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# SEPARATION OF POWERS IN POST- COMMUNIST GOVERNMENT: A CONSTITUTIONAL CASE STUDY OF THE RUSSIAN FEDERATION

Amy J. Weisman\*

## INTRODUCTION

This comment explores the myriad of issues related to constructing and maintaining a stable, democratic, and constitutionally based government in the newly independent Russian Federation. Russia recently adopted a constitution that expresses a dedication to the separation of powers doctrine.<sup>1</sup> Although this constitution represents a significant step forward in the transition from command economy and one-party rule to market economy and democratic rule, serious violations of the accepted separation of powers doctrine exist. A thorough evaluation of these violations, and indeed, the entire governmental structure of the Russian Federation is necessary to assess its chances for a successful and peaceful transition and to suggest alternative means for achieving this goal.

This comment analyzes these constitutional provisions and suggests solutions to possible problems. Part I discusses the concept of separation of powers generally. Part II provides a summary of the history and cultural background of Russia and sets out the context in which to view

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1. See KONST. RFR [Constitution] art. 10 (Russia) (providing that "State power in the Russian Federation shall be exercised on the basis of its separation into legislative, executive and judicial branches. The bodies of legislative, executive and judicial power shall be independent from one another").

the new Constitution. Part III analyzes the constitutional provisions for each branch of government in the context of the present political situation. Finally, Part IV provides predictions for future success and suggestions for possible amendments.

## I. SEPARATION OF POWERS DOCTRINE

The separation of powers doctrine provides that distribution of powers within the government should be separated into different branches.<sup>2</sup> Although no specific references to this concept exist in the United States Constitution, the drafters deliberately structured the American system of government to separate its powers into three distinct divisions:<sup>3</sup> a legislative branch to pass laws;<sup>4</sup> an executive branch to enforce the laws;<sup>5</sup> and a judicial branch to interpret the laws.<sup>6</sup> The framers of the United States Constitution insisted on the separation because they regarded the accumulation of these powers in one person or governmental body as "the very definition of tyranny."<sup>7</sup> The drafters feared that enabling one branch or person to gain control of the passing, promulgation, and interpretation of the nation's laws would lead to abuse and oppression.<sup>8</sup> Indeed, human nature itself would create such a result if allowed to proceed without restraint.<sup>9</sup>

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2. GARY WASSERMAN, *THE BASICS OF AMERICAN POLITICS* 28-29 (4th ed. 1985).

3. *Id.* at 29.

4. U.S. CONST. art. I. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." *Id.* § 1.

5. *Id.* art. II. "The executive Power shall be vested in a President of the United States of America." *Id.* § 1.

6. *Id.* art. III. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* § 1.

7. *THE FEDERALIST* NO. 47 (James Madison), reprinted in *CLASSIC READINGS IN AMERICAN POLITICS* at 43-44 (Pietro S. Nivola & David H. Rosenbloom eds., 1986).

8. *Id.* at 45.

9. *THE FEDERALIST* NO. 51 (James Madison), reprinted in *CLASSIC READINGS IN AMERICAN POLITICS*, *supra* note 7, at 49. James Madison writes:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A depen-

Even in a system of separated power, the branches of government cannot operate in a vacuum. Simply dividing the powers likely would create a dominant legislature such as those that developed in the early American colonies.<sup>10</sup> The creation of a system of checks and balances was intended to prevent such an occurrence.<sup>11</sup> A check is the control one branch may exert over another, creating the balance of power.<sup>12</sup> The United States Constitution contains several procedures intended to bestow different interests and bases of support upon government officials, and creating obstacles to intra-governmental interference.<sup>13</sup>

Particularly important in a separation of powers system is the existence of a truly independent judiciary with the power of judicial review.<sup>14</sup> Early commentators noted that the judiciary must only pass judgment and not make active resolutions.<sup>15</sup> Judges also should retain life tenure in order to ensure their independence<sup>16</sup> and quality.<sup>17</sup>

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dence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

*Id.*

10. WASSERMAN, *supra* note 2, at 29. The legislature, as initiator of the lawmaking process, could determine whether the other branches ever exercised their powers. *Id.*

11. *Id.* at 29.

12. *Id.* at 29-30.

13. *Id.* at 30; *see, e.g.*, U.S. CONST. art. I, § 7 (stating that the President shall have legislative power to veto a bill with which he or she does not agree and that the Congress may check this power with its right to override a presidential veto by a two-thirds majority vote); U.S. CONST. art. II, § 2 (stating that the Senate shall have the executive power to confirm presidential appointments of ambassadors and Justices of the Supreme Court).

14. WASSERMAN, *supra* note 2, at 34. The concept of judicial review simply means that the judicial branch retains the power to rule acts of federal, state, and local governments unconstitutional. *Id.* It is not specifically mentioned in the United States Constitution but has been an accepted doctrine in American government for nearly 200 years. *See generally* *Marbury v. Madison*, 5 U.S. 137 (1803) (holding for the first time that the Supreme Court possesses the power to determine the constitutionality of acts of Congress and that this power is implicit in the Constitution).

15. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) *reprinted in* CLASSIC READINGS IN AMERICAN POLITICS, *supra* note 7, at 514 (commenting that the judiciary has "neither FORCE nor WILL but merely judgment").

16. *See id.* at 517 (explaining that if judges' futures were beholden to either the executive or legislative branch, a temptation to please that branch would prevail; if beholden to both branches, a judicial paralysis would likely develop; and if beholden to the people, decisions would be based on popularity rather than the Constitution).

17. *See id.* at 518 (noting that a temporary duration on the bench would discourage the most qualified potential jurists from leaving their jobs to serve on the

These are the basic tenets of the doctrine of separation of powers. The doctrine, however, is somewhat flexible. Nations may structure their governments differently while still adhering to these basic principles.<sup>18</sup>

## II. PRE-SOVIET AND SOVIET HISTORY

Placement in the context of political and cultural history is instructive in the effort to understand the present-day political situation in the Russian Federation. Many of the current political and constitutional problems of Russia are directly attributable to its long history of dictatorship.<sup>19</sup>

The first Slavonic principality, the Kievan Rus, emerged in the year 862 in what is now Ukraine.<sup>20</sup> By the twelfth century, others came into existence and began expanding, including Novgorod (the center of early Slavonic culture) and Muscovy (today's Moscow).<sup>21</sup> Soon, however, these early Russian states were attacked and dominated by the Tartars for nearly two-hundred and fifty years.<sup>22</sup> In 1480, Muscovy successfully united the disparate Russian states and overthrew the Tartars.<sup>23</sup>

Muscovy emerged as the dominant principality and pursued a dual course of positioning itself as a European power and fulfilling its ambitions to claim the Caucasus, Siberia, and Central and Far East Asia as its own.<sup>24</sup> A turning point in Russia's history occurred in 1721 when Tsar Peter the Great, after a brutal campaign of "Westernization," offi-

Court).

18. See BERNARD H. SIEGAN, DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM 14-16 (1994) (explaining that both American-style presidential systems and European-style parliamentary systems fall within the separation of powers doctrine). Compare U.S. CONST. (creating a presidential democracy) with FR. CONST. (creating a presidential-parliamentary democracy).

19. See Alexander Yakovlev, *The New Russian Constitution: Social Validity*, in CONSTITUTION OF THE RUSSIAN FEDERATION 3, 3 (Vladimir V. Belyakov & Walter J. Raymond eds., 1994) (explaining that analysis of the new Constitution must include not only textual examination but also attention to historical developmental factors).

20. THE ECONOMIST INTELLIGENCE UNIT LTD., EIU Country Profile 1993-94, Russia, 3 (1994) [hereinafter EIU PROFILE RUSSIA].

21. *Id.*

22. *Id.*

23. *Id.* This period in Russian history is often referred to as the Tartar yoke. See generally NICHOLAS V. RIASANOVSKY, A HISTORY OF RUSSIA 11-139 (1984) (detailing the history of pre-Muscovite Russia); MEDIEVAL RUSSIA: A SOURCE BOOK 900-1700, at 1-162 (Basil Dmytryshyn ed., 1973) (chronicling the history of medieval Russia through the writings of its people at that time).

24. EIU PROFILE RUSSIA, *supra* note 20, at 3.

cially proclaimed Russia to be an empire.<sup>25</sup> The nineteenth century in Russia was dominated by the clash between these "Westernizers," who believed Russia to be European and felt it should follow the same developmental path as other European powers, and the "Slavophiles," who felt that Russia was a separate "Euro-Asian" power and should develop on its own.<sup>26</sup> By 1813, however, Russia consolidated its status as a continental power by defeating Napoleon in the War of 1812.<sup>27</sup>

Despite its strong leaders and military, however, Russia's economy remained weak.<sup>28</sup> Poor living conditions and continued autocratic rule spawned many revolutionary movements in the late nineteenth and early twentieth centuries.<sup>29</sup> Although some reforms were instigated under Tsar Nicholas II in 1905,<sup>30</sup> they were not enough to ward off the impending revolution. In 1917, the Romanov Dynasty, under Tsar Alexander II finally collapsed.<sup>31</sup> After a brief period of liberal rule under Alexander Kerensky, the Bolsheviks, led by Vladimir Ilyich Lenin, seized power on November 7, 1917.<sup>32</sup>

Communist leaders from Lenin through Gorbachev continued the tradition of strong central leadership. Instead of a system of capitalist autocracy, however, the Soviets embarked on an experiment with a communist economy and a "democratic centralism" form of government.<sup>33</sup>

25. *Id.*

26. *Id.* Ironically, this debate has undergone a passionate renewal in the aftermath of the Soviet Union. *Id.*

27. *Id.* at 4.

28. *Id.*

29. *Id.*

30. EIU PROFILE RUSSIA, *supra* note 20, at 4. These reforms included an unsuccessful attempt at limited political representation through an ineffective parliament, called the Duma. Under then-Prime Minister Petr Stolypin, reforms aimed at creating a class of "middle class peasants" were unsuccessfully attempted. *Id.*; see RIASANOVSKY, *supra* note 23, at 404-21 (detailing Nicholas II's attempted reforms, their effects on the Russian populace, and the reasons for their failure).

31. *Id.*

32. *Id.* See generally RIASANOVSKY, *supra* note 23, at 143-461 (providing a detailed history of Russia from the rise of Muscovy to the fall of the Romanovs); MEDIEVAL RUSSIA: A SOURCE BOOK 900-1700, *supra* note 23, at 165-333 (tracing the history of this period through primary source materials); IMPERIAL RUSSIA: A SOURCE BOOK 1700-1917 (Basil Dmytryshyn ed., 1974) (detailing the history of Tsarist Russia from Peter the Great to the fall of the Romanovs through primary sources).

