their thoughts to the assembly for its consideration.²⁹⁸ No one resigned. Zorkin continued to fend off suggestions that the public split within the Court, and a number of dissents in its public decisions, meant that the Court was no longer operating on the basis of law:

I hope you would agree with me that the words politics and law are not divided by an impenetrable wall. What is law but a means, a form of life, including political life[?] . . . [T]he Supreme Court of the United States of America sometimes passes its decisions on a four-by-five pattern—and no one says that the Supreme Court has split. . . . I think we should all get accustomed to democratic practices.²⁹⁹

But to the charge that he had changed his own mind frequently (something that, as we have seen, is hard to sustain, given that he supported presidentialism, constitutional modification under the existing constitutional procedures, and compromise between the political factions throughout the crisis), he nonetheless damningly said, “I think that there is something to be said for a chameleon because he can survive in the environment in which he lives. If he didn’t do it, he wouldn’t last a day.”³⁰⁰

When a new draft Constitution featuring strong presidential powers came to a vote before the constitutional assembly in July, Zorkin indicated his support,³⁰¹ saying that the proposal was “within the civilized framework of all constitutions.”³⁰² Though he thought that the presidential powers were “excessive” because they allowed the President to dissolve Parliament, and though he indicated that the pro-

²⁹⁷ Tatiana Borovik, *Constitutional Court: Crack Is Not Wide, So Far*, MEGAPOLIS-EXPRESS, June 16, 1993, at 2, translated in RUSS. PRESS DIG., June 16, 1993.

²⁹⁸ Valery Zorkin, Chairman, Constitutional Court, Press-Lunch, in OFFICIAL KREMLIN INT’L NEWS BROADCAST, June 28, 1993.

²⁹⁹ *Id.* (some ellipses in original).

³⁰⁰ *Id.*

³⁰¹ Lyudmila Alexandrova, *Chief Justice Votes for Constitution, Diamond Producer Against*, ITAR-TASS, July 12, 1993.

³⁰² Valery Zorkin: *Figure 15 Should Stay Sacred*, SEGODNYA (Russia), July 16, 1993, at 1, translated in RUSS. PRESS DIG., July 16, 1993.

posal to increase the number of constitutional judges from fifteen to eighteen was not a good idea, on balance he approved the draft.³⁰³

Throughout the summer of 1993, then, Zorkin was acting in a more conciliatory fashion by participating in the constitutional drafting process and generally supporting what Yeltsin's followers wanted. But Zorkin's popularity was still low. (Then again, the Russian public viewed few politicians with any respect during this time.) In a poll taken in August 1993, only 20% said they would vote for Yeltsin for President if elections were held that day; he was the most popular politician on the list. A miniscule 1% supported Zorkin for that position.³⁰⁴

Interviewed in August 1993, however, a hint of paranoia crept into Zorkin's reflections on his constitutional role: "There are things I cannot write even in my diary. . . . Let me express this the way Schiller did: the customs officials are rummaging in my luggage, but all my secrets are in my head."³⁰⁵ Perhaps Zorkin was prescient, because in early September, right after Zorkin left the *dacha* that had been returned to him during the period of conciliation over the summer, Yeltsin ordered presidential security guards to blockade Zorkin's *dacha* again.³⁰⁶ When Zorkin was finally allowed to return to recover his possessions from the *dacha*, he found his cat dead—killed by a bullet wound.³⁰⁷

As it turned out, the Russian Parliament itself was the next fatality. On Wednesday, September 21, Yeltsin issued a decree that seized all state power, dissolved Parliament and announced new elections to be held for Parliament in December.³⁰⁸ The problem was that the Constitution then in place did not give the President the legal ability to dissolve Parliament. Yeltsin acknowledged as much in his official decree, but argued that the April referendum had "supreme judicial power" and permitted him to take this step.³⁰⁹ Parliament refused to

³⁰³ *Id.*

³⁰⁴ Andrei Suldin, *Yeltsin Remains Most Popular Politician in Russia—Poll*, ITAR-TASS, Aug. 5, 1993.

³⁰⁵ Vladimir Orlov, *Valery Zorkin: A Year and a Half in Search of Objectivity*, MOSCOW NEWS, Aug. 13, 1993, at 33.

³⁰⁶ Helen Womack, *Judge Accuses "Spiteful" Yeltsin*, INDEPENDENT (London), Sept. 10, 1993, at 11.

³⁰⁷ Olivia Ward, *Yeltsin Fires Another Salvo at Foes*, TORONTO STAR, Sept. 19, 1993, at F3.

³⁰⁸ Margaret Shapiro, *Yeltsin Dissolves Parliament, Orders New Vote*, WASH. POST, Sept. 22, 1993, at A1.

³⁰⁹ *Id.*

be dissolved and promptly stripped Yeltsin of his powers. Parliament instead swore in Vice President Rutskoi in Yeltsin's place.³¹⁰ There were rumors of troop movements in the city.

The Constitutional Court went into emergency session, as they had done for the March crisis. The judges decided after a three-hour session by a vote of ten to four that Yeltsin had violated the Constitution by dissolving the Parliament.³¹¹ This time, however, in contrast with the March emergency decision, the Constitutional Court found that the dissolution of Parliament constituted *legal* grounds for Yeltsin's impeachment.³¹² As usual, it was Valerii Zorkin who was out in front, speaking for the Court and making the announcement about the Court's decision on television. Zorkin's announcement was published along with the Court's official finding:

The highest leadership of the country has resolutely moved to a point beyond which lies the loss of control over the development of events, the paralysis of power, chaos, and anarchy on the territory of an enormous country, [which remains] as formerly a nuclear superpower. Such a condition will not last long and will inevitably lead to a dictatorship of one side or another, with all its attendant attributes.³¹³

Zorkin then proposed a four-point plan to deal with the crisis: First, the Congress of People's Deputies should pass a resolution permitting early concurrent elections for both the presidency and Parliament. Second, Yeltsin should be permitted to retain control over the government, but the Congress of People's Deputies should supervise the cabinet. Third, the Supreme Soviet should suspend work on its draft constitution and ensure merely that the elections were legally carried out. Fourth:

The Constitutional Court of the Russian Federation shall be recognized in the capacity of a guarantor of the achieved agreement, ceasing at the given stage the function of middleman in the midst of political strife,

³¹⁰ *Id.*; Steven Erlanger, *Showdown in Moscow; Yeltsin's Gamble: Force the Issue Now*, N.Y. TIMES, Sept. 22, 1993, at A19.

³¹¹ *What the Constitutional Court Has Decided*, ROSSIISKIE VESTI, Sept. 23, 1993, at 1, translated in 30 STATUTES & DECISIONS 35, 35 (Nov.-Dec. 1994).

³¹² Given the situation of legal fluidity, it is significant that the Court published its conclusions not in the parliamentary newspaper, which had been its practice, but instead in one of the leading newspapers. *In re* Edict No. 1400, On Staged Constitutional Reform in the Russian Federation et al., ROSSIISKAYA GAZ., Sept. 23, 1993, at 2, translated in 30 STATUTES & DECISIONS 33, 33 (Nov.-Dec. 1994).

³¹³ *The Constitutional Crisis and Possible Measures To Overcome It*, ROSSIISKAIA GAZ., Sept. 23, 1993, at 1, translated in 30 STATUTES & DECISIONS 34, 34 (Nov.-Dec. 1994) (brackets in original).

and shall continue to work in its normal regime, concentrating its attention on the defense of the constitutional rights of citizens.³¹⁴

The decision of the Constitutional Court that Yeltsin had violated the Constitution and could therefore be impeached prompted an angry dissent from Justice Amestistov, who had sided with Yeltsin ever since the Court started to split into factions. He slammed the majority for deciding prematurely, outside of the regular Court procedure, on the constitutionality of Yeltsin's decree, and he supported Yeltsin's view that the President was empowered to act simply on the basis of the April referendum:

From the preamble to the Edict, it follows that it was passed with the goals of the execution of the will of the Russian people expressed in the referendum of 25 April 1993, which is grossly ignored by the Congress of People's Deputies and the Supreme Soviet of the Russian Federation. In the Edict are brought forth multiple facts of serious violations of this will. Moreover, it is necessary to take account of part 2 of Article 2 of the Constitution of the Russian Federation, in accordance with which the people shall exercise state power not only through the soviets of people's deputies, but also directly, that is, through referendum. . . . This, in our opinion, means that the decision of the referendum concerning any concrete question has greater legal force than other laws, and even than the Constitution of the Russian Federation, as precisely this decision is the direct and highest expression of rule by the people.³¹⁵

With the Court visibly split, Zorkin announced that he did not intend to mediate between the President and Parliament in this new fight.³¹⁶ He did continue, however, to press his four-point plan for solving the crisis. Khasbulatov convened a press conference and announced his support for Zorkin's ideas.³¹⁷ Yeltsin, on the other hand, refused to talk to Parliament and ignored Zorkin's proposal. Noting that after his decree, Parliament had ceased to exist, Yeltsin rejected the suggestion of a "dialogue" with the other side: "Can't be, won't be and needn't be."³¹⁸

³¹⁴ *Id.* at 34-35.

