

# Threats of Judicial Counterreform in Putin's Russia

PETER H. SOLOMON, JR.

**Abstract:** This article explores a series of proposals and initiatives in Russia from 2001 to 2005, all of which threatened some of the substantial achievements of judicial reform under Boris Yeltsin and Vladimir Putin. These include the Mironov proposals to change the makeup and way of selecting members of the Judicial Qualification Collegia; an attempt to end life appointments for judges; a challenge to the power of the Constitutional Court to declare laws invalid; the plan to move the top courts from Moscow to St. Petersburg; efforts to tame jury discretion in political cases; and widespread talk about corruption in the courts. These counterreform threats are compared to analogous proposals in the late Tsarist period. Although the Putin era threats have not been realized, this article suggests that counterreform discourse may have an inhibiting effect on the judiciary in Russia.

**Key words:** Constitutional Court, counterreform, Judicial Qualification Collegia

In late September 2004, the Federation Council approved a draft law sponsored by its speaker, Sergei Mironov (allegedly written in the state legal administration of the president, which would change the composition and method of choosing members of the Judicial Qualification Collegia, the only bodies that can discipline or fire a judge for cause. As a result, judges would no longer constitute a majority, and even the judicial members would be confirmed by the Federation Council itself. "It is a big stupidity," said Yuri Sidorenko, head of the Council of Judges of the Russian Federation on the pages of a national newspaper, "but unfortunately in the spirit of the times. It is clear that these actions are meant to

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Peter H. Solomon, Jr., is professor of political science, law, and criminology at the University of Toronto. He is the author of *Soviet Criminal Justice under Stalin* (Cambridge University Press, 1996) and, in Russian translation, *Sovetskaia iustitsiia pri Staline* (ROSSPEN, 1998); editor of *Reforming Justice in Russia, 1964–1998: Power, Culture, and the Limits of Legal Order* (M. E. Sharpe, 1997); and coauthor, with Todd S. Foglesong, of *Courts and Transition in Russia: The Challenge of Judicial Reform* (Westview, 2000). He is an active participant in judicial reform projects in Russia.

limit the independence of courts and judges” (Kornia and Romanicheva 2004; “Proekt” 2004).

This initiative constitutes an example of the threat of judicial counterreform. It is just one of a number of such initiatives that appeared in public discourse in the Putin years.

To understand and assess these threats requires remembering that Vladimir Putin's presidency has done much to improve the courts and advance judicial reform in Russia. Among other things it has (1) promoted hierarchy of laws and sought to reduce inconsistencies in the laws of different governments; (2) achieved the adoption and initial implementation of new procedural codes (criminal, civil and arbitrazh) that include many positive features; and (3) dramatically increased funding of the courts (a process that is continuing) to cover such initiatives as raising the salaries of judges (while reducing their perks); expanding the court system through the new justices of the peace, thereby reducing caseload for many judges; introducing jury trials throughout the Russian Federation; adding significantly to the staff of courts (especially clerks); repairing court buildings; and moving toward full computerization of the courts (Solomon 2003a, 2004a). All this came on top of the Yeltsin era achievements of security of tenure for judges (at least in theory), judicial self-government, and the successful empowerment of courts in the areas of constitutional and administrative justice (Trochev 2005; Solomon 2004a).

Without progress in judicial reform one could not logically speak of counterreform (movement in an opposite direction), and unless the courts actually resolved some important issues impartially, people would not be tempted to seek leverage over them. *Ipsa facto*, the mounting of counterreform initiatives implies that reforms are making a difference, at least in the minds of some beholders.

Moreover, successful judicial reform in postcommunist states is bound to be marked by zigs and zags, including initiatives that might be seen as steps backward. Even in countries not undergoing transitions, calls to restrict judicial power or to enhance the accountability of judges to the point of control are common, especially from losers in the courts. But it is important to recognize counterreform proposals for what they are and understand their dynamics and implications.

As it happens, the term judicial counterreform was first used by Soviet scholars in the 1960s to describe developments in Tsarist Russia, where the Judicial Reform of 1864, designed to develop independent courts within an autocracy, produced courts that sometimes acted against the interests of the Tsar. From this tension came proposals in the 1870s, 1880s, and 1890s that threatened to undermine judicial independence (Vilensky 1969; Nemytina 1999).

This article begins with discussion of the concept of judicial counterreform and its utility as an analytical tool, using events and proposals from late Tsarist Russia as an example. The core of the article explores a series of proposals and initiatives of the years 2001 to 2005, all of which may be understood as threats to judicial power or independence. These include the Mironov proposals and other suggestions relating to judicial self government and financing; an attempt to end life appointments for judges; a challenge to the power of the Constitutional Court to render laws invalid and order their rewriting; the plan to move the top

courts from Moscow to St. Petersburg; efforts to tame jury discretion in political cases; and widespread talk about corruption in the courts. The article concludes with a discussion of the sources and impact of judicial counterreform attempts in the Tsarist and Putin periods.

### The Concept

My starting assumption is that the main purposes of judicial reform are (1) to increase the chances of impartial adjudication through insulating judges from potential sources of pressure and dependency and (2) to enhance judicial power by enlarging the jurisdiction of courts, giving judges more discretion, and improving the authority of judges (to ensure compliance with decisions and verdicts). Or, put simply, to promote judicial independence and judicial power.