33. See KONST. SSSR [Constitution] art. 3 (1977) (describing democratic centralism). This document provides that "[t]he organization and activity of the Soviet state are constructed in accordance with the principle of democratic centralism; . . . [which] combines single leadership with local initiative . . ." *Id.*; see also KONST.

By the late 1980's, after several years of Gorbachev's reform campaign of *perestroika* and *glasnost*,<sup>34</sup> popular agitation among the republics and the citizens of the USSR skyrocketed.<sup>35</sup> By loosening the central controls of the Communist Party, Gorbachev inadvertently lost dominion over both his domestic empire, and over most of Eastern Europe.<sup>36</sup> On August 19, 1991, a coup attempt, led by communist hardliners, failed and took with it the remnants of communist power in the USSR.<sup>37</sup> Shortly thereafter, all fifteen republics, including Russia, declared their independence from the Soviet Union.<sup>38</sup>

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SSSR [Constitution] art. 6 (1977) (explaining the role of the Communist Party within Soviet society). Specifically, Article Six states:

The Communist Party of the Soviet Union is the leading and guiding force of Soviet society, the nucleus of its political system and of [all] state and public organizations . . . . [It] determines general prospects for the development of society and the lines of the USSR's domestic and foreign policy, directs the great creative activity of the Soviet people, and gives their struggle for the victory of communism a planned, scientifically substantiated nature.

*Id.* See generally John S. Reshetar, Jr., *THE SOVIET POLITY: GOVERNMENT AND POLITICS IN THE USSR* (1989) (detailing the governmental structure and political philosophy of the Soviet Union).

34. See KENNETH KATZNER, *ENGLISH-RUSSIAN, RUSSIAN-ENGLISH DICTIONARY* 682, 480 (1984) (defining these terms as "rebuilding" and "publicity," respectively).

35. EIU PROFILE RUSSIA, *supra* note 20, at 4.

36. *Id.*

37. *Id.*

38. *Id.* at 4-5. It is important to note that the Russian Federation itself, although the dominant republic, was in fact, a captive of the USSR. *Id.* When the Russian Federation, under Boris Yeltsin's presidency, left the Soviet Union, Mikhail Gorbachev effectively became irrelevant. *Id.* at 5. See generally MIKHAIL GORBACHEV, *PERESTROIKA 1987* (describing Gorbachev's vision of a new Soviet Union under a less totalitarian form of communism); *VOICES OF GLASNOST* (Stephen F. Cohen & Katrina vanden Heuvel eds., 1989) (presenting interviews with top reformers in the Gorbachev Administration).

III. POST-COMMUNIST CONSTITUTIONAL GOVERNMENT<sup>39</sup>

The adoption of a constitution is one of the most significant events in a nation's history.<sup>40</sup> The guiding principle in deciding on the structure of government should be creation of a division of powers which best fits current conditions in a given country, in order to promote a stable and viable system for the future.<sup>41</sup> Citizens of the former Soviet Union have little, if any, experience with democracy. It must be remembered that democracy is a learned skill and that new constitutions will evolve over time.<sup>42</sup>

## A. EXECUTIVE BRANCH

Although the framers of the U.S. Constitution feared the domination of legislative power over that of the executive, recent history has shown that democracy has more to fear from a powerful executive.<sup>43</sup> The President is usually the only elected official with a truly national constituency. As such, the office is capable of creating a "cult of personality" which threatens constitutional restraint.<sup>44</sup> Alternatively, a strong Presi-

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39. See CENTRAL AND EAST EUROPEAN LAW INITIATIVE, AMERICAN BAR ASSOCIATION, ANALYSIS OF THE CONSTITUTION OF THE RUSSIAN FEDERATION (forthcoming 1995) [hereinafter ABA/CEELI RUSSIA ANALYSIS] (detailing the events leading up to the adoption of the new Constitution from 1990 through the referendum on December 12, 1993); see also Dwight Semler, *The End of the First Russian Republic*, E. EUR. CONST. REV., Fall 1993/Winter 1994, at 107, 107-14 (explaining Boris Yeltsin's *Ukaz* 1400 which dissolved the Supreme Soviet and provided for presidential rule until adoption of a new constitution, leading to the deadly confrontation between parliamentary leaders and presidential forces on October 3, 1993).

40. SIEGAN, *supra* note 18, at 7. This adoption involves the relinquishment of the people's rights to a group of fellow citizens. *Id.* This group is now empowered to exercise dominion over the populace. *Id.*

41. Lawrence Lessig, *The Path of the Presidency*, E. EUR. CONST. REV., Fall 1993/Winter 1994, at 104, 104.

42. *Id.* at 106.

43. Cass Sunstein, *Changing Constitutional Powers of the American President*, E. EUR. CONST. REV., Fall 1993/Winter 1994, at 99, 99.

44. *Id.* In the United States, although the office of President has evolved from a relatively weak position to one of great power, this tendency has been checked by a subjection of presidential acts to judicial review. *Id.* at 99, 101. Further, all implied powers stemming from the Constitution are conferred upon Congress rather than the President so that the more diverse body retains the final say over any expansion of federal powers. U.S. CONST. art. I, § 8, ¶ 18; see also Lessig, *supra* note 41, at 105-06 (explaining the role of the "necessary and proper" clause in keeping presidential



dent, especially in the unstable republics of the former USSR, may wield executive power in a manner beneficial to democratic reform.<sup>45</sup> What is needed, therefore, is a constitutional structure that allows the branches of government to develop both workable internal systems, and more importantly, viable systems of cooperation.<sup>46</sup>

The Russian Constitution clearly violates the doctrine of separated powers by granting the President disproportionate leverage.<sup>47</sup> Although it is possible to maintain a democracy without a clear separation of powers,<sup>48</sup> and strong central control may appear necessary to stabilize the republic,<sup>49</sup> such a structure may prove dangerous to democratic development.<sup>50</sup> Additionally, the intention of the document's drafters was to create a separation of powers system.<sup>51</sup> This is explicitly stated in the Constitution itself.<sup>52</sup> Thus, the document set out to create one type of system, yet created a conflicting one.

In a separation of powers system, the President is the nation's chief executive officer and is responsible for execution of the country's laws.<sup>53</sup> The drafters of the new Russian Constitution, however, defined

powers from over-expanding).

45. Sunstein, *supra* note 43, at 99.

46. Lessig, *supra* note 41, at 106.

47. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 38.

48. *Id.* England is an example of a functioning democracy without a written constitution or clear separation of powers. *Id.*

49. *Id.* at 38-39.

50. *Id.* at 39. Russia has no democratic tradition. Although this Constitution may help expedite the transition to capitalist democracy, it will not foster a political culture of decentralization or popular participation. *Id.*

51. See Irina Muravyeva, *Constitution Drafter Praises, Criticizes Final Version*, ROSSIYSKAYA GAZETA, Nov. 17, 1993, at 1-2, translated in F.B.I.S., USR-93-151, Dec. 1, 1993 at 1 (interviewing Valeriy Savitskiy, a member of the Russian Constitutional Commission). Mr. Savitskiy explains that the point of the draft was to ensure separated powers:

God forbid that we should once again start getting subtle and start somehow combining that power and another one (and sometimes even a third) in one and the same person, and that will be the end! We will encounter an erosion of the fundamental principle of a state based on rule of law.

*Id.*

He further expresses a fear that "transitional elements" in a constitution can become permanent and that constitutional principles should not be violated even temporarily. *Id.*

52. KONST. RFR [Constitution] art. 10 (1993). See *supra* note 1 (providing the full citation of the operative language of this article).

53. SIEGAN, *supra* note 18, at 14. It is also permissible for the President to exer-

the presidential role more broadly to include the responsibility of facilitating interaction among all the branches.<sup>54</sup> This effectively gives the executive branch permission to interfere with other governmental functions. In fact, the presidential system created by the Constitution has been labeled "superpresidentialism."<sup>55</sup>

### 1. Judicial Powers of the President

As head of state, the President is the sole representative of the Russian people both internationally and domestically.<sup>56</sup> Further, the executive is called upon to guarantee the Constitution and coordinate the functioning of the entire government.<sup>57</sup> To facilitate this role, the President retains the power to use "reconciliatory procedures" to resolve intra-governmental conflicts.<sup>58</sup> Thus, the President constitutionally takes on the traditional role of the judiciary in dispute resolution. The Constitution provides only that the President *may* refer such disputes to the courts.<sup>59</sup> Therefore, the President may resolve a dispute on terms favorable to the executive office and refuse to refer it to the courts for fur-

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cise certain legislative powers such as the veto power and formulation of foreign policy. *Id.*

54. *Constitutional Drafting Committee Stenographic Report—Part II*, ROSSIYSKAYA GAZETA, Nov. 9, 1993, at 4, translated in F.B.I.S. USR-93-149, Nov. 24, 1993, at 3 [hereinafter *Drafting Committee Report*].

55. Stephen Holmes, *Superpresidentialism and its Problems*, E. EUR. CONST. REV., Fall 1993/Winter 1994, at 123, 123.

56. KONST. RFR [Constitution] art. 80.4. "The President of the Russian Federation, as head of state, shall represent the Russian Federation domestically and in international relations." *Id.* This differs significantly from the United States and western European democracies such as France and Germany where the totality of government organs represent the nation internally. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 18.