³¹⁵ Separate Opinion of Judge Ernst Amestistov, ROSSIISKIE VESTI, Sept. 25, 1993, at 1, translated in 30 STATUTES & DECISIONS 35, 38-39 (Nov.-Dec. 1994).

³¹⁶ Guy Chazan, *Judge Calls for Early Elections To Solve Russia's Crisis*, UPI, Sept. 22, 1993.

³¹⁷ Ruslan Khasbulatov, Chairman, Supreme Soviet, Press Conference, in OFFICIAL KREMLIN INT'L NEWS BROADCAST, Sept. 23, 1993.

³¹⁸ Michael Hiltzik, *Yeltsin Retains Military and Cabinet Support*, L.A. TIMES, Sept. 23, 1993, at A1.

With the United States and European governments lining up behind Yeltsin, the military steadfastly remaining neutral, the central bank supporting Yeltsin, and Yeltsin's cabinet largely remaining intact, the efforts of Khasbulatov and Parliament were doomed to futility.³¹⁹ Yeltsin used the loyalty of those in the finance ministry to cut off the salaries of parliamentary deputies.³²⁰ Parliament refused to disband and the deputies blockaded themselves in their offices, while their supporters gathered outside the White House. Parliament acted as though it were under siege, and with troops loyal to Yeltsin ringing the Parliament building, a siege seemed imminent.³²¹

Zorkin, appearing before the blockaded Parliament, pleaded with the deputies to accept Yeltsin's proposal for an election. "Let us think about Russia," he said. "I do not want to discuss here what is right and what is wrong."³²² Of course, this was not an easy position for Zorkin, given that he had written the Court decision that provided the grounds for Parliament to impeach the President whom Zorkin was now urging them to support. Asked about the consistency of his statements, all Zorkin could do was admit: "You have caught me in a contradiction. But note that the contradiction is born of a contradictory situation whose participants are located in a real so-called parallel world."³²³ Zorkin pressed on.

The crisis intensified. As one foreign correspondent noted, "Outside the Parliament building, the presidential grip is tightening. Inside, they may be on the verge of eating their young."³²⁴ Riot police circled the White House. The electricity was cut off. Vice President Rutskoi appeared on the balcony of the White House to talk to the supporters of Parliament who were increasingly agitated outside. When the supporters demanded weapons, Rutskoi announced, "We can win only one way—not with submachine guns, truncheons or fists. We can win only with law."³²⁵

³¹⁹ Fred Kaplan, *Yeltsin Stays in Control; Foes' Decrees Are Ignored*, BOSTON GLOBE, Sept. 23, 1993, at 1.

³²⁰ Richard Boudreaux & Sonni Efron, *Yeltsin Urges Early Vote for Russian Presidency*, L.A. TIMES, Sept. 24, 1993, at A1.

³²¹ Richard Boudreaux, *In Barricaded Russian Parliament: A Dramatic Plea*, L.A. TIMES, Sept. 25, 1993, at A1.

³²² *Id.*

³²³ Sonni Efron, *Game of "Chicken" Has Russian Parliament Nervous*, L.A. TIMES, Sept. 25, 1993, at A1.

³²⁴ *Id.*

³²⁵ *Id.*

For his part, Zorkin felt pulled back into the role of mediator. Shuttleing between Rutskoi in the Parliament building and Mikhail Poltaranin, a close aide to Yeltsin, Zorkin attempted to convince all sides to return to the point just before things had run off the rails. He called on Yeltsin to restore Parliament and called on Parliament to consent to concurrent elections for the presidency and Parliament in December.³²⁶ On Tuesday, September 28, Zorkin made a public statement announcing the Constitutional Court's intention (by this time, perhaps only his own private intention) to take up the question of the constitutionality of acts since Yeltsin's decree dissolving Parliament:

The Russian political and social situation continues to deteriorate. Fundamentals of the constitutional system and federal relations are being destroyed. There is a real threat of large-scale violations of human rights. Both sides to the conflict refuse from searching for a compromise and do not exclude a possibility of violence.³²⁷

Zorkin demanded that Yeltsin suspend his emergency decree, that Parliament repeal everything it had done since the emergency was declared, that force not be used by either side, that rights not be limited in any way, and that a high-level conference immediately be convened with the major players to determine how to go forward to a joint election of the President and Parliament.³²⁸ Yeltsin, clearly leading in the streets and in controlling the government, refused Zorkin's compromise. When Yeltsin refused, so did Parliament.³²⁹

In the meantime, the Constitutional Court continued quite publicly to fall apart. Some of the judges openly claimed that they would refuse to sit with the Court as long as it was engaged in politics. Justice Vitruk finally submitted his resignation.³³⁰ On September 29, the Constitutional Court—at least, all of the judges who were still formally on the Court—held a press conference. Zorkin spoke first:

[J]udging from the mood in the Constitutional Court, we will discharge the duties under the Constitution. Individual judges of course, are at liberty to resign or otherwise make their dissenting position known. But if you want my personal opinion, I think such behavior is at variance with

³²⁶ John Lloyd, *Parliament Rebellion Starts To Fade*, FIN. TIMES, Sept. 27, 1993, at 4.

³²⁷ *Constitutional Court Chairman—Statement*, TASS, Sept. 28, 1993.

³²⁸ *Id.*

³²⁹ *Yeltsin Opposes New Move for Simultaneous Elections*, HOUS. CHRON., Sept. 28, 1993, at A8.

³³⁰ David Hearst, *Anti-Yeltsin Protestors Take to Moscow's Streets*, GUARDIAN (London), Sept. 29, 1993, at 8.

the duties of judges under the law on the Constitutional Court. I hope that the situation will be rectified and everybody will understand that not only the decisions of the Constitutional Court but decisions of executive and legislative branches of power must be complied with. The important thing is that these decisions should be within the Constitution. . . . [T]he conflict should not be resolved with the help of barbed wire, but in the constitutional way.³³¹

But Justice Morshchakova took issue with Zorkin's statement that the Court should proceed as it was. Morshchakova, who is fluent in German and an expert on German constitutional law, pressed a comparison between Germany and Russia:

I would like to ask a counter question, a rhetorical question, can you imagine a situation when you will go to the Constitutional Court of West Germany asking about the political prospects or the prospects for political development? I think the questions now being raised in our Constitutional Court are diverting the Constitutional Court from its direct duties, even in this difficult and unusual situation. The Constitutional Court is a body that provides legal protection, not an instrument for the resolution of political conflicts.³³²

Justice Ametistov agreed with Morshchakova:

[T]he law on the Constitutional Court and the Constitution inasmuch as it applies to the activities of the Constitutional Court categorically forbids any forms of political activities of the court. This is an issue that arose a year ago and it is precisely what made the work of the Constitutional Court much more difficult and this is what prompted me and not only me, but also other judges to declare yesterday that we will refrain from taking part in the court sessions.³³³

Zorkin attempted a recovery to the audience gathered at the press conference: "Ladies and Gentlemen, as you see democracy prevails in the Constitutional Court."³³⁴

With this public expression of disagreement within the Court, however, Yeltsin's forces were quick to side with the Court's dissenters. Sergei Shakhrai, Yeltsin's advisor, built on this impression of Zorkin as a political activist. "I have the impression that the Constitutional Court is no longer acting as a court and has transformed itself into a political organ," he said in a public speech. "In this situation, the

³³¹ Russian Federation Constitutional Court, Press Conference, in OFFICIAL KREMLIN INT'L NEWS BROADCAST, Sept. 29, 1993.

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

Constitutional Court can no longer be trusted as a Court which is to be respected and whose decisions are mandatory. Regrettably, they have been destroying their own reputation."³³⁵ Yeltsin aide Gennady Burbulis piled on:

I am against any persecution of Zorkin as a citizen, but I intend to make every effort to ensure that Society recognizes the harmful and sinister nature of that man, who has lost any possibility to represent the law and who, regrettably, can no longer be viewed as a more or less sensible figure in our life.³³⁶

In the meantime, tension swelled in the streets. A scuffle between pro-Parliament demonstrators and the police erupted. The police gave the defenders of the White House one day to surrender or face attack.³³⁷ When the attack did not come, tension escalated even further.