57. KONST. RFR [Constitution] art. 80.2. "The President shall take measures . . . [to] ensure the coordinated action and interaction of the bodies of state authority." *Id.*

58. *Id.* art. 85.1. The Constitution defines the use of these measures: "The President of the Russian Federation may use reconciliatory procedures in order to settle differences between the bodies of state authority of the Russian Federation, as well as between the bodies of state authority of Russian Federation members." *Id.*

59. *Id.*; see also ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 19 (describing this provision and its implications). This provision could empower the President to mandate that all intra-governmental disputes initially be brought to him or her for resolution. *Id.* If the President fails to resolve the issue, no requirement appears to exist that the matter be referred to the courts. *Id.* The President may possess discretionary power over whether the courts ever hear such matters. *Id.*

ther consideration. The President retains similar powers over acts by the executives of member republics,<sup>60</sup> again usurping the traditional realm of the judiciary.<sup>61</sup>

## 2. Presidential Lawmaking Powers

The Constitution confers upon the President substantial lawmaking power.<sup>62</sup> While the Federal Assembly's power to adopt decrees is limited to the constitutionally granted spheres of the State Duma<sup>63</sup> and Federation Council,<sup>64</sup> virtually no checks exist on the President's decree-making powers.<sup>65</sup> The only effective limit to this authority is that presidential decrees may not contradict the Constitution or federal legislation.<sup>66</sup> Taken to their logical end, these provisions endow the Presi-

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60. KONST. RFR [Constitution] art. 85.2. In this case, the President also retains the power of constitutional interpretation. The Constitution provides: "The President of the Russian Federation shall be entitled to suspend the acts . . . of executive bodies of Russian Federation members if they contradict the Constitution of the Russian Federation . . . until the matter is resolved by the appropriate court." *Id.* Thus, the President retains power to interfere with elected local governments in his or her interpretation of a constitutional violation without any initial judicial guidance.

61. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 19-20. In the short-term this power may not prove as harmful as it first appears. *Id.* This arrangement will help keep political disputes out of the Constitutional Court, and possibly will help the Court bolster its position as an apolitical entity. *Id.* at 20.

62. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 20. This law-making power is defined as the "[p]ower of a President, acting alone, to issue legally binding decrees that alter the legal rights or responsibilities of citizens." *Id.*

63. KONST. RFR [Constitution] art. 103.2. The State Duma shall adopt resolutions on the matters that are within its jurisdiction. *Id.* The Constitution lists each of the powers within the realm of the State Duma with no provision for granting additional powers not enumerated. *Id.* art. 103.1.

64. *Id.* art. 102.2. This provision is identical to that of the State Duma. *Id.* It also provides an enumerated list with no stated exceptions. *Id.* art. 102.1.

65. *Id.* arts. 90.1-2. The Constitution provides that "[t]he President of the Russian Federation shall issue decrees and directives." *Id.* art. 90.1. These decrees are given the power of law. "Decrees and directives of the President of the Russian Federation shall be binding for execution throughout the territory of the Russian Federation." *Id.* art. 90.2. These articles grant the President authority to issue edicts and decrees that have the force of statutory laws. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 21.

66. KONST. RFR [Constitution] art. 90.3. The Constitution does not specifically state, however, that such laws are automatically invalid. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 21 n.19. An additional check operates on the executive ability to declare martial law or a national state of emergency. KONST RFR [Constitution]

dent with the authority to rule by decree until the Federal Assembly acts.<sup>67</sup> This will likely discourage legislative development and is dangerously reminiscent of Russia's political past.<sup>68</sup>

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art. 102.1(b)-(c).

67. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 21. Further, Russia's current President, Boris Yeltsin, has already exhibited a willingness to rule by decree. See Semler, *supra* note 39, at 107-14 (detailing the period of presidential rule immediately preceding the adoption of the new Constitution). More importantly, Yeltsin has exercised this power under the current Constitution. On June 14, 1994, Yeltsin issued *Ukaz* 1226 in response to concerns over organized crime. The decree, which, among other provisions, allows the police to detain criminal suspects for up to 30 days without formal charges, and dispenses with search warrant requirements, has repeatedly been condemned by the Duma as unconstitutional. Indeed the *Ukaz* seems to violate at least six separate provisions of the Constitution. Despite these possible violations, Yeltsin refuses to withdraw the decree, and in fact, acknowledges its possible detrimental effect on human rights in his country. See *Constitution Watch (Russia)*, E. EUR. CONST. REV., Summer/Fall 1994, at 18, 20 (describing the details of *Ukaz* 1226, the constitutional provisions which it likely violates, and the reactions of various officials).

68. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 22. Although such a system is expedient, in a nation with no democratic history, it could prove dangerous as well. *Id.* The drafters, however, were more concerned with assuring these presidential powers than with their future implications. In the discussions preceding the final version of the document, drafters never questioned the intrinsic right of a President to exercise such power. *Id.* In deciding on the exact wording of Article 80.3, A.A. Kotenkov, Chief of the Russian Federation State and Legal Affairs Administration, argued that "[a]ccording to the [present draft of the] Constitution [the President] has the right to define the basic directions of the policy. If we remove this right, then [the President's] right to interfere in this sphere of activities will always be questioned." *Drafting Committee Report*, *supra* note 54, at 4. Kotenkov, however, did subsequently argue for the provision that presidential direction must remain within Constitutional parameters. *Id.* at 5.

This decree-making power, however, may already be posing a threat to constitutionalism. Some commentators note that one year after adoption of the Constitution, the Russian Federation appears to be controlled by the President's Security Council rather than by the government as a whole. *Constitution Watch (Russia)*, E. EUR. CONST. REV., Winter 1995, at 23, 24. The Security Council was created in 1992, before adoption of the current Constitution. *Id.* The present document, however, does empower the existence of such an organization, although it leaves all specifics to federal legislation. KONST. RFR [Constitution] art. 83(g). The Council is accountable only to the President, and its decisions easily translate into presidential decrees. *Constitution Watch (Russia)*, *supra*, at 24. In addition, it operates in complete secrecy and may demand information from any government authority, while maintaining complete dominion over its budget. *Id.* It appears very much like the Politburo of the Soviet Union. *Id.* at 24-25.

### 3. Presidential Power over Parliament

In addition to law-making power, the Russian President commands substantial power over the Parliament.<sup>69</sup> In an effort to prevent the previous clashes between the executive and legislative branches,<sup>70</sup> the document grants the President virtual dominion over the lower house of the Parliament, or State Duma.<sup>71</sup> The upper chamber, the Federation Council, is immune from presidential dissolution.<sup>72</sup>

Presidential authority to disband the Duma may be invoked in two circumstances. The first occurs when the Duma refuses the President's candidate for Chairman of the Government (Prime Minister) three successive times.<sup>73</sup> In this event, the President is constitutionally mandated to appoint the candidate, dissolve the Duma, and call for new elections.<sup>74</sup>

The second circumstance occurs when the Duma issues a vote of no-confidence in the Government.<sup>75</sup> In this case, the President may force resignation of the Government or reject the vote of the Duma. If the Duma again votes no-confidence within three months, the President must either announce the resignation of the Government or dissolve the Duma.<sup>76</sup>

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69. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 24.

70. See Nikolay Kishkin, *TRUD Commentary on Draft Constitution*, MOSCOW TRUD, Nov. 11, 1993, at 1, translated in F.B.I.S., USR-93-149, at 6 (expressing the population's interest in preventing intra-governmental clashes, like those of autumn, 1993).

71. See ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 24-26 (outlining the President's power to dissolve the Duma).

72. *Id.* at 24. Superficially, this grants the Russian President fewer powers over Parliament than the French President who may dissolve both chambers. FR. CONST., art. 12. The French Constitution states that "[t]he President of the Republic may, after consultation with the Premier and the Presidents of the assemblies, declare the dissolution of the National Assembly." *Id.*

73. KONST. RFR [Constitution] art. 111.4.

74. *Id.* After such a dissolution, the President should set an election date so that the new State Duma may convene within four months. KONST. RFR [Constitution] art. 109.2. Further, the Duma cannot be dissolved after filing charges against the President until the Federation Council has declared a corresponding decision. *Id.* art. 109.4. It is also immune from disbandment during a state of emergency or martial law, and in the six months preceding the expiration of the President's term of office. *Id.* art. 109.5.

75. KONST. RFR [Constitution] art. 117.3. This circumstance occurs when the State Duma adopts a no-confidence resolution upon a majority vote of the total number of deputies. *Id.*

76. *Id.* This provision is subject to the above-mentioned exceptions stipulated for

These provisions seem to provide a certain way for the Duma to prevent disbandment: accede to the President's wishes.<sup>77</sup> Of course, this is not the ideal way to foster legislative independence. Because there are no constitutional limitations on who the President may nominate as Chairman of the Government, the specter of intentional nominations of unacceptable candidates is not impossible.<sup>78</sup> Further, it will prove equally difficult for the Duma to preserve itself by avoiding a vote of no-confidence in the Government.<sup>79</sup> Duma members who are known to lack conviction in the Government's abilities would be forced to publicly lie in order to preserve their positions.<sup>80</sup> Also, the Duma is composed of 450 members representing thirteen parties (including Independents who are counted as one bloc).<sup>81</sup> These parties represent such dis-

Article 111. Additionally, the Duma may not be dissolved under Article 117.3 within the first year after its election. *Id.* art. 109.3.

The Government faced its first threat of a no-confidence vote on October 27, 1994. *Constitution Watch (Russia)*, *supra* note 68, at 23. Strikingly, the Government of current-Chairman Viktor Chernomyrdin survived with only 54 out of the 450 deputies voting confidence in his Government. *Id.* at 23-24. This occurred because, due to the constitutional mandate for an absolute majority of all Duma deputies in such votes, KONST. RFR [Constitution] art. 117.3, abstentions were counted as votes in favor of the Government. *Constitution Watch (Russia)*, *supra* note 68, at 23-24. Such a high rate of abstentions reveals how difficult it will be to cultivate a parliament able to formulate and achieve consensus on important issues. *Id.* at 24.

77. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 25-26.

78. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 25-26. It is entirely possible that a President, facing an unsupportive Duma, could propose someone known to be unacceptable three times in a row. After the candidate's rejection, the President could dissolve the Duma and appoint the Chairman without parliamentary consent. *Id.* This situation is exacerbated by the fact that no provision exists in the Constitution for the new Duma to confirm or reject the Chairman. Thus the President may effectively shuttle his or her choice of Chairman into office while simultaneously disbanding an uncooperative, but popularly-elected representative body. *Id.* Interestingly, in earlier drafts of this Article, the President could appoint an acting, but not a permanent Chairman in these circumstances. *Id.* at 25 n.42.

79. *Id.* at 24.

80. *See id.* (expressing concern that Duma members will have difficulty voting confidence in the Government for purely strategic reasons).

81. *See* EIU PROFILE RUSSIA, *supra* note 20, at 8 (presenting a breakdown of the various parties and number of seats held by each after the December 12, 1993 elections). The breakdown is as follows:

PARTY	SEATS IN STATE DUMA
Russia's Choice (backed by Boris Yeltsin)	70
Liberal Democrats (backed by Vladimir Zhirinovskiy)	64
Communists	48

parate interests as liberal reformers, ultra-nationalists, and communists.<sup>82</sup> Sufficient accord to ensure the blockage of a forced vote of no-confidence seems unlikely.<sup>83</sup> Rather than strengthen the separation of powers, these provisions will stifle honest democratic debate and lead to presidential domination of the Duma.<sup>84</sup>

#### 4. Appointment, Veto, and Emergency Powers

Ironically, the provisions dealing with presidential appointment authority clearly follow standard separation of powers doctrine.<sup>85</sup> With only two exceptions,<sup>86</sup> the executive requires the approval of either the Federation Council or Duma to appoint top officials.<sup>87</sup> Recent events, however, have cast doubt on current-President Boris Yeltsin's commitment to the spirit of these provisions.<sup>88</sup>

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Agrarian	33
Yabloko	23
Civic Union	1
Democrats	14
Dignity & Charity	2
Russian Unity & Accord	19
Women of Russia	23
Russian Movement for Democratic Reforms	4
Unlisted Parties	14
Independents	129

*Id.* The number does not add up to 450 because the election was held to be illegal in six regions. *Id.*

82. *Id.* at 7-8.

83. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 24.

84. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 24. These provisions further the Soviet custom of creating officials who must say one thing when they mean something entirely different. *Id.* at 25-26.

85. *Id.* at 27.

86. See KONST. RFR [Constitution] art. 83(j)-(k) (stating that the President, acting alone, possesses authority to appoint and dismiss presidential plenipotentiary representatives and top commanders of the armed forces). Both types of officials are typically loyal only to the President. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 27-28.

87. KONST. RFR [Constitution] art. 83(a), (d)-(f), (l). Of course, the approval procedure associated with nomination of the Chairman of the Government (Article 83(a)) could prove entirely artificial if used by the President to dominate the Duma. See *supra* note 74 and accompanying text (discussing the President's power to dissolve the Duma for repeated refusal to confirm the presidential nominee for the Chairman position).

88. See Dimitri K. Simes, *The Imperial Consensus*, WASH. POST, Dec. 25, 1994, at C1, C2 (reporting that, despite three refusals by the Federation Council to confirm

The President may veto legislation presented by the Federal Assembly within fourteen days.<sup>89</sup> In this event, the Assembly may override this veto by a two-thirds majority vote of the total membership of both chambers.<sup>90</sup> In this way, the President can block legislation with the support of only one-third of either chamber.<sup>91</sup> Since the President retains the power to rule by decree, any legislation which is passed effectively chips away at the President's authority to decide the issue in the future without parliamentary interference.<sup>92</sup> Thus, the President main-

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Alexei Illushenko for the office of Prosecutor-General, current-President Yeltsin continues to keep him in the position in an "acting" capacity); *see also Constitution Watch (Russia)*, *supra* note 68, at 25 (explaining that Illushenko's participation in the commission which incriminated former Vice President Alexei Rutskoi with forged documents permanently disqualifies him for this position in the opinion of many Federation Council members). The Kremlin has also proved willing to infringe upon the State Duma's confirmation powers as well. On October 14, 1994, Viktor Gerashchenko, the Chairman of the Central Bank, tendered his resignation to the President who then dismissed Gerashchenko by decree. *Id.* at 23. This action ignored Article 103.1(c) which empowers the State Duma to appoint and dismiss the Central Bank Chairman. KONST. RFR [Constitution] art. 103.1(c). When the Duma refused to approve the dismissal, President Yeltsin once again appointed an "acting" Chairman. *Constitution Watch (Russia)*, *supra* note 68, at 23. Reportedly, the Duma voted against the nomination of Tatyana Paramonova for this position only because it had not yet approved the former Chairman's dismissal. *Id.* The Duma was attempting to preserve its check on executive powers by exercising its removal powers. *Id.* It appears that the constitutional right of the legislature to maintain the system of checks and balances by use of its appointment and removal powers is, in reality, merely illusory. *Id.*

89. KONST. RFR [Constitution] art. 107.3. As in the United States, legislation must pass by a majority vote of both houses. *See id.* art. 105 (detailing the process by which legislation must pass in the Duma and Federation Council) and U.S. CONST. art. I, § 7 (detailing the process by which legislation becomes law in the United States).

90. KONST. RFR [Constitution] art. 107.3. The constitutional text states:

If after a repeat consideration, the federal law is approved in its previous edition by a majority vote of at least two-thirds of the total number of the Federation Council members and State Duma Deputies, it should be signed by the President of the Russian Federation within seven days and made public.

*Id.* The document is silent as to whether the legislation becomes law in the event the President refuses to sign the previously vetoed bill. It only provides that he or she should sign it. *Id.*

91. *Id.* Although the President of the United States possesses the same power, the context in which it is used is quite different. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 26.

92. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 27. An analogous situation in the United States would occur if the Congress passed a law which grants the



tains an interest in vetoing legislation in order to preserve maximum executive power.<sup>93</sup> If, however, the Assembly overrides a veto, the President "should" sign the bill into law within seven days.<sup>94</sup>

Russia's President may impose martial law "in the event of aggression" and must notify the Federal Assembly immediately of such an occurrence.<sup>95</sup> Unfortunately, the term "aggression" is not defined.<sup>96</sup> Although there is no constitutional provision for the declaration of war, the President cannot use Russian forces outside Russian territory without the consent of the Federation Council.<sup>97</sup>

## 5. Impeachment of the President

The procedure for impeachment of the President is somewhat more difficult in the Russian Constitution than in the U.S. Constitution, although the grounds for charges are similar.<sup>98</sup> The Duma may consider

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President legislative power over anything it has not yet considered. Of course, this would be unconstitutional. *Id.* In this situation, each new statute would diminish this presidential power. *Id.* Clearly, the President now has a vested interest in vetoing legislation where he or she did not have such an interest before. *Id.*

93. *Id.* In the United States, presidential law-making authority is subject to congressional constraint. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (ruling, in part, that the President may not use executive powers to thwart the expressed will of Congress).

94. KONST. RFR [Constitution] art. 107.3. The Constitution remains silent regarding a presidential refusal to actually sign the legislation.

95. *Id.* art. 87.2.

96. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 29. Such vagueness may leave open the possibility of abuse. *Id.*

97. KONST. RFR [Constitution] art. 102.2. This is extremely important because the President does not have the power to dissolve the Council in case of repeated disagreement. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 29. Unfortunately, current-President Yeltsin has not felt constrained to check with the Assembly before using Russian forces against rebellious factions within Russian borders. See Simes, *supra* note 88, at C2 (stating that Yeltsin failed to consult with either body of the Federal Assembly before launching the covert actions against Chechnya which later developed into a massive military operation). In fact, the decision to invade the secessionist territory of Chechnya was made by the President's secretive Security Council. *Constitution Watch (Russia)*, *supra* note 68, at 23. Some commentators now believe this mysterious and unelected executive body to be the most powerful group of people in the Federation. *Id.* The constitutional impotence of the Parliament has likely led to the executive branch's unilateral decision to launch this war. *Id.*

98. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 31-32. A Russian President can be impeached for "high treason or another grave crime." KONST. RFR [Constitution] art. 93.1. In the United States, the grounds are "Treason, Bribery, or other high

charges if one-third of its members back the measure and may indict on a two-thirds majority vote.<sup>99</sup> The Supreme Court and Constitutional Court then confirm the legality of this ruling.<sup>100</sup> The Federation Council then has up to three months in which to decide whether to remove the President from office.<sup>101</sup> An apparent problem with this system, however, is that it leaves open the possibility that the President could be removed from office on the strength of charges for which he or she ultimately could be found innocent in a court of law.<sup>102</sup>

## 6. Conclusions

Although some argue that current conditions in Russia necessitate a dominant presidency,<sup>103</sup> the potential and actual abuses of such power

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Crimes and Misdemeanors." U.S. CONST. art. II, § 4.

99. KONST. RFR [Constitution] art. 93.2. The provision also mandates that in addition to the concurrence of one-third of the State Duma deputies, there must be an affirmative vote to advance the charges by a special commission set up within the State Duma for this purpose. *Id.*

100. *Id.* art. 93.1. The Supreme Court affirms that the charges, if proved, constitute the elements of the crime charged and the Constitutional Court confirms that the proper filing procedures were observed. ABA/CEELI Russia Analysis, *supra* note 39, at 32.

101. KONST. RFR [Constitution] art. 93.3. If the Council fails to rule within three months, the charges will be automatically dropped. *Id.* The Council must produce a two-thirds majority vote in order to unseat the President. *Id.* art. 93.2.

102. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 32. Of course, this is also a possibility under the provisions of the U.S. Constitution. U.S. CONST. art. I, § 3. This section provides that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy an Office of honor, Trust or Profit under the United States." *Id.* Interestingly, the Russian Constitution appears to confer upon the President unlimited immunity. KONST. RFR [Constitution] art. 91. The document simply states that "[T]he President of the Russian Federation shall have immunity." *Id.* In contrast, members of the Federal Assembly enjoy immunity only during their term of office. *Id.* art. 98.1. Further, they can lose their inviolability when caught *locus delicti* or on the recommendation of the Prosecutor-General. *Id.* arts. 98.1-2. Since limitations are elaborated for members of the Federal Assembly but not for the President, it is possible that the President enjoys total immunity from criminal prosecution for any act committed while in office. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 32. If this is the case, then the impeachment provision is quite different from that in the U.S. Constitution which provides no immunity for criminal acts performed while in office. See U.S. CONST. art. I, § 3 (providing that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law"). *Id.*

103. See Ninel S. Krylova, *The New Constitution of Russia: Main Principles and*

have led most observers to criticize the conglomeration of such massive powers in one person, especially in light of Russia's political history.<sup>104</sup> Additionally, the association of democracy in Russia with a single person can prove dangerous to the future of reform. If the people become disillusioned with their President, they likely will become disillusioned with the democracy he or she represents.<sup>105</sup>

## B. THE GOVERNMENT

Legislatively created agencies and ministries, which administer regulations, have recently emerged as a fourth branch of government.<sup>106</sup> Russia, like most European democracies, has established a dual executive branch by creating a Government, headed by the Chairman, which exercises executive authority.<sup>107</sup> Although the Government's functions fall mainly within the administrative realm, it may initiate legislation concerning specific areas<sup>108</sup> and retains the power of decree in order to carry out this function, subject to the President's tacit approval.<sup>109</sup>

*Features*, 27 AKRON L. REV. 397, 404 (1994) (arguing that the instability of Russia's party system necessitates a strong presidential role).