There were rumors that four of the constitutional justices had resigned.³³⁸ A statement from the Court said that "truant" judges might face suspension.³³⁹ Responding to restlessness from Russia's regions, the Constitutional Court welcomed to Moscow and to the court building itself the representatives of sixty-two of Russia's eighty-nine regions for a meeting to form an alternative Parliament—a Council of Federation Subjects.³⁴⁰ Zorkin defended the Court's action in helping to coordinate Russia's regions, expressing his worry that the country could slide into civil war without a new reconfiguration of the regions.³⁴¹ The Court was no longer above the conflict; it had sunk down into the middle of it.

The Court continued to crumble. The remaining judges voted to suspend justices Ametistov, Vitruk, and Kononov. The first two were suspended for their refusal to take part in Court sessions and the latter for "health reasons." But it was unclear just what the suspension meant. According to Justice Morshchakova, the decision was made to enable the Court to have a quorum for its actions—for which four-

³³⁵ Sergei Shakhrai, Chief of Staff, Russian Federation President, Speech, in OFFICIAL KREMLIN INT'L NEWS BROADCAST, Sept. 29, 1993.

³³⁶ Gennady Burbulis, Press Conference, in OFFICIAL KREMLIN INT'L NEWS BROADCAST, Sept. 30, 1993.

³³⁷ Fred Kaplan, *Yeltsin Turns Up Pressure on Foes*, BOSTON GLOBE, Sept. 29, 1993, at 2.

³³⁸ *Id.*

³³⁹ Sonni Efron, *Foes of Yeltsin Get Ultimatum*, L.A. TIMES, Sept. 30, 1993, at A1.

³⁴⁰ Vladislav Dorofeyev, *Regions Establish Own Body of Federal Power*, KOMMERSANT (Moscow), Oct. 1, 1993, at 3, translated in RUSS. PRESS DIG., Oct. 1, 1993.

³⁴¹ Valentin Logunov, *What Is Needed Is Goodwill*, PRAVDA (Moscow), Oct. 1, 1993, at 1, translated in RUSS. PRESS DIG., Oct. 1, 1993.

fifths of the sitting judges would be required.³⁴² If some non-participating judges were suspended, they no longer counted as “sitting” for the purposes of setting the quorum. Ironically, the Court could therefore still meet and make decisions, even though the suspended judges were boycotting the Court proceedings precisely to prevent the Court from having a quorum.

But time ran out—not only for the Court, but also for Parliament. On Sunday, October 3, Rutskoi, still holed up in the White House, directed bands of parliamentary supporters to take over the office of the Moscow mayor and the Ostankino television tower. Armed demonstrators followed his command, and a pitched battle raged at the television tower when Yeltsin’s troops opened fire on the demonstrators. The demonstrators shot back. Troops moved through the city; gunfire was heard in many areas. As smoke rose over Moscow, there was confusion about who was fighting where, whether the troops stayed with Yeltsin or defected to the side of the demonstrators, and what was happening in the White House.³⁴³

On Monday morning, October 4, at 7 a.m., Yeltsin ordered his troops and tanks to attack the White House itself. Crowds of Muscovites watching from nearby bridges and television audiences all over the world were eyewitnesses as tanks fired directly into the Parliament building. Rutskoi and Khasbulatov stayed in the White House, hoping that Russians would rise to their defense. But there was no uprising. In the panic, Rutskoi called Zorkin and pleaded for help: “They are murderers. They are shooting point-blank, crushing people with tanks. If you are a real Christian, you have to do something.”³⁴⁴ Though Rutskoi must have thought he was speaking confidentially to Zorkin, in fact, the phone call was broadcast live over the *Ekho Moskvy* radio station. While Zorkin’s replies were inaudible, Rutskoi could be clearly heard in a panic shouting into the phone, “They won’t let us

³⁴² Alexander Balashov, *Three Constitutional Court Judges Suspended*, KOMMERSANT (Moscow), Oct. 1, 1993, at 3, translated in RUSS. PRESS DIG., Oct. 1, 1993.

³⁴³ Detailed accounts of that first crucial day can be found in Margaret Shapiro & Fred Hiatt, *Troops Move in To Put Down Uprising After Yeltsin Foes Rampage in Moscow*, WASH. POST, Oct. 4, 1993, at A1; Sonni Efron, *Yeltsin Calls in Troops After His Foes Rampage in Moscow and Rout Police*, L.A. TIMES, Oct. 4, 1993, at A1.

³⁴⁴ Lee Hockstader, *Under Fire, Hard-Liners Watch as Crusade Crumbles*, WASH. POST, Oct. 5, 1993, at A29.

out of here alive. I beg you, call the embassies. . . . I implore you, Valera [Zorkin's nickname], you understand."³⁴⁵

But at this point, there was nothing either Zorkin or the Constitutional Court could do. As Zorkin told the *Moscow News* at the time, "We have no weapons, we cannot put up any resistance. . . . We are lawyers."³⁴⁶

By mid-afternoon on Monday, Rutskoi and Khasbulatov had surrendered, along with the other parliamentarians in the building. They were taken into custody. Around the city, the death toll was mounting as bodies of demonstrators and bodies of police were collected. At least 150 people died that day fighting at the television tower and at the White House.³⁴⁷

Back at the Constitutional Court, an open rebellion broke out against Zorkin. Four of the justices—Vitruk, Oleinik, Morshchakova, and Ametistov—called for Zorkin's resignation. Vitruk gave a public statement in which he announced that "many judges" could not work with Zorkin and so "we are breaking up the Court as a collective democratic body."³⁴⁸ Morshchakova noted that the Constitutional Court Act prevents any judge from engaging in politics, and "therefore, [Zorkin] may no longer continue not only as the chief justice, but also as a judge of the Constitutional Court."³⁴⁹ Oleinik said that Zorkin "has no right, even a moral one, to be a Constitutional Court member."³⁵⁰ Justice Nikolai Seleznev and the Court's General Secretary, Yuri Rutkin, also supported the demand for Zorkin to resign.³⁵¹ Only Justice Gadis Gadzhiev publicly supported Zorkin, saying that his resignation would be merely a "good beginning for a stage-by-stage break-up of the Constitutional Court," though apparently eight of the other judges were also privately on Zorkin's side.³⁵² Yeltsin's chief of

³⁴⁵ A. Rutskoi to V. Zorkin: "Valera, Call the Embassies," IZVESTIA (Moscow), Oct. 7, 1993, at 3, translated in Rutskoi et al.: *From Bravado to Surrender*, CURRENT DIG. POST-SOVIET PRESS, Nov. 3, 1993, at 6.

³⁴⁶ Vladimir Orlov, *Zorkin Made Redundant*, MOSCOW NEWS, Oct. 15, 1993 (ellipsis in original).

³⁴⁷ Justin Burke, *In Name of Law and Order, Yeltsin Crushes Opposition*, CHRISTIAN SCI. MONITOR, Oct. 7, 1993, at 1.

³⁴⁸ Igor Belsky, *Four Judges Demand Constitutional Court Chief Resignation*, ITAR-TASS, Oct. 6, 1993.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² Anna Ostapchuk, *Constitutional Court: Crisis Inside and Outside*, NEZAVISIMAYA GAZ., Oct. 7, 1993, at 1, translated in RUSS. PRESS DIG., Oct. 7, 1993.

staff, Sergei Filatov, called Zorkin to say that legal proceedings would be instituted against him for “creating a legal basis for the extremist actions” if he did not resign.³⁵³ For his part, Zorkin was briefly hospitalized as his colleagues demanded his departure.³⁵⁴

On Wednesday, October 6, Zorkin resigned his position as President of the Constitutional Court.³⁵⁵ He did not, however, resign his position as a judge.

Yeltsin took to the television and denounced his opponents, blaming them for the violence. In that group, Yeltsin prominently included Zorkin.³⁵⁶

With the Court on the ropes and its justices in open rebellion against their former President, Yeltsin issued a decree on October 7, 1993, closing the Constitutional Court.³⁵⁷ In this decree, Yeltsin blamed the Court itself for the crisis:

Twice during 1993, the Constitutional Court of the Russian Federation has placed the country on the edge of civil war with its precipitous actions and decisions. But when the threat of civil war became real, the Constitutional Court failed to act. . . . The Constitutional Court of the Russian Federation has turned from a body of constitutional justice into a weapon of political struggle representing an exceptional danger for the state.³⁵⁸

Yeltsin suspended the activity of the Court “until the passage of a new Constitution of the Russian Federation,” opened the question of what institution would be best able to preserve constitutionality in Russia (thereby suggesting that the Constitutional Court might be abolished). He also turned the remains of the Court over to the care of a body called the Department for the Protection of the Highest Bodies of Judicial Power, in which the chair of the department was to be appointed by the minister of security.³⁵⁹

The judges who had backed Yeltsin all along were obviously not pleased by this move. Both Vitruk and Morshchakova spoke out against the closure of the Court, though both noted that they could

³⁵³ *Id.*

³⁵⁴ Belsky, *supra* note 348.

³⁵⁵ Jeff Berliner, *Russia's Top Judge Quits*, UPI, Oct. 6, 1993.

³⁵⁶ *Id.*

³⁵⁷ President of the Russian Federation, Edict No. 1612, On the Constitutional Court of the Russian Federation (Oct. 7, 1993), COLLECTION OF ACTS OF THE PRESIDENT AND THE GOVERNMENT OF THE RUSSIAN FEDERATION (SAPP), 1993, No. 41, Item 3921, *translated in* 30 STATUTES & DECISIONS 40, 40 (Nov.-Dec. 1994).

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 41.

hardly blame Yeltsin for doing it. When it finally dawned on this group of judges that the President could now do anything he wanted, one of the judges, Nikolai Vedernikov, explained that “the president is [now] effectively without control.”³⁶⁰ Zorkin, who understood this all along, despaired, “A new leaf is being turned over in Russian history with the army capable of becoming the next collective head of state.”³⁶¹

The press, which had largely been supportive of Zorkin as he had attempted to mediate over that last difficult year of the first Constitutional Court, came down on him hard, some with baseless accusations. A headline in the *Rossiiskiy Vestnik* proclaimed “Zorkin Handed Out Firearms.”³⁶² In an astonishing rewriting of history, Zorkin’s bias was now evident going back to the days of the Communist Party trial, since he was now retroactively seen as unduly sympathetic to the Communists.³⁶³ The Constitutional Court “stopped paying attention to the increasing number of Parliament’s resolutions which ran counter to the constitution,” said *Rossiiskiy Vestnik*,³⁶⁴ against the evidence. Zorkin was even accused of having falsified the results of the voting in the Constitutional Court decision that declared Yeltsin’s March state of emergency proclamation unconstitutional,³⁶⁵ though no such charges had been made at the time.

Zorkin, now sidelined at home with high blood pressure, worried about the “terrible legal nihilism” running through the last thousand years of Russian history.³⁶⁶ He gave interviews to the press explaining his side of the story in those early October days.³⁶⁷ When the new constitutional draft finally appeared and Yeltsin announced it would be voted on in a referendum in December, Zorkin renewed his criticism

³⁶⁰ Lena Afanasyeva, *Constitutional Court Bows to Yeltsin*, UPI, Oct. 8, 1993.

³⁶¹ Orlov Vladimir, *The Collapse of the Constitutional Court*, MOSCOW NEWS, Oct. 8, 1993.

³⁶² Boris Vladimirov, *Zorkin Handed Out Firearms*, ROSSIISKIYE VESTI, Oct. 19, 1993, at 2, translated in RUSS. PRESS DIG., Oct. 19, 1993.

³⁶³ *Id.*

³⁶⁴ *Id.* (citing an account in the *Rossiiskiy Vestnik*).

³⁶⁵ Rudolf Gladkikh, *Zorkin Falsified Voting Results, Vitruk Says*, ITAR-TASS, Nov. 6, 1993, translated in RUSS. PRESS DIG., Nov. 6, 1993.

³⁶⁶ Richard Boudreaux, *Ex-Judge Defends Role in Moscow Showdown*, L.A. TIMES, Nov. 4, 1993, at A14.

³⁶⁷ Interview by Anna Ostapchuk with Valery Zorkin, in NEZAVISIMAYA GAZ. (Moscow), Nov. 12, 1993, translated in OFFICIAL KREMLIN INT’L NEWS BROADCAST, Nov. 16, 1993; Tatyana Borovik, *Valery Zorkin: “I Made Mistakes, But I Always Sought Concord,”* MEGAPOLIS-EXPRESS (Russ.), Nov. 17, 1993, at 13, translated in RUSS. PRESS DIG., Nov. 17, 1993.

of the extremely strong powers concentrated in the President in this new Constitution. “Bureaucratic centralization will simply steamroll over the provinces,” he said.³⁶⁸ As it turned out, the new Constitution put forward for a vote in December was not exactly the Constitution that had been voted on by the constitutional assembly in the summer. It had greatly enhanced presidential powers, even over and above the extraordinary powers of the summer draft. Zorkin’s earlier objections to executive centralization found new energy in the increased executive centralization of the proposed new Constitution.

On the grounds that he had become a critic of the President’s new Constitution, Zorkin’s fellow judges voted to suspend him from his office as a constitutional judge.³⁶⁹ Zorkin intemperately lashed out against them for being “perjurers and accomplices in a state crime.”³⁷⁰ At a news conference, he said that his fellow judges were “under the thumb of a dictatorial, authoritarian regime.”³⁷¹ After all, said Zorkin, “What kind of law-governed state are we talking about when it is forbidden to criticize the constitution?”³⁷² It was small comfort to Zorkin that the remaining constitutional judges had voted to suspend Justice Viktor Luchin as well—in his case, for fraternizing with the Communist Party.³⁷³

Zorkin kept up his attack on Yeltsin’s proposed Constitution. It was a “constitution of shock therapy,” he told one group.³⁷⁴ In the *Nezavisimaya Gazeta*, he said that the new Constitution reminded him of the old communist Constitution in which the leading role of the Communist Party was defined. “But then there was a whole party. Now it is one man.”³⁷⁵ On another occasion he said, “One should not allow Russia to become a presidential banana republic.”³⁷⁶ Pessimistic

³⁶⁸ Radik Batyrskin, “There Will be No Free Elections,” Declares Ex-Chairman of Constitutional Court Valery Zorkin, *NEZAVISIMAYA GAZ.* (Moscow), Dec. 1, 1993, at 1, translated in *RUSS. PRESS DIG.*, Dec. 1, 1993.

³⁶⁹ *Former Chief Justice Lashes Out at Colleagues Who Suspended Him*, UPI, Dec. 2, 1993.

³⁷⁰ *Id.*

³⁷¹ Wendy Sloane, *Former Judge Warns of Authoritarian Rule in Russia*, *CHRISTIAN SCI. MONITOR*, Dec. 3, 1993, at 8.

³⁷² *Id.*

³⁷³ *Former Chief Justice Lashes Out at Colleagues Who Suspended Him*, *supra* note 369.

³⁷⁴ Jonathan Steele, *Sacked Judge Keeps Sights on Yeltsin*, *GUARDIAN* (London), Dec. 4, 1993, at 13.

³⁷⁵ *Id.* (quoting *NEZAVISIMAYA GAZ.* (Dec. 1, 1993))

³⁷⁶ Orlov Vladimir, *Valery Zorkin: No Longer a Judge?*, *MOSCOW NEWS*, Dec. 10, 1993.

about the new Constitution, he said to a journalist, "I have to ask the question: 'Why has God again forsaken Russia?'"³⁷⁷

Yeltsin was nothing if not confident about the outcome of the referendum that was to be held on his new Constitution. At the same time, and on the very same ballot as the question of constitutional approval, he set elections for representatives to the newly reconstructed Parliament. The December election, then, featured party lists and individual representatives jockeying for seats in a body that would only exist if the first question on the ballot were answered in a positive fashion.³⁷⁸

In any event, the new Constitution was approved, though not without question. Support for the Constitution softened in the polls on the evening of the vote. Just to make clear what he thought was at stake, Yeltsin threatened that civil war would break out if the Constitution were not approved: "The question of whether or not there is to be civil peace and tranquillity in Russia depends on what you decide."³⁷⁹ Increasing the political tension, fifty of the new political parties with candidates in the election called at the last minute for a cancellation of the constitutional referendum.³⁸⁰ But the referendum went ahead.