104. See, e.g., ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 17, 22 (expressing apprehension that the substance of the Russian President's powers may inhibit the creation of a new tradition of separated powers in Russia); Holmes, *supra* note 55, at 123 (explaining that the system of "superpresidentialism" set up in this document could prove problematic in the future, especially in the event of the sudden incapacity of a sitting President); Edward W. Walker, *Politics of Blame and Presidential Powers in Russia's New Constitution*, E. EUR. CONST. REV., Fall 1993/Winter 1994, at 116, 116 (arguing that the presidential provisions of the new Russian Constitution contain "all the brittleness of the U.S. Constitution but lack its balanced division of powers").

105. Walker, *supra* note 104, at 119. Polish democracy, however, has flourished despite the declining popularity of current-President Lech Walesa, largely because democracy and painful reforms are not regarded by the population as synonymous with one person. *Id.*

106. SIEGAN, *supra* note 18, at 19. Although (or perhaps, because) the persons responsible for the functioning of these ministries are not elected, they must be subjected to constitutional controls. *Id.*

107. KONST. RFR [Constitution] arts. 110.1-2; see also ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 22 (describing this dual authority).

108. KONST. RFR [Constitution] art. 114.1. The Government's powers of legislative initiative include: submitting the federal budget to the State Duma and reporting on its implementation; ensuring a uniform financial, monetary, and credit policy for the Russian Federation; ensuring a uniform social and environmental policy within the Federation; managing federal property; carrying out defense and foreign policy measures; executing measures to ensure human rights, property rights, and to combat crime; and carrying out other federal laws and presidential decrees. *Id.*

109. *Id.* art. 115.1. Although binding, this decree power is subordinate to the will

The President's power over the Government is further bolstered by the previously discussed ability to dissolve either the Government or the Duma in case of disagreement between the branches.<sup>110</sup> Thus, the President commands a great deal of loyalty from the Government by the ability to both protect and discipline it.<sup>111</sup> Additionally, the President may preside over Government sessions, further establishing presidential superiority.<sup>112</sup> The Government may not even resign on its own; presidential approval is needed.<sup>113</sup>

### C. THE LEGISLATIVE BRANCH

Unlike many newly emerging former Soviet republics, the Russian Federation created a bicameral legislature.<sup>114</sup> The Federal Assembly consists of an upper house, the Federation Council, and a lower house, the State Duma.<sup>115</sup> Legislative action is accomplished either through joint action of both houses<sup>116</sup> or through independent decree of either

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of the President. The President may rescind such edicts if they contradict the Constitution, federal laws, or decrees of the President. *Id.* arts. 115.2-3.

110. *Id.* arts. 117.2-4.

111. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 22-23. Such superiority creates a system more like that in the United States than in this Constitution's "paper cousin" in France. *Id.* at 22. Most parliamentary systems, even those with strong presidencies such as France, confer upon the legislature the ability to control the existence of the Government. *Id.* at 23; FR. CONST. art. 50. Additionally, the French Constitution allows the President to dissolve the Government only when the Government itself presents its resignation to the President. *Id.* art. 8. By contrast, the United States Congress retains virtually no power over the continued tenure of members of the administrative agencies. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 23; see also *Myers v. United States*, 272 U.S. 52 (1926) (holding that one house may not take part in the removal of an administrative official).

112. KONST. RFR [Constitution] art. 83(b). "The President of the Russian Federation shall be entitled to preside over sessions of the Government of the Russian Federation." *Id.* This provision, however, may prove to be harmless. The French Constitution also provides that "[T]he President of the Republic shall preside over the Council of Ministers." FR. CONST. art. 9.

113. KONST. RFR [Constitution] art. 117.1. The President may reject the Government's resignation. *Id.*

114. Compare KONST. RFR [Constitution] art. 95 (describing the composition of the bicameral Federal Assembly) with LITH. CONST. art. 55 (describing the unicameral Seimas) and TAJIK CONST. art. 49 (describing the unicameral Majlisi Milli).

115. KONST. RFR [Constitution] art. 95.1.

116. *Id.* art. 105. The process of lawmaking in the Federal Assembly proceeds as follows: federal laws are adopted by a majority votes of the total number of State Duma deputies. *Id.* art. 105.1. These laws are submitted to the Federation Council

chamber within its sphere of sole jurisdiction.<sup>117</sup> The only requirements for membership in the Duma are that a candidate has reached twenty-one years of age and is eligible to vote in the Russian Federation.<sup>118</sup> No constitutional requirements for members of the Federation Council appear to exist.<sup>119</sup> No person may serve in both houses simultaneously.<sup>120</sup>

The constitutional drafters were clearly interested in preventing repeated clashes between the executive and legislative branches.<sup>121</sup> They created, however, a system that undermines the supremacy of the Parliament in legislative matters and instead confers this authority upon the President, thus defeating the separation of powers.<sup>122</sup> A further irony is

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within five days of their passage in the Duma. *Id.* art. 105.3. If a majority of the total number of deputies of the Federation Council vote for the law, or if the Council fails to consider the legislation within 14 days, it will be deemed adopted. *Id.* art. 105.4. If the Federation Council rejects the legislation, both houses may convene a reconciliatory commission to settle their differences, and then resubmit the legislation for consideration by the Duma. *Id.* If the Federation Council again rejects the bill, the Duma may still enact the legislation if two-thirds of its membership vote in favor of it. *Id.* art. 105.5

117. *Id.* arts. 102 (Federation Council), 103 (State Duma). Interestingly, the President retains the power to issue binding decrees unilaterally with no jurisdictional limitations. *Id.* art. 90; ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 33-34; *see supra* notes 55-63 and accompanying text (explaining that the President's lawmaking powers, unlike those of the Federal Assembly, lack jurisdictional limitations).

118. KONST. RFR [Constitution] art. 97.1. Interestingly, in the United States, one must attain the age of 25 before they are eligible for election to the House of Representatives. U.S. CONST. arts. I, § 2. In France, there is no constitutional age requirement. *See* FR. CONST. arts. 24-33 (detailing the French Parliament but not mentioning qualifications).

119. *See* KONST. RFR [Constitution] arts. 94-109 (detailing the composition and duties of both houses of the Federal Assembly but failing to note any mandatory qualifications for election to the Federation Council). There is no apparent explanation for this discrepancy.

120. *Id.* art. 97.2. The prohibition states, "No individual shall be a member of the Federation Council and a deputy of the State Duma simultaneously." *Id.*

121. Kishkin, *supra* note 70, at 6. One commentator explains, "But having observed the destructive congressional battles, we are very interested in how we are insured against a repetition of the skirmishes between the two authorities and their wars of mutual annihilation." *Id.* Unfortunately, the quest to avoid such confrontations resulted in a system which deprives the legislature of its traditional role as primary lawmaker. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 36-37.

122. *See* ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 36-37 (discussing the fact that no preference for legislative lawmaking exists over presidential decree-making in the Constitution); *see also supra* notes 62-65 and accompanying text (discussing

that although all laws must pass the State Duma in order to be considered by the Federation Council or the President, the President may dissolve the Duma.<sup>123</sup> This exacerbates the weakness of the already fragile legislative system. One of the few advantages to the new system is that it ends the former Soviet practice of allowing the legislative body to change the Constitution to suit its own desires.<sup>124</sup>

### 1. Federation Council

The Federation Council is immune from dissolution by the President.<sup>125</sup> It is composed of a representative from the legislative and ex-

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this concept in detail).

123. KONST. RFR [Constitution] arts. 117.3-4; ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 33-34.

124. See Kishkin, *supra* note 70, at 6 (explaining that the new procedure for amendments will eliminate such maneuvering). Compare KONST. RFR [Constitution] arts. 134-137 with KONST. SSSR [Constitution] art. 174 (1977) (detailing the procedure for amendment to the respective constitutions). It was, in fact, so easy to amend the last Soviet Constitution, that over 300 amendments were added to it. Krylova, *supra* note 103, at 397. The Soviet Constitution of 1977 provided, "The USSR Constitution is changed by a decision of the USSR Supreme Soviet, adopted by a majority of at least two-thirds of the total number of Deputies in each of its chambers." KONST. SSSR [Constitution] art. 174. The procedure for amending the present Constitution of the Russian Federation is significantly more complex and depends upon which provision the proponents wish to amend. The President, the State Duma, the Federation Council, the Government, or any of the legislative bodies of the members of the Russian Federation may propose an amendment, provided they have the support of a group of at least one-fifth of the deputies of the State Duma or of the members of the Federation Council. KONST. RFR [Constitution] art. 134. Any change to Chapters One (Principles of the Constitutional System), Two (Human and Civil Rights and Freedoms), or Nine (Constitutional Amendments and Revision of the Constitution) requires a supermajority of three-fifths of the total membership of both houses of Parliament. *Id.* art. 135.2. If such a supermajority is reached, a Constitutional Assembly shall be convened to either affirm the integrity of the current Constitution or to draft a new one. *Id.* art. 135.3. A new Constitution becomes law if either two-thirds of the members of the Constitutional Assembly vote for it or if, in a national vote, more than half of those voting cast their ballots in its favor (conditioned upon a majority of the registered electorate participating). *Id.* Amendments to Chapters Three through Eight (organization of the Federation, and composition and functioning of local and federal government), are passed by the same procedure as adoption of a federal constitutional law and with the consent of two-thirds of the legislatures of the members of the Federation. *Id.* art. 136. Changes to Article Sixty-five, which lists the members of the Russian Federation, are achieved by federal constitutional law governing the admission of new members and changes to the status of present members of the Russian Federation. *Id.* art. 137.1.

125. See KONST. RFR [Constitution] art. 109 (providing for the possibility of the

ecutive branches of each of the eighty-nine constituent subjects of the Russian Federation.<sup>126</sup> In addition to its joint lawmaking powers with the Duma, it retains several important areas of sole jurisdiction including: approval of border changes among internal republics;<sup>127</sup> approval of presidential decrees of martial law<sup>128</sup> and state of emergency;<sup>129</sup> and what appears to be formal authority to declare war.<sup>130</sup>

## 2. The State Duma

In contrast to the Federation Council, the State Duma remains one of the more controversial creations of the new Constitution due to its reliance on the President for its continued existence.<sup>131</sup> Although the power of the Duma to confirm presidential nominations for Chairman of the Government<sup>132</sup> appears impressive on paper, it is illusory. Disputes with the President on this matter could prove fatal to the Duma.<sup>133</sup>

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dissolution of the State Duma, but not the Federation Council).