The ground rules of the vote required that the Constitution pass by an absolute majority of votes in an absolute majority of the population of eligible voters; in short, at least 50% voting in favor of the constitution with a turnout of at least 50% of the total electorate. But, given the controversy in the run-up to the constitutional vote, was the turnout on the day of the election really enough? In the face of doubts on this question, the Kremlin seized the moment and announced victory in the constitutional referendum almost immediately after the polls closed, despite the fact that no one at that time could tell what the official turnout had been.³⁸¹ For its part, the election

³⁷⁷ Olivia Ward, *Former Top Judge Warns of Perilous Times*, TORONTO STAR, Dec. 13, 1993, at A12.

³⁷⁸ Tamara Zamyatina, *Russia's Electoral Marathon Close to the Home-Stretch*, ITAR-TASS, Dec. 10, 1993.

³⁷⁹ *Yeltsin Addresses the Nation on Importance of Adopting New Constitution* (Ostankino Channel 1 TV broadcast and Mayak Radio broadcast Dec. 9, 1993), translated in BBC SUMMARY WORLD BROADCASTS, Dec. 11, 1993; Tony Barber, *Russian Elections: Yeltsin Warns of Civil War*, INDEPENDENT (London), Dec. 10, 1993, at 12.

³⁸⁰ *Fifty Russian Parties and Organizations Call for Cancellation of Referendum* (ITAR-TASS News Agency (World Service) radio broadcast Dec. 6, 1993), printed in BBC SUMMARY WORLD BROADCASTS, Dec. 10, 1993.

³⁸¹ *Kremlin: New Constitution Passing*, UPI, Dec. 12, 1993.

commission hesitated. In some regions, turnout did not meet the 50% threshold, and so aggregate figures had to be compiled for the whole country before the result was known.³⁸² Eventually, the election commission announced that turnout had been 53%, out of which 60% had voted for the new Constitution.³⁸³ With the active support of about one-third of the electorate, then, the Constitution squeaked into effect. While the Kremlin called attention to its success in the matter of the Constitution, it could not help but have been dismayed that, in the parliamentary voting, parties supporting Yeltsin trailed behind the quasi-fascist party led by the flamboyant Vladimir Zhirinovskiy, with the Communist Party coming in a close third.³⁸⁴

The new Constitution, perhaps surprisingly, retained the Constitutional Court, but in a move reminiscent of American President Franklin Roosevelt's court-packing plan, the new Russian Constitution added six judges to the thirteen authorized under the previous Constitution.³⁸⁵ Perhaps because of the imminent dilution of their power, the remaining judges of the frozen-in-amber Constitutional Court,³⁸⁶ realizing the threat to the independence of the Court that new Yeltsin appointments might make, hurriedly recalled their previously discredited colleagues. Both Zorkin and Luchin were given back their judicial jobs by their fellow justices.³⁸⁷ As *Izvestia* noted, "Zorkin's comeback . . . should be interpreted as an indication that the Court is ready to take an active political stand within the current balance of powers in Russia."³⁸⁸

Zorkin, perhaps true to form, immediately expressed his doubts about whether the new Constitution had in fact been legitimately ap-

³⁸² *Preliminary Results of Elections Announced in Russia*, ITAR-TASS, Dec. 13, 1993.

³⁸³ Lyudmila Yermakova, *Russia Has Adopted New Constitution—Preliminary Results*, TASS, Dec. 13, 1993.

³⁸⁴ Serge Schmemmann, *Yeltsin's Reformers Show Weakness in Russian Vote; Constitution Is Approved*, N.Y. TIMES, Dec. 13, 1993, at A1.

³⁸⁵ RUSSIAN CONSTITUTION art. 125(1).

³⁸⁶ Because the Court was merely suspended and not legally abolished, judges and their staffs continued at their work throughout the shutdown. I discovered this when I was doing research at the Constitutional Court and found records and correspondence from the period during which I had assumed that the Court was simply shuttered. When I asked, several staff members said that everyone came to work as usual during that time, though the Court issued no public decisions. It was always preparing, however, to be reopened.

³⁸⁷ Leonid Nikitinsky, *Constitutional Court in Its Former Composition Issues First Warning to President*, IZVESTIA (Moscow), Jan. 27, 1994, at 3, translated in RUSS. PRESS DIG., Jan. 27, 1994.

³⁸⁸ *Id.*

proved.³⁸⁹ Later, during the long period when the Court was still not in session because the new law regulating the Court had not yet been passed and the new judges mandated by the new Constitution had not yet been appointed, he signed a statement supporting a left-of-center political movement called "Accord in the Name of Russia." This caused his fellow judges to once again give him an ultimatum to stay out of politics or be voted off the Court.³⁹⁰ Bowing to pressure, Zorkin announced his disengagement from politics: "I am in the Constitutional Court so far, and I'm not going to leave it."³⁹¹

But the Court languished in limbo all spring, waiting for Parliament to approve a new draft law on the Constitutional Court.³⁹² The law was finally passed in summer,³⁹³ with a "Zorkin clause," providing that a Constitutional Court judge could be stripped of his powers if, when warned by his colleagues, he refused to stop engaging in activities or actions "incompatible with his office."³⁹⁴ But the limbo of the Court did not end. Yeltsin let the Court languish for another half year. Only in February 1995 were enough judges finally elected to the Court to allow it to resume its operation.³⁹⁵ By the time new judges were appointed, the Court had been closed for nearly seventeen months, and by the time the Court actually reopened for business, eighteen months had passed. The new President of the Court, elected by his fellow judges, was one of the new judges: Vladimir Tumanov.³⁹⁶ The new mandate of the Court sharply reduced the Court's discre-

³⁸⁹ Steven Erlanger, *Finance Minister Shuns Yeltsin Plea and Quits Cabinet*, N.Y. TIMES, Jan. 27, 1994, at A1.

³⁹⁰ Sergei Parkhomenko, *The Constitutional Court Has Asked Zorkin To Resign in a Good Way*, SEGODNYA (Russ.), Mar. 22, 1994, at 1, translated in RUSS. PRESS DIG., Mar. 22, 1994.

³⁹¹ Tatyana Krasnova, *Valery Zorkin: "We Must Live in Peace and Remember the Past,"* VEK (Moscow), Apr. 22, 1994, at 3, translated in RUSS. PRESS DIG., Apr. 22, 1994.

³⁹² Howard Witt, *Russia's Constitutional Court Languishes in Legislative Limbo*, J. COM., May 24, 1994, at 6A.

³⁹³ *Parliament Passes Law on Court*, UPI, June 24, 1994.

³⁹⁴ Russian Constitutional Court Act, *supra* note 24, art. 18(7); Indira Dunayeva, *Law on the Constitutional Court Adopted*, NEZAVISIMAYA GAZ. (Moscow), June 25, 1994, at 1, translated in CURRENT DIG. POST-SOVIET PRESS, July 20, 1994, at 17.

³⁹⁵ Yelena Tregubova & Sergei Parkhomenko, *Federation Council Shows Political Will*, SEGODNYA (Russ.), Feb. 8, 1995, at 1, translated in RUSS. PRESS DIG., Feb. 8, 1995. Judges on the Constitutional Court under the new Constitution are nominated by the President and approved by the Federation Council, the new upper house of Parliament.

³⁹⁶ *Russian Court Elects Chairman*, UPI, Feb. 13, 1995.

tion: the new law on the Constitutional Court no longer allowed the Court to take up cases on its own initiative.³⁹⁷

The newly reconstituted Court answered the questions raised before it with such a focus on law that broader issues of politics seemed to pass it by. In its first major decision after reconstituting itself, the Court decided, by a vote of eleven to eight, that Boris Yeltsin had committed no constitutional violation by launching the First Chechen War.³⁹⁸ Tumanov was in the majority; Zorkin dissented. Interviewed about the decision, Tumanov said that political questions were not a matter for the Court.³⁹⁹ That said, however, nearly all of the judges expressed different views in public about the opinion.⁴⁰⁰

The Chechen War case was not typical of the Second Russian Constitutional Court, however. After this case, the Court settled into a sort of routine, issuing relatively bland judgments with much law and little overt politics visible in the decisions. A bit of nostalgia set in for the First Constitutional Court. By the end of 1996, one Russian commentator was able to say:

The Constitutional Court under the chairmanship of Vladimir Tumanov has not left any significant mark on the judicial process. The last time that it attracted public attention was in the summer of 1995 when it was considering "the Chechen case." Its verdict was disappointing

In the two years of its activity under Tumanov's chairmanship the Constitutional Court has not rejected a single normative act passed by the President, Government or Federal Assembly. This means that either all Federal legislation is perfect from a constitutional stand-point or else the Court's judges read decrees put before them without taking the bands off their eyes. The latter supposition seems more likely.⁴⁰¹

³⁹⁷ Article 36 of the Russian Constitutional Court Act permits the Court to consider only cases brought to it by petition.

³⁹⁸ *In re* Edict No. 2137, On Measures for the Restoration of Constitutional Legality and Law and Order on the Territory of the Chechen Republic, ROSSIISKAYA GAZ., Aug. 11, 1995, translated in 31 STATUTES & DECISIONS 48, 51 (Sept.-Oct. 1995); Liubov Tsukanova & Dmitry Orlov, *Tumanov: The Court Is Concerned with Law Rather Than Politics*, ROSSIISKIYE VESTI, Aug. 2, 1995, at 1, translated in RUSS. PRESS DIG., Aug. 2, 1995.

³⁹⁹ Tsukanova & Orlov, *supra* note 398. When I interviewed Tumanov in spring 2003, the first thing he wanted to talk about was the Chechen War case. He wanted to make sure I understood that Yeltsin had not intervened in any way in that case, and that Tumanov had decided the case independently of any political influence. I had not asked him that question, but he volunteered that answer.

⁴⁰⁰ Aleksei Korpichnikov, *Constitutional Judges Criticize the Constitutional Court*, SE-GODNYA (Russ.), Aug. 2, 1995, at 2, translated in CURRENT DIG. POST-SOVIET PRESS, Aug. 30, 1995, at 4.

⁴⁰¹ Lev Seagull, *Court Gets out of Harm's Way*, OBSHCAYA GAZ. (Russ.), Nov. 7, 1996, at 8, translated in RUSS. PRESS DIG., Nov. 7, 1996.

For practical purposes, Zorkin disappeared from public view. Virtually all references to him in the media were to things he had done while he was the President of the Court years earlier; his current activities, even though he was still a judge on the Court, were invisible. And the same invisibility extended to the Court as a whole.

In early 1997, Marat Baglai took over as President of the Court, when age forced Justice Tumanov to step down.⁴⁰² The Baglai Court was no more active than the Tumanov Court had been. In 2000, a Western commentator summed up the Constitutional Court's accomplishments: "The 'second court,' reconstituted after 1993, has been distinguished not by ambition, but by a lack of it."⁴⁰³ Herman Schwartz, whose book on post-Communist constitutional courts was the result of much travel, many interviews, and the beneficial discipline of comparison among courts, noted that the Russian Constitutional Court seems "overly cautious substantively."⁴⁰⁴

While the Court largely disappeared from the public stage, the country as a whole went through many shocks. The August 1998 collapse of the ruble and the surprising ascent of Vladimir Putin from obscure former-KGB agent to Prime Minister to President on the eve of the millennium were just two events that rocked Russian public life. Through all of this, however, the Court went on deciding cases, taking in petitions, doing its work in relative obscurity.⁴⁰⁵

The 1993 Russian Constitution had created a presidency with few constraints on presidential power, as Zorkin and others had warned at the time it was written. With the rise of Vladimir Putin, however, the country was to get its first disciplined President. Putin had been trained as a lawyer, and he understood the boost to political power that law can give. Upon taking office, he pushed through Parliament a whole series of major legal changes: a new land law, a new criminal

⁴⁰² Andrei Kolesnikov, *The Keys from Impeachment in Reliable Hands*, SEGODNYA (Russ.), Feb. 22, 1997, at 2, translated in RUSS. PRESS DIG., Feb. 22, 1997.

⁴⁰³ John Lloyd, *Crime and Punishment: Russia Is Emerging From the Ashes of Communism as a Relatively Benign Force in the World*, NEW STATESMAN, Nov. 6, 2000.

⁴⁰⁴ HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE 159 (2000).

⁴⁰⁵ In a project I am presently working on, however, I argue that the Court was not really inactive, but simply operating under the radar of Russian national politics. Though the Court only published about twenty-five cases per year during this period, it decided another several hundred each year in a sort of epistolary jurisprudence that resulted in petitioners getting letters from the Court resolving their complaints. But since those cases were not published, no one except those working in the Court knew that all of this activity was going on throughout the reign of the Second Russian Constitutional Court.

code, a new criminal procedure code, and more. He supported an independent judiciary and ran for election on the platform of the “dictatorship of the law.”⁴⁰⁶

As it turned out, Putin was quite concerned with what the Court thought of his legislative proposals. While he did not bring cases to the Court himself, he met often with the judges and made it clear that he sought their advice.⁴⁰⁷ He was also very active in ensuring that the judges he thought were most favorable to his own position remained on the Court. Both President Baglai and Vice President Morshchakova were due to retire from the Court in 2001. They were judges Putin thought he could count on, and the Court was also reluctant to let them go because they were experienced and fair-minded. The Court proposed to Putin that the terms of the justices be extended by removing the mandatory retirement age so that all would serve life terms in office, with the idea that Putin would introduce these proposals in Parliament. While the justices were on summer holiday, however, Putin in fact introduced not only an amendment to remove the retirement age, as the judges had requested, but also an amendment to extend their still-fixed terms of office, which made life tenure impossible.⁴⁰⁸

The judges were not pleased. They had hoped that Putin would consult with them before fixing the specific forms of his proposals. It now appeared that Putin was playing favorites on the Court, having drafted a complicated proposal that just happened to have the effect of keeping Baglai and Morshchakova on the Court, while not in fact accomplishing the equalization of judicial tenure that the judges themselves had sought. The justices on the Court turned a wary eye on Baglai, whom some suspected to be part of the plot to keep him as President of the Court.⁴⁰⁹

When the bill came under debate in the Duma, its political purposes seemed so transparent that some of the deputies called it the “Law on Baglai.”⁴¹⁰ As the bill went through the protracted legislative process, seemingly neutral amendments were introduced for political reasons; the amendments would have permitted Baglai to stay, but

⁴⁰⁶ *Vladimir Putin: Dictatorship of Law Is the Only Dictatorship We Must Obey*, RIA NOVOSTI, Jan. 31, 2000.

⁴⁰⁷ I owe this account of events to intrepid court-watcher Alexei Trochev’s article, *supra* note 21, at 5.

⁴⁰⁸ *Id.* at 6-7.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 8.

would have required Morshchakova to go. The debate was complicated, involving the Duma (lower house of the Russian Parliament), the Federation Council (the upper house, consisting of regional representatives), and the office of the President. In the end, a version of the “tenure amendments” passed: the one that extended Baglai’s term, but not Morshchakova’s. Almost as an act of resistance, the Constitutional Court reelected Morshchakova as vice president of the Court, even though she only had a few months left to serve on the bench.⁴¹¹ But what of Baglai? As it turns out, his term as President of the Court was up in early 2003. The judicial tenure battles had, however, soured his colleagues on him and made them suspicious of his closeness to political factions in Putin’s entourage and in Parliament, because the judicial tenure amendments of 2001 seemed to have been passed just for him.

Voting for the presidency of the Constitutional Court is done by secret ballot of all of the judges. If there is no majority in the first round, voting goes to a second round and so on until a particular candidate has a majority of the votes.

When the vote for Constitutional Court President was held in February 2003, no one was more surprised at the result than Valerii Zorkin. In the second round of voting, by a bare minimum vote of ten votes to nine, Zorkin himself was reelected President of the Constitutional Court of the Russian Federation.⁴¹² Facing reporters, he uncharacteristically said that he was completely unprepared to answer questions. But, he said, “life goes on and everything will be normal in the Constitutional Court.”⁴¹³

Why was Zorkin elected President of the Court? How could he have returned to the position from which he had fallen so precipitously a decade before?

Some of the explanation no doubt lies in changes in the Court’s composition. Those who had been most critical of Zorkin—Ametistov, Morshchakova, and Vitruk—had all left the Court. Vitruk, in fact, had left the Court only weeks before Zorkin’s election, and

⁴¹¹ *Id.* at 7-15. As Trochev explains, the system of retirement from the Constitutional Court depends on a successor being named to fill the position. As it turns out, Putin failed to nominate a replacement for Morshchakova for some months, allowing her to stay on the bench for a full year after her mandatory retirement age. *Id.* at 13-15.

⁴¹² Natalia Panshina, *Russian Constitutional Court Elects Chairman*, TASS, Feb. 21, 2003.

⁴¹³ *Id.*

Morshchakova only the year before.⁴¹⁴ They were, as a result, no longer around to vote against him. But the rumor around the Court at the time⁴¹⁵ was that the judges wanted to show Putin that he could not play fast and loose with the tenure of judges. If Baglai had been willing to allow himself to be the beneficiary of a crass political move, the other judges were not going to let him go on to lead the Court.⁴¹⁶ And who better to stand up to authority and to hold the Court's ground than its former firebrand Valerii Zorkin?