126. *Id.* art. 95.2. The main function of the Federation Council is not direct popular representation as in the State Duma, but representation of the interests of the member Republics of the Russian Federation. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 34.

127. KONST. RFR [Constitution] art. 102.1(a).

128. *Id.* art. 102.1(b).

129. *Id.* art. 102.1(c).

130. *Id.* art. 102.1(d). It is unclear why no formal war powers are expressed in the Constitution. Although the Council has final power over whether to use Russian forces outside the Federation's borders, the question remains whether the President could unilaterally order missiles to be sent abroad. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 34. The Council also possesses certain appointment and removal powers. KONST. RFR [Constitution] art. 102.1(e) These powers include: power to call presidential elections; *id.*; removal of the President from office by impeachment; *id.* art. 102.1(f), *see supra* notes 99-103 and accompanying text (discussing the procedure for impeachment and removal of the President); appointment of judges to the Constitutional Court, Supreme Court, and Supreme Court of Arbitration; *id.* art. 102.1(g); appointment and removal of the general prosecutor of the Russian Federation; *id.* art. 102.1(h); and appointment and removal of the Deputy Chairman of the Accounting Chamber and half of the Chamber's auditors; *id.* art. 102.1(i).

131. KONST. RFR [Constitution] art. 117.3. This provision allows the President to dissolve the State Duma in the event the Duma expresses no-confidence in the Government three successive times. *Id.*

132. *Id.* art. 103.1(a). This provision states, "The State Duma shall have the power to approve the nominee of the President of the Russian Federation to the office of the Chairman of the Government of the Russian Federation." *Id.*

133. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 35. The Constitution may, in fact, coerce acquiescence by the Duma to the President's choice of Chairman of

Other powers of the Duma include: appointment of the Chair of the Central Bank;<sup>134</sup> appointment and removal of the Chairman of the Accounting Chamber and half of its auditors;<sup>135</sup> appointment of a Human Rights Commissioner,<sup>136</sup> power to grant amnesty;<sup>137</sup> and power to bring charges against the President in order to impeach.<sup>138</sup>

The Duma is composed of 450 elected deputies.<sup>139</sup> The membership appears divided into highly factionalized blocs,<sup>140</sup> however, and will likely find it difficult to conduct itself in an efficient and beneficial manner.<sup>141</sup> Although in the short-term, a weak Duma may aid demo-

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the Government. It provides: "After the State Duma rejects three candidates to the office of Chairman of the Government of the Russian Federation, the President . . . shall appoint the Chairman of the Government of the Russian Federation, dissolve the State Duma, and call new elections." KONST. RFR [Constitution] art. 111.4.

134. *Id.* art. 103.1(c).

135. *Id.* art. 103.1(d). *But see supra* note 88 (explaining how current-President Yeltsin disregarded the spirit of this provision).

136. *Id.* art. 103.1(e).

137. *Id.* art. 103.1(f).

138. *Id.* art. 103.1(g). Once the Duma lodges formal accusations against the President, the President loses the power to dissolve it. *Id.* art. 109.4.

139. *Id.* art. 95.3.

140. THE ECONOMIST INTELLIGENCE UNIT LIMITED, EIU COUNTRY REPORT, RUSSIA, 1ST QUARTER (1994), at 11 [hereinafter EIU REPORT RUSSIA]. *See also supra* note 81 and accompanying text (presenting a breakdown of the individual parties comprising the membership of the State Duma).

141. *Id.* The autumn 1994 legislative session produced no laws of major import. *Constitution Watch (Russia)*, *supra* note 68, at 27. Although 222 laws originally appeared on the docket of the State Duma, only 59 were actually considered. Of those laws, it is questionable how many were seriously considered. *Id.* Legislation considered but not passed included: the laws on presidential and parliamentary elections, privatization, the criminal code, and the 1995 budget. *Id.* In fact, of the 12 federal constitutional laws needed for complete implementation of the Constitution, only one, the Law on the Constitutional Court, has been passed. *Id.* This law is mandated by Article 128.3 of the Constitution. KONST. RFR [Constitution] art. 128.3. Unfortunately, key provisions of this law missed their implementation deadline and are currently being ignored. *Constitution Watch (Russia)*, *supra* note 68, at 26; *see infra* note 163 (providing analysis and explanation of this situation). The other constitutionally mandated federal constitutional laws are: Law on the State of Emergency, KONST. RFR [Constitution] art. 56.1; Law on the Order of Creating New Subjects of the Russian Federation, *id.* art. 65.2; Law on the Change of the Statute of Subjects of the Russian Federation, *id.* art. 66.5; Law on the Flag, State Arms and National Anthem of the Russian Federation, *id.* art. 70.1; Law on Referendum, *id.* art. 84(c); Law on the Regime of Martial Law, *id.* art. 87.3; Law on the Ombudsman, *id.* art. 103(d); Law on the Government, *id.* art. 114.2; Law on the Court System, *id.* art. 118.3; Law on the Supreme Court, *id.* art. 128.3; Law on the Highest Arbitrage Court (Supreme



cratic reform by allowing current-President Yeltsin to pass measures without the factionalized and heavily conservative body, this approach could backfire in the future if an anti-reformer should ascend to the presidency.<sup>142</sup>

### 3. Compatibility

One of the more perplexing articles in the Constitution appears in the Concluding and Transitional Provisions section of the document.<sup>143</sup> This article allows for a deputy in the first convocation of the Duma to simultaneously serve as a Government minister.<sup>144</sup> Passionate opposition to this provision exists. One of the document's drafters, Valeriy Savitskiy, has expressed fear that such "deputy-ministers" would be unable to provide an accounting from the Government because they would be the Government.<sup>145</sup> Further, "transitional provisions" may easily become permanent provisions.<sup>146</sup> The underlying fear is that if the compatibility provision becomes permanent, the President may use his or her ministers to "stage manage" the Duma's functions.<sup>147</sup> This will further undermine the independence of an already weak legislature.<sup>148</sup>

Alternatively, many argue that compatibility may prove to be beneficial, and actually bolster Parliament's authority.<sup>149</sup> Because the major

Court of Arbitration), *id.* art. 128.3; Law on the Federal Courts, *id.*; Law on the Constitutional Assembly, *id.* art. 135.2. As of January, 1995, none of these laws has been passed. Edward W. Walker, *Designing Center-Region Relations in the New Russia*, E. EUR. CONST. REV., Winter 1995, at 54, 60.

142. Walker, *supra* note 141, at 14. The prospect of Vladimir Zhirinovskiy or a like-minded ultra-nationalist assuming the Russian presidency with its massive powers does not bode well for future reform or stability. *Id.*

143. KONST. RFR [Constitution] Concluding and Transitional Provisions, art. 9.

144. *Id.* Such a person gives up their legislative immunity. *Id.*

145. Muravyeva, *supra* note 51, at 1. Savitskiy continues by criticizing the possible "snowballing" effect of such a provision, "Would the next stage then be to combine the office of judge and the office of deputy?" *Id.*

146. *Id.* Savitskiy explains: "Nothing can be more permanent than a transitional period. That 'transitional' element can become deeply rooted. Fundamental principles should not be violated, even for a transitional period." *Id.*

147. See Stephen Holmes & Christian Lucky, *Storm Over Compatibility*, E. EUR. CONST. REV., Fall 1993/Winter 1994, at 120, 120-21 (detailing the arguments against compatibility).

148. *Id.* The authors argue that opposition to compatibility provisions stems from an historical suspicion of and animosity toward the executive branch by the legislative branch. *Id.* at 121.

149. *Id.* at 122. The argument is set forth that democratic reformers should sup-

problem in post-Soviet government has been executive-parliamentary gridlock,<sup>150</sup> compatibility may provide a link between the branches that will foster cooperation.<sup>151</sup> Compatibility also contradicts the popular assumption that the President and the Parliament cannot work together productively.<sup>152</sup> It remains to be seen which view will prevail.

#### D. THE JUDICIARY

Whether the President and Parliament adhere to the Constitution depends largely on the effectiveness of judicial enforcement.<sup>153</sup> The Constitution provides for a Constitutional Court,<sup>154</sup> a Supreme Court,<sup>155</sup> a Supreme Court of Arbitration,<sup>156</sup> and for the development of various lower courts.<sup>157</sup> Because the Constitutional Court is the only judicial body endowed with the ability to rule on the constitutionality of laws and government acts,<sup>158</sup> it is the most important segment of the judiciary for the purposes of examining the interaction of the other branches. The power of judicial review belongs solely to the Constitutional Court.<sup>159</sup>

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port compatibility because it eases the Constitution's strong bias toward the executive branch by allowing deputies of the State Duma a voice in executive matters. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* It is suggested that compatibility will work to moderate the severity of presidential rule and parliamentary weakness because the executive will be less likely to ignore the Duma if he or she retains some influence within it. *Id.* Vice Premier Alexander Shokhin explains:

[T]he experience of the separation of powers in the Russian Federation until recently has shown that an abstract scheme of separation of powers is fraught with confrontation which sometimes erupts into direct struggle. Therefore the inclusion of cabinet ministers in the process of law-making makes it possible to make laws that are realistic and enforceable.

*Press Conference by RF Vice-Premier Alexander Shokhin on RF-EC Relations, Official Kremlin Int'l News Broadcast, Nov. 9, 1993, available in WESTLAW, News Library, Current Events file. Obviously, this situation is not ideal, but it may prove helpful during the transitional period. Holmes & Lucky, supra note 147, at 122.*

153. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 40. In determining the effectiveness of the constitutional articles on the judiciary, one must also take into consideration the other various substantive and procedural articles distributed throughout the document. *Id.*

154. KONST. RFR [Constitution] art. 125. Due to the constraints of this comment, only the Constitutional Court will be discussed in depth.

155. *Id.* art. 126.

156. *Id.* art. 127.

157. *Id.* art. 128.3.

158. *Id.* arts. 125.2-6.

159. Herman Schwartz, *The New East European Constitutional Courts, in CONSTI-*

## 1. History of the Constitutional Court

The communist legacy is not one that fosters the notion of an independent judiciary. Before the onset of *perestroika*, the concept of an independent body endowed with the authority to judge actions of the leadership did not exist.<sup>160</sup> The Constitutional Court was actually established in October, 1991,<sup>161</sup> well before passage of the new Constitution in December, 1993. It started out as fiercely independent under the leadership of former Court Chairman Valery Zorkin.<sup>162</sup> The structure and functioning of the Court changed somewhat under the new Constitution and Court Act.