When he finally appeared ready to speak before the media, Zorkin again appeared as the guardian of the Constitution, this time in a “non-revolutionary” situation:

I don't know how the administration assesses the Constitutional Court. I try not to follow it because my negative experience has taught me that in an ordinary situation, not in a revolutionary situation, a judge should be silent and should look only into the text of the Constitution. And considerations of expediency—political, the Kremlin administration's opinion, economic expediency—this is for politicians. The Court looks for a legal form. . . . I think we should not be guided by what pleases whom, but by what pleases the Constitution.⁴¹⁷

With the phoenix-like rise of the once and future President of the Constitutional Court, the press rediscovered that he was their favorite all along. There was even some strategic rewriting of history. “Unlike most of the key players in the 1993 power struggle,” wrote pundit Boris Kagarlitsky, “Zorkin emerged with his dignity intact.”⁴¹⁸ “No one has ever challenged the professional credentials of lawyer Valery Zorkin,” said the *Moscow News*.⁴¹⁹ “Zorkin has been brought back not because he has ‘mended his ways,’ but rather because at the initial

⁴¹⁴ Trochev, *supra* note 21, at 17-18.

⁴¹⁵ I was living in Moscow and doing research at the Constitutional Court when Zorkin was reelected. Obviously, his surprise reelection was a matter of frenzied speculation among staffers at the Court. What I report here is the result of that gossip in the halls of the Court.

⁴¹⁶ As Evgeny Kiselyov reported before his televised interview with Zorkin: “According to well-informed sources, the top interpreters of the Constitution have been feeling increasingly unhappy about the policy of the former Chairman, as a result of which, some people claim, the Constitutional Court has turned into a legal division of the President's administration.” Interview by Evgeny Kiselyov with Valerii Zorkin, Chairman, Constitutional Court, in OFFICIAL KREMLIN INT'L NEWS BROADCAST, Feb. 25, 2003.

⁴¹⁷ *Id.*

⁴¹⁸ Boris Kagarlitsky, *A Constitutional Cakewalk*, MOSCOW TIMES, Feb. 25, 2003.

⁴¹⁹ Konstantin Katanyan, *Constitutional Court Gets Old Chairman Back*, MOSCOW NEWS, Feb. 26, 2003, at 7.

and most difficult stages, he knew how to steer the ship between Scylla and Charybdis,” asserted *Vremya*.⁴²⁰ The first deputy speaker of Parliament said that Zorkin “is a man of principles who has a well-developed sense of self-respect and knows how to stand up for his own opinion.”⁴²¹ And perhaps the highest praise:

The Constitutional Court chairman is a free man subject only to the law. This can be a serious problem for the powers that be. When a high official can't be bought, he seems to be someone out of this world. Ours is a world where there is a price on everything—a court ruling, a song of praise, a government award, anything. The relations between these two worlds, which exist within a single state system, can be the subject of a fascinating study. Just watch Zorkin.⁴²²

An insightful observation indeed.

And so it came to be that on the ten-year anniversary of the events of October 1993 and on the ten-year anniversary of the new Constitution itself, Valerii Zorkin was the only official from that time still left standing in a high position of state power.

* * *

How was it, through this turbulent history, that Zorkin managed to be restored not only to the presidency of the Constitutional Court but also to the role of the guardian of the Constitution? Despite the accusations made against him, Zorkin's positions remained constant throughout the whole time he was in public view. He believed that state bodies of power had to follow the existing Constitution, that on balance a moderate presidentialist system would be better for Russia than a parliamentarist one, that conflicting political forces had to reconcile and compromise, that politics was not about the winner taking all. He also believed that separation of powers was crucial to a constitutional state, that human rights must be respected even in times of crisis, and that the job of the guardian of the Constitution was to speak constitutional truth to potentially unconstitutional power, no matter what the personal (or political) cost. His colleagues, at least those who remained on the Court in 2003, knew that.

⁴²⁰ Yury Feofanov, *Paths of the Judicial Branch*, VREMYA (Moscow), Mar. 6, 2003, at 6, translated in CURRENT DIG. POST-SOVIET PRESS, Mar. 26, 2003, at 4.

⁴²¹ Yury Stroganov, *Zorkin Is on Guard Again*, TRUD (Moscow), Feb. 26, 2003 at 2, translated in CURRENT DIG. POST-SOVIET PRESS, Mar. 26, 2003, at 3.

⁴²² Viktor Loshak, *Watch Zorkin!*, MOSCOW NEWS, July 23, 2003.

Though Zorkin was often thin-skinned, quick to personalize disputes, and not as restrained as he might have been at moments of high political tension, on balance his constitutional sensibility was strong, stable, and incorruptible. In retrospect, he seems marvelously sane given what happened to him when he was the victim of a political smear campaign waged by Yeltsin's supporters during the crisis of 1993. Quite often, as we have seen, Yeltsin's forces simply lied about what Zorkin had done, said, or believed. For example, Zorkin was not an opponent of economic reform, a person who always sided with Khasbulatov and the Communists, or someone who had benefited personally from Khasbulatov's largesse, as Yeltsin's entourage claimed. Yeltsin's forces politicized the Constitution so that every adverse decision was spun as a merely political decision for their opponents, every favorable decision was simply ignored because it did not fit the image they wanted to convey—that Zorkin was a political opportunist who had chosen sides. Yeltsin's forces consistently twisted what Zorkin said to make his recitation of what the Constitution required sound like Zorkin's personal, political platform. In fact, the Constitution of the time did say that it was Parliament, and not the President, who had the dominant power in the Russian state. During the 1993 crisis, Yeltsin's forces used every method at their disposal to rattle Zorkin personally—throwing him out of his house, taking away his car, cutting off his phone, perhaps even shooting his cat. Under these tough circumstances, Zorkin was the voice of moderation, compromise, and constitutional fidelity.

Perhaps Zorkin was too eager to speak for the Court when in fact the Court's consensus had already fallen apart. He was accused of that as well. Still, in retrospect, it is easy to exaggerate how much of the Court he lost. The Court had thirteen judges, and only four of them ever spoke out against Zorkin. The other eight stayed with him.

During Zorkin's period of political exile from 1993 to 2003, he nevertheless remained a sitting judge on a quiescent Court, where he had a reputation for being one of the most brilliant legal minds on the bench.⁴²³ When it appeared that Putin and Parliament were going to play games with judicial tenure, picking favorites and singling out certain judges for punishment, Zorkin's fellow judges knew to whom they could turn when it came time to defend the Court. They picked Zorkin. And in fact, in 2005, Parliament passed a new amendment to

⁴²³ I know this from talking to the other judges and staffers in the building. The other justice who routinely won praise for legal brilliance was Morshchakova.

the Constitutional Court Act equalizing judicial tenure so that now all judges serve life terms with a common retirement age of seventy.⁴²⁴ As of the publication of this Article, Zorkin has another seven years to go. Not in any hurry to see him leave, in February 2006, Zorkin's fellow judges reelected him to another term as President of the Constitutional Court.⁴²⁵

III. THE CONSTITUTIONAL COURT PRESIDENT AS GUARDIAN OF THE CONSTITUTION

When communism collapsed, constitutionalism stood up to take its place. Or, at least, constitutionalism offered itself as a moral ideology of the state to replace the instrumental ideology of communism. While virtually all in Hungarian public life eagerly embraced this new philosophy, the acceptance of constitutionalism in Russia was far more variable. As we have seen, it was, among state actors, only the Russian Constitutional Court that took the Constitution seriously in those early turbulent years after the Soviet Union was dismantled. In Hungary, however, virtually everyone became a constitutionalist overnight.

Even with this variation, however, the Constitutional Courts of the two countries attempted to do the same thing: to articulate what their Constitutions meant and to get the other branches of power to accept that they were bound by this understanding. In this, the Hungarian Constitutional Court largely succeeded through the 1990s, while the Russian Constitutional Court largely failed in the period we have focused on, from 1991 to 1993. But the Russian failure was less a problem of the courts than of the politicians with whom they had to work. Russian President Boris Yeltsin was constitutionally uncontrollable, and apparently without a rule-of-law bone in his body. Parliamentary Speaker Ruslan Khasbulatov was similarly impetuous, though he seemed more favorable to the Constitution perhaps because the Constitution seemed more favorable to him and to the Russian Parliament generally. By contrast, all of the major political parties and party leaders in Hungary claimed allegiance to the Hungarian Constitution and pledged to uphold the decisions of the Hungarian Constitutional Court. These were radically different contexts and starting points,

⁴²⁴ Trochev, *supra* note 21, at 1.

⁴²⁵ Yury Kolesov, *Three-Time Chairman: Valery Zorkin Remains Head of Constitutional Court*, VREMYA NOVOSTEI, Feb. 22, 2006, at 3, translated in CURRENT DIG. POST-SOVIET PRESS, Mar. 22, 2006.

and they marked both different histories and different futures of the two countries.

Although Russia and Hungary are very dissimilar countries, politically and constitutionally speaking, the first Presidents of the two Courts nonetheless had uncannily similar political trajectories. László Sólyom and Valerii Zorkin were elected Presidents by their fellow constitutional justices, and they became major public figures in the political lives of their countries because they spoke for their Courts. They were constantly in the press, explaining their Constitutions and their Constitutional Courts' decisions. In fact, each appeared to gain the political strength he had from channeling the Constitution of each country by being its spokesperson and its strongest legal ally. The Russian and Hungarian Constitutional Courts issued decisions inconvenient for all those who held political power, and did so on a regular basis. It fell to the Presidents of the respective Courts to explain what these Courts were doing. The Constitutional Court Presidents also had to cajole compliance from sometimes reluctant politicians and had to defend constitutional visions to a general public new at such things.

Both Sólyom and Zorkin had been professors leading quiet lives before they were thrust into these positions of power. And both retained the public personality of the professor in their new roles. Both were serious, knowledgeable, and patient in their detailed explanations. They professed a lack of interest in politics, and sharply distinguished the legal things they did from the political things that politicians did. They took the task of education to be central to their jobs, and they often gave what amounted to lectures in the public press to explain what their respective Constitutions required and what their respective Courts were doing.

In short, neither Sólyom nor Zorkin had the public personality of the politician. They did not make populist appeals; in fact, both generally did the opposite by explaining how public opinion was irrelevant to their tasks. They did not claim constituencies or allegiances to any part of the party system or the population; in fact, both self-consciously maintained identities as leaders above politics, as men who governed by ideas, not by political faction. They always claimed to put the Constitution, the constitutional order, and the Constitutional Court ahead of any personal ambition. In short, they had *judicial personalities*.

In addition, the power both Sólyom and Zorkin claimed was distinctly *legal* power. Speaking for their Courts, and even for their Con-

stitutions, both Sólyom and Zorkin typically referred to chapter and verse of their respective Constitutions for the authority they needed to push their respective governments toward constitutional compliance. Both the Hungarian and Russian Constitutional Courts published their decisions; in important cases, the judges—often the Presidents—even read decisions from the bench in front of the press and public. When Sólyom and Zorkin went out to “sell” a decision to the broader public or to reluctant politicians, they did so relying on the published opinions of their institutions.⁴²⁶ In their public pronouncements, they often explicitly claimed to *not* be doing anything political. They constructed the space for *legal* influence by explicitly disavowing *political* influence.

Finally, in both cases, Sólyom and Zorkin deployed a good deal of strategic constitutional aggression. Though they had been quiet professors before moving to the bench, they were pit bulls as Constitutional Court Presidents. When their Courts or their Constitutions were challenged, they attacked back, claiming the moral high ground of constitutional analysis. When they saw constitutional violations, they felt free to growl at the violators. They were never off duty and they were never inclined to react with retreat to the aggression that was launched in their direction. They were, in short, eager to defend what they saw as their territory and could be quite aggressive about doing so.

We can see that *judicial personality*, *legal power*, and *constitutional aggression* kept both Zorkin and Sólyom speaking out as guardians of their Constitutions. The politicians would not—in fact, almost surely *did not*—like what the Constitutional Courts did, but it was hard for politicians to attack the Courts as long as the Courts, their Presidents, and their justices stuck to the script in which judicial personalities used legal power in the service of constitutional aggression. Perhaps the best evidence that these were the elements holding the Courts and

⁴²⁶ In both Russia and Hungary, though, the decisions of the respective Constitutional Courts are not written in a way that the ordinary person could understand. They use extremely technical language, typically refer by article and section numbers to passages in the laws they are reviewing without reproducing the content of those sections of the law in the opinions themselves, and have a highly formulaic quality. In fact, in both Russia and Hungary, it takes several pages of reading in a typical opinion before the determined reader can even figure out what the case is about. No wonder the Presidents of both Courts feel the need to explain in ordinary language to the press what the major decisions mean!

their Presidents in place comes from what happened when Sólyom and Zorkin stopped relying on the triple strength of these three sources.

Sólyom lost his seat on the Hungarian Constitutional Court when he entered the political fray in arguing for the renewal of both his own term and the terms of his other colleagues who were due to leave the Court at the same time. As he proposed more and more desperate ways of staying on the Court, Sólyom's support evaporated, not just in Parliament but also within the Court itself. Sólyom spoke increasingly for himself, and not for the Court. He spoke on subjects that were not obviously tied to the Constitution itself. And perhaps most fatally, he spoke in what appeared to be his own self-interest and not for the good of the Constitution.

Zorkin also began his long and horrible fall from power when he stepped outside the three sources of judicial power. Appearing on the steps of the White House during the faux emergency of March 1993, he appeared to be acting as a politician, and not as a judge. Moderating between the President and Parliament throughout the spring and into the fall of 1993, Zorkin's power appeared to be anything but distinctly legal, especially when the two sides were no longer pledging to uphold the Constitution as he tried to force them into a compromise. Finally, when the rest of the Court broke from him in public, he could no longer claim to be channeling the Constitution or even the Court. And so the aggressive stance he took to keep the Constitution from falling to pieces no longer seemed like distinctly constitutional aggression, but instead something he deployed only as a personal matter.

In both cases, Sólyom and Zorkin fell from power when they ceased to look like the guardians of their Constitutions. How, then, can we explain their returns to positions of high power?

Sólyom and Zorkin were both returned to power by the actions of their colleagues and not because they had self-evidently sought power for themselves. Sólyom and Zorkin seem to have both been humbled by their experiences in leaving the Court presidencies the first time, and were instead perfectly content to wait in the wings until others thought they might be of use. In both cases, they disappeared from the public realm and made no visible effort to seek power. It is crucial to the return of each of these men that each was drafted from newfound obscurity into the positions that they did not overtly seek. Sólyom and Zorkin were, as a result, not apparently back in the game for political power, but instead were committed to maintaining the

constitutional integrity of the institutions they were called upon to lead.

In both cases, too, Sólyom and Zorkin were returned not to positions in the push and shove of ordinary politics, but to offices that had been held out as positions above politics. Zorkin, of course, returned as Court President. Sólyom returned as President of the Republic of Hungary. The presidency in Hungary, however, is a ceremonial and symbolic position, with the country's governmental policy-setting head located in the office of the Prime Minister. The President of the Republic stands for the country and its constitutional order much the same way that the President of the Court stands for the Constitution itself. Sólyom and Zorkin, then, both returned as guardians of the Constitution, each in their own way. They did not return as politicians.

Finally, both Sólyom and Zorkin returned as modest, humble, professorial, un-self-interested servants of the larger constitutional order. Sólyom's presidential campaign consisted largely of his promises to be faithful to the Constitution and its principles. Zorkin's return to the presidency of the Russian Constitutional Court came precisely when his fellow judges were eager to have someone defend the Court's constitutional independence from politics.

In short, nostalgia and principle seem to predominate in the return to power of both men. Nostalgia was invoked because those who selected them for their new positions of power chose them precisely because of the ways that they had defended their Constitutions in their previous turns in office. But principle was invoked as well, because both men are expected not to just rest on their laurels, but to be active and aggressive defenders of their Constitutions in their new roles. The return of Sólyom and Zorkin to public life signals a return of a certain form of constitutional consciousness that each man had stood for in the early years of the political transition from communism.

In constitutional systems, then, constitutions need defenders, and the person who can be the guardian of the constitution has an important and powerful role in the ongoing operation of constitutional politics. The U.S. Chief Justice may be the head of the judiciary, and the first among equals, but the U.S. Chief Justice does not generally become the primary public defender of the Constitution. Constitutional Court Presidents, as I have tried to show, get the power they do from adopting that role, not from being the central figure at the apex of a generalized judiciary. For all of his power, then, the U.S. Chief

Justice lacks a crucial capacity that gives the heads of other high courts a legal and even moral authority that the mere administrative head of the judiciary cannot match. By being the guardian of the constitution, a constitutional court president can have more constitutional clout than anyone else in the political system.