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TUTION MAKING IN EASTERN EUROPE 163, 165 (A.E. Dick Howard ed., 1993). The importance of judicial review in preventing the majority from depriving minorities of life, liberty, and property cannot be overstated. *Id.* Alexis de Tocqueville wrote:

If it be admitted that a man, possessing absolute power, may misuse that power by wronging his adversaries, why should a majority not be liable to the same reproach? . . . I can never willingly invest any number of my fellow creatures with that unlimited authority which I should refuse to any of them.

SIEGAN, *supra* note 18, at 23 (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 249 (1835)).

When considering the Constitutional Court, it is important to recognize the difference between such courts and the U.S. Supreme Court. Where the U.S. Supreme Court is the court of last resort for any type of case and is part of the federal judiciary, a constitutional court of the European type serves a different purpose. Schwartz, *supra*, at 164-65. See U.S. CONST. art. III, § 2 (providing, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ."). These constitutional courts do not hear litigation between parties. Schwartz, *supra*. Their sole function is constitutional interpretation and they may issue opinions regardless of whether an actual case or controversy exists. *Id.* Normally, they are the only court granted the power to rule on constitutional issues. *Contra* U.S. CONST. art. III, § 2 (limiting United States federal courts' jurisdiction to actual cases or controversies).

160. Schwartz, *supra* note 159, at 177. Judicial authority resided in the leadership of the Communist Party. *Id.*

161. *Id.*

162. *Id.* Among the Court's most controversial decisions was its invalidation of Boris Yeltsin's presidential decree ordering the merger of the ISS (successor to the KGB) and the MVD (internal security). Yeltsin issued the decree in December, 1991 and appointed a personal friend to run the consolidated agency. The merger evoked Russian fears of the Stalinist purges that occurred after the last such integration in 1936. *Id.* at 178. In its ruling, the Court held the decree to violate the separation of powers of the RSFSR Constitution and declared the presidential decree to be void. *Id.* at 201 n.84. Reportedly it took Chairman Zorkin an hour to convince President Yeltsin that he was obligated to obey the Court's order. *Id.* at 181.

## 2. The Court Under the New Constitution

The present Constitutional Court consists of nineteen judges,<sup>163</sup> with tenures of twelve years.<sup>164</sup> Its jurisdiction includes constitutional interpretation,<sup>165</sup> determination of the constitutional validity of federal<sup>166</sup> and local governmental acts,<sup>167</sup> and resolution of disputes among the other branches<sup>168</sup> or between the federal and local governments.<sup>169</sup> The Court also has the authority to rule on constitutional issues arising in particular lower court cases at the request of those courts.<sup>170</sup> There is, however, no explicit grant of discretion given to the Court. It may prove difficult for the Court to rule on every request for interpretation from the other courts.<sup>171</sup>

A possible danger stemming from the ability of the Court to issue advisory opinions is that it may become too closely affiliated with the

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163. KONST. RFR [Constitution] art. 125.1. This is an increase over the original panel of thirteen judges. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 40. President Yeltsin signed the Constitutional Court Act on July 21, 1994. *Constitution Watch (Russia)*, *supra* note 68, at 25. According to Part 5, Article 2 of the Law, the Federation Council was to approve all Constitutional Court justices by August 21, 1994. *Id.* Unfortunately, no procedure exists for failure to comply with this deadline and as of January, 1995, one vacancy remains on the Court. *See id.* at 25-26 (detailing the various presidential nominees to the Court and the Federation Council's reasons for rejecting most of them).

Due to confusion over what constitutes a working quorum, the Court has yet to begin functioning under the new Constitution. *Id.* at 26. Several current justices oppose commencing work until the last position is filled. *Id.* They argue that the President and Federation Council may decide not to fill the last position once the Court begins functioning. *Id.* This vacancy, they assert, will erode the Court's legitimacy as it will appear to the public as an incomplete body. *Id.* In fact, it is not entirely clear that the current President desires to see a functioning Constitutional Court. *Id.* at 25. Such a body may question the constitutionality of presidential rule by decree. *Id.*

164. *Constitution Watch (Russia)*, *supra* note 67, at 19. The Constitutional Court Act reduced the judges' tenure from life to 12 years. *Id.* The problems associated with limited tenure for judges are discussed *supra* note 17. Whether these concerns apply in this situation remains to be seen.

165. KONST. RFR [Constitution] art. 125.5.

166. *Id.* art. 125.2(a).

167. *Id.* art. 125.2(b).

168. *Id.* art. 125.3(a).

169. *Id.* art. 125.3(b).

170. *Id.* art. 125.4.

171. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 40. Because the Court can not exercise discretion as to which cases it will hear, the sheer number of requests may prove unworkable. *Id.*

governmental bodies requesting the opinions. In that case, the Court could become merely an executive agency rather than an independent entity.<sup>172</sup> Furthermore, because virtually any government official can request such a ruling, the Court may become overwhelmed with requests for rulings on every dispute within the legislature.<sup>173</sup>

The Russian Constitutional Court is the only court in the Federation which can declare a law to be unconstitutional.<sup>174</sup> Added to the already liberal ability of the government to solicit the Court's opinion and the Court's seeming inability to reject requests,<sup>175</sup> the sheer number of issues this will likely bring before the Court will make it nearly impossible for the judges to fulfill their constitutional mandates.<sup>176</sup>

A further complication of the system of referral is that it creates a heavily one-sided system which favors the government over private parties.<sup>177</sup> If a lower court finds no constitutional conflict, it will not refer the issue to the Constitutional Court. Only an entity with constitutional authority to appeal a case may do so.<sup>178</sup> Most government bodies have this authority while private citizens do not.<sup>179</sup> If a lower court, therefore, rules in favor of a law's constitutionality and against an individual, that citizen has no right of appeal.<sup>180</sup>

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172. *Id.* at 40-41. In this case the Court loses its effectiveness as a check on executive power. *Id.* at 41.

173. *Id.* at 41.

174. KONST. RFR [Constitution] arts. 125-27. Article 101 of the Constitutional Court Act authorizes all courts to refer any constitutional issue to the Constitutional Court. Vladimir Chetvermin, *Three Questions to the Authors of the Act*, E. EUR. CONST. REV. Summer/Fall 1994, at 80-81.

175. See KONST. RFR [Constitution] art. 125.5 (mandating that the Constitutional Court, "shall interpret the Constitution of the Russian Federation at the request of the President . . . the Federation Council, the State Duma, the Government . . . and the bodies of legislative power of the members of the Russian Federation"). There is no mention of a concurrent ability of the Court to reject requests at its discretion. *Id.*

176. See Chetvermin, *supra* note 174, at 81 (arguing that because most cases involve some type of constitutional issue, the Court will be inundated with referrals). A suggested compromise to lighten the Court's burden is to allow lower courts to deal with issues arising under laws held over from before the passage of the new constitution. These laws were created under a very different system and should not be afforded the same deference as those emerging under the current Constitution. *Id.*

177. Schwartz, *supra* note 159, at 174.

178. KONST. RFR [Constitution] art. 125.5.

179. See *id.* arts. 125.2-125.4 (outlining the jurisdiction of the Constitutional Court and who may seek its opinion).

180. Schwartz, *supra* note 159, at 174. Citizens challenging a law will appear before the Constitutional Court only if they have won in a lower courts. The govern-

Among the more blatant violations of traditional separation of powers doctrine is the inclusion of legislative initiative among the Court's privileges.<sup>181</sup> The Court's objectivity may be severely compromised should a law it originally proposed come before it on a constitutional challenge.<sup>182</sup> In addition, the citizenry's confidence in the fledgling court system may suffer due to even the appearance of a conflict of interest.<sup>183</sup>

In contrast, the Constitution withholds several areas of traditional court jurisdiction from the Court and instead gives them to the President.<sup>184</sup> The President is the guarantor of the Constitution and of the civil rights and freedoms of the Russian citizenry.<sup>185</sup> The President also assures the coordinated functioning of the organs of government.<sup>186</sup> It appears that the Court only hears intra-governmental disputes when the President refers such disputes to it.<sup>187</sup> Traditionally, the judiciary has been considered the final guarantor of these provisions.<sup>188</sup> Although the

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ment, however, may challenge any lower court ruling with which it disagrees. *Id.* at 174. This places substantial power in the lawmakers to ensure that their own laws remain valid. *See id.* at 174-75 (arguing that such a system will work largely to the government's advantage).

181. KONST. RFR [Constitution] art. 104.1. The Supreme Court and Supreme Court of Arbitration also retain this power. *Id.* Interestingly, the former Soviet Republic of Tajikistan reverses this situation. *See* CENTRAL AND EAST EUROPEAN LAW INITIATIVE, AMERICAN BAR ASSOCIATION ANALYSIS OF THE DRAFT CONSTITUTION OF THE REPUBLIC OF TAJIKISTAN 6 (1994) [hereinafter ABA/CEELI TAJIKISTAN ANALYSIS] (describing the Majlisi Milli, or National Assembly of Tajikistan, and its powers). The Tajik Constitution empowers the Majlisi Milli to interpret the Constitution. TAJIK CONST. art. 50.2. This provides for a situation where the legislature can pass laws that are clearly unconstitutional, yet declare them to be constitutional anyway. ABA/CEELI TAJIKISTAN ANALYSIS, *supra*, at 6.

182. Schwartz, *supra* note 159, at 173; ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 45.

183. *Id.* With no tradition of an independent judiciary, the public's confidence in such a non-majoritarian institution is vital for the continuation of democratic reform. *Id.*

184. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 41.

185. KONST. RFR [Constitution] art. 80.2.

186. *Id.*

187. *See* KONST. RFR [Constitution] art. 85.1 (allowing the President to use "reconciliation" measures to solve these disputes and noting that the President *may* refer them to the courts if unsuccessful); *supra* note 59 and accompanying text (explaining this provision in detail).

188. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 41. In fact, these grants of power appear to contradict the Court's right of constitutional interpretation and its jurisdiction over intra-governmental disputes. *See* KONST. RFR [Constitution] art. 125

courts should serve as a bulwark against executive abuse,<sup>189</sup> it appears that here too, the President's expansive powers have infringed upon their jurisdiction.<sup>190</sup>

#### IV. RECOMMENDATIONS

The most important and urgent amendments to the Russian Constitution should address the extensive powers of the President.<sup>191</sup> Many of the most serious problems with the construction of the Russian government exist because the President wields such tremendous power over the government's other branches.<sup>192</sup>

In order to develop a truly effective Parliament, there must be a reduction in the President's ability to rule by edict.<sup>193</sup> In a separation of powers system, the legislature must have priority over the President in the making of laws;<sup>194</sup> otherwise the separation is merely illusory. It is unlikely that Russia will turn to the American system which grants all legislative power to Congress, leaving it up to the legislature whether to grant certain regulatory powers to the executive.<sup>195</sup> Instead, a system similar to that used in France may work well in a country which does not fully trust its legislature. In most cases, the French Constitution requires that legislation be the primary form of lawmaking.<sup>196</sup> It does, however, grant the Council of Ministers (Government) the power to issue decrees in limited situations and within a limited scope.<sup>197</sup> This

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(granting similar powers to the Constitutional Court).

189. Schwartz, *supra* note 159, at 167, 188.

190. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 41.

191. See KONST. RFR [Constitution] arts. 80-93 (detailing the structure and powers of the presidency in the Russian Federation).

192. See *id.* arts. 94-125 (describing the composition, powers, and limitations of the Federal Assembly, the Government, and the Constitutional Court); *supra* notes 70-85 and accompanying text (discussing in detail the problems posed by presidential power over these branches).

193. KONST. RFR [Constitution] art. 90.

194. See ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 20-22 (criticizing the nearly unlimited decree-making power of the Russian President).

195. U.S. CONST. art. I, § 1. "All legislative Powers herein granted shall be vested in a Congress of the United States." *Id.*

196. FR. CONST. art. 34. The French Constitution declares, "All laws shall be passed by Parliament." *Id.*

197. *Id.* art. 38. The document states: "The Government may, in order to carry out its program, ask Parliament to authorize it [the Government], for a limited period, to take through ordinances measures [sic] that are normally within the domain of law." *Id.* The President is obligated to sign these decrees. *Id.*

allows the legislature to develop independently, while permitting an alternative method of lawmaking should the President and Parliament become deadlocked.<sup>198</sup>

Another serious obstacle to the development of a truly independent and effective Parliament is the ability of the President to dismiss the elected deputies of the State Duma.<sup>199</sup> Although in the short-term these provisions may prove helpful in quickly resolving impasses,<sup>200</sup> if abused, they could lead the electorate to believe that votes cast for an opponent of the President are meaningless. At the very least, the Constitution should include a one-year-after-elections moratorium on dissolution of the Duma in cases in which it refuses to confirm the President's nomination for Chairman of the Government.<sup>201</sup> Also a provision setting the maximum number of times that the President may nominate the same person to the Government Chairman position at two would further lessen the President's power over the Duma. If after three attempts, the Duma still refuses to confirm a candidate in this manner, the President could dissolve it and call for new elections. After the second rejected candidate, however, a mandatory meeting between the President and opposition leaders should occur in order to facilitate agreement and avoid dissolution. The President thereby retains time to convince the Duma to accept the candidate on a second vote, but cannot force dissolution by nominating a clearly unacceptable candidate for a third time. Further, the time required to accomplish this, as well as the mandatory meeting, will lead to more open, democratic debate.<sup>202</sup>

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198. *Id.* arts. 34, 38. Another advantage of eliminating the President's nearly unlimited edict power is that it will remove the incentive for executive vetoes of legislation. See ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 27 (explaining that since the President retains the power to rule by edict, every law passed by the legislature effectively diminishes this power). Since each new law will no longer diminish presidential power to issue decrees, unnecessary executive-legislative battles may be avoided. *Id.*

199. KONST. RFR [Constitution] arts. 111.4, 117.3.

200. See ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 25 (describing how the President may dismiss the Duma if it does not accede to his or her wishes).

201. See KONST. RFR [Constitution] art. 109.3 (including this limitation in the provisions allowing dissolution of the Duma upon three successive votes of no confidence). No reason is currently offered for providing this protection in one instance but not the other.

202. *Contra* KONST. RFR [Constitution] art. 111.4 (allowing dissolution of the State Duma after three successive failures to confirm the President's candidate for Chairman of the Government). Certainly such a procedure will prove time consuming, but it will help to discourage executive abuse. Furthermore, the time and expense of



Clarification of which branch of government guarantees the provisions of the Constitution is also necessary. This power must belong solely to the judiciary. Allowing the President to claim authority to protect constitutional rights<sup>203</sup> not only violates separation of powers doctrine, but may give him or her a claim, albeit tenuous, to usurp the Court's jurisdiction, and suspend judicial review in a time of crisis.

The courts' right of legislative initiative<sup>204</sup> must also be eliminated. A constitutional system based on the separation of powers and supported by the concept of judicial review, is irreconcilable with the power of the courts to propose their own legislation.<sup>205</sup> Human beings cannot be expected to sit in judgment of themselves and remain impartial. An effective court system which commands the respect of the Russian people is vitally important in a country with a weak legislature and few other checks on the power of the President.<sup>206</sup>

If no other provision in the Constitution is changed, then the statement of commitment to separation of powers should be amended.<sup>207</sup> Although this goal must not be abandoned, the document is presently self-contradictory. Rather than continuing to violate Article Ten<sup>208</sup> by following other constitutional provisions, an amendment expressing the desire to achieve the goal of true separation of powers may be preferable. In this way, if the Russian people truly believe that these provisions are necessary to emerge from their totalitarian past into a viable democracy, they can do so without violating the Constitution. This is not simply a matter of semantics. Continued violations could set a precedent that not every article of the Constitution is, in actuality, the supreme law of the Russian Federation.

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new elections (which could conceivably result in the election of the very same deputies) will not only surpass that of forced debate, but may in fact, anger an already discouraged electorate.

203. KONST. RFR [Constitution] art. 80.2.

204. *Id.* art. 104.1.

205. ABA/CEELI RUSSIA ANALYSIS, *supra* note 39, at 45.

206. *See* KONST. RFR [Constitution] art. 104.1 (bestowing power upon the Constitutional Court, Supreme Court, and Supreme Court of Arbitration to initiate legislation). Certainly the courts must also review the acts of the legislative branch and local government. In the current Russian system, however, there is far more to fear from an unchecked President.

207. KONST. RFR [Constitution] art. 10.

208. *Id.*

## CONCLUSION

Although the concept of a constitutionally-based system of separated powers in Russia is a new and important step toward ensuring democracy in a nation with no democratic traditions, the current document will not achieve this goal. Current-President Boris Yeltsin himself admits that amendments will likely prove necessary in the near future.<sup>209</sup> Endowing a single person with such a disproportionate amount of control over the Federation not only diverges from the Constitution's stated dedication to the separation of powers,<sup>210</sup> it may well lead to a retreat into autocratic rule in Russia.<sup>211</sup> With the increasing instability of the economic and political situation in the Russian Federation and with current-President Boris Yeltsin's turn toward anti-democratic forces in the midst of the Chechnya crisis, the specter of a radical nationalist take-over of the Kremlin looms large. Although the immediate possibility of a coup seems remote,<sup>212</sup> presidential elections are scheduled for late 1996. Campaign promises of law and order, such as those espoused by Vladimir Zhirinovskiy in the last election,<sup>213</sup> could prove irresistible to

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209. *Yeltsin Holds News Conference on Vote Results*, MOSCOW OSTANKINO TELEVISION FIRST CHANNEL NETWORK, Dec. 22, 1993, translated in F.B.I.S., SOV-93-244, Dec. 22, 1993, at 5. It is unlikely, however, that Yeltsin had a diminution of his powers in mind.

210. KONST. RFR [Constitution] art. 10.

211. See *Constitution Watch (Russia)*, E. EUR. CONST. REV., Fall 1993/Winter 1994, at 17, 18 (arguing that clashes between the President and Parliament will likely result in Parliament's dissolution).

212. Lee Hockstader, *Will There be a State of Emergency?*, WASH. POST, Jan. 8, 1995, at A1. If the unpopular conflict drags on, however, analysts believe a hard-line coup could be the end result. *Id.* at A26. Encouragingly, however, current-President Yeltsin publicly reaffirmed his commitment to ensuring that the 1995 parliamentary and 1996 presidential elections take place on schedule. During his address to the Russian Federation on February 16, 1995, Yeltsin declared that delaying the elections would violate the Constitution. Margaret Shapiro, *Yeltsin Pledges Further Reforms, No Election Delays*, WASH. POST, Feb. 17, 1995 at A27, A31.

213. See EIU REPORT RUSSIA, *supra* note 140, at 10-13 (explaining generally the results of the December 1993 elections and the success of Vladimir Zhirinovskiy and his right-wing, Liberal Democratic Party). It appears that two main groups of people voted for Mr. Zhirinovskiy. The first group was urban males between the ages of 25 and 40 who strongly supported Zhirinovskiy's law and order platform from the start of the campaign. *Id.* at 13. The second group consisted of older, less educated males who made up their minds late in the campaign. *Id.* In both cases, the central reason for supporting Zhirinovskiy appears to have been his emphasis on strong government and a strictly ordered society. *Id.*

an electorate weary of the democratically instigated chaos. The West should note that such an event would not only reverse the democratic gains of the Russian people, but could return the world to a cold-war-type political situation where nuclear weapons concerns are paramount.

The Constitution of the Russian Federation in its present form will not promote a long-lasting, secure democratic structure. It may, however, serve as an interim document while the Federation develops its own sense of democracy.<sup>214</sup> If this is the case, then the dangerous agglomeration of powers within the document is not as menacing as it appears. Unfortunately, given the events of the first year after the Constitution's passage, it seems unlikely that this Russian Constitution will emerge as the blueprint for a stable and democratic future for the Russian Federation.<sup>215</sup>

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214. See *Constitution Watch (Russia)*, *supra* note 67, at 18 (describing the evolution of Russian law since the adoption of the new Constitution).

215. See generally, *Constitution Watch (Russia)*, *supra* note 68, at 23-30 (expressing a belief that the new Constitution is not adequate to support a properly functioning separation of powers system). The extent to which the spirit of the new Constitution is currently being violated was expressed by the decree issued on December 7, 1994 by current-President Boris Yeltsin. Yeltsin signed an *ukaz*, declaring December 12 to be Constitution Day in the Russian Federation. Ironically, the State Duma had rejected such a proposal the previous day. *Id.* at 28.