To be counted as judicial counterreform, measures must reduce either judicial power or judicial independence *in an unreasonable or unjustifiable way*. The qualification matters, for the more power that the courts assume, the more important the accountability of judges becomes, and measures that hold judges accountable usually come at some cost to their independence. Examples include the election of judges in most states of the United States and the management of judicial careers in civil law countries. At the end of 2001, Russian authorities adopted a law that reduced the number of judges on the Judicial Qualification Commissions that handle the selection and disciplining of judges from 100 percent to two-thirds. Although some judges saw this as a step backwards (even as counterreform), this move put Russia in line with most countries of Western Europe and was accepted by most observers as a justifiable expression of the need to balance independence with accountability (Solomon 2002, 2004a; Guarnieri and Pederzoli 2001). But, as we shall see, some efforts to enhance accountability mask urges to gain control.

To a degree, what constitutes judicial counterreform is in the eye of the beholder or a judgment call. This suggests that scholars must not accept mechanically the views of the players in the conflicts that they study.

At the same time, one should recognize that judicial counterreform can have harmful effects *merely as discourse*, without particular measures being adopted or implemented. Persistent criticism of judges and courts, along with the promotion of measures that might harm them, can have detrimental effects on both individual judges and the judicial community. The cumulation of threats and negative talk can intimidate and make even leading judges cautious and defensive. As of March 2005, it was precisely such a syndrome that seemed to be taking its toll among the judiciary of the Russian Federation.

### The Tsarist Experience

The Judicial Reform of 1864 established actual public trials for the first time in Russia, where two sides represented by lawyers argued their causes orally before a judge. For most criminal matters of any seriousness, trial by jury was an option, and one that produced higher rates of acquittal than cases heard by a judge alone. For their part, judges in the three upper layers of the court system had appoint-

ments for life, with removal only for cause. Significantly, the reform was driven by a group enlightened officials in the upper levels of the bureaucracy who believed that a strong legal order would make government more effective and fair (Wortman 1976).

As the reform was implemented during the 1870s, 1880s, and early 1890s, conservative Tsars and their advisors moved to check the manifestations of judicial power that bothered them most. These included juries that gave acquittals in trials of revolutionaries (such as Vera Zasulich) because they sympathized with the accused and judges too ready to rule in favor of citizens who challenged government officials. Tsarist leaders responded to what they perceived as challenges to the authority of the tsarism by narrowing the jurisdictional limits of the regular courts, by removing political offenses to military courts or the Senate, and by drastically curtailing access of complainants to administrative justice, itself implemented by a Department of the Senate bound to be loyal. At the same time, there were measures adopted to expose judges to a disciplinary board, compel them to explain their decisions to the Ministry of Justice, and allow the transfer of judges to less desirable posts against their will. In these and other ways, the jurisdiction of the courts (and thereby judicial power) was reduced and the tools of judicial bureaucracy sharpened to facilitate the management of judges (Wagner 1976). Taken together, these changes, albeit introduced over a twenty-year period, have been described as judicial counterreform, but not of a sort that undermined the core goals and principles of the exercise.

In 1894, however, a Commission on the Revision of the Laws on Justice Administration was established under the lead of the new Minister of Justice, Nikolai Muraviev, who understood that the Tsar wanted the judiciary brought under control, a goal shared by a whole wing of the bureaucracy. Already in 1885, Minister of the Interior Pobedonostev had identified as the targets of change the principles of irremovability and trial by jury, both of which facilitated court decisions against government interests. The Commission was asked to take a hard look at both of these institutions to see whether they should be retained. Fortunately, the Commission's broad membership included articulate liberal jurists (for example, Koni and Tagantsev). Its proceedings were made public in the course of its meetings and compromises were reached on most of the proposed changes. Moreover, the legislative drafts produced by the commission received considerable criticism from other governmental bodies during the winter of 1899, and Sergei Witte himself opposed them in the State Council (Tarnovski 1981).

The failure of the Commission to actually implement judicial counterreform reflected the distribution of political forces, especially the sharp divisions within the bureaucracy. For his part, Muraviev proved pragmatic, an official of conservative inclination (a former prosecutor), who charted a middle course in the face of constraints. One recent observer (Jorg Baberowski) has characterized Muraviev as a hero trying to strengthen bureaucratic oversight and tame a judi-

cial system out of control because of an experiment that was misguided from the start (Wortman 2005).

Ultimate political success aside, during most of the 1890s, judges and academic jurists who stood behind independent courts and liberal jurisprudence faced an ever-present threat of serious damage to their enterprise, including not only changes to the rules of tenure of judges and a remaking of the jury, but also the reorganization of local justice and serious steps backward in criminal procedure. The source of the threat came from outside the administration of justice—from rulers and officials who did not appreciate the value of independent and empowered courts. Within the authoritarian regime constituted by the autocracy, the prominence of such people and positions was hardly surprising.

**The Mironov Proposals on  
the Judicial Qualification  
Collegia**

Since 1993, most judges in post-Soviet Russia, like their Tsarist forerunners, enjoyed the benefits of life appointments and irremovability from office except for cause. The Judicial Qualification Collegia

was empowered with determining when judges had committed serious breaches of law or ethics and deserved to be removed from office. Established in 1989, these bodies were composed exclusively of judges, chosen by the congresses and conferences of judges, and represented important bodies of judicial self-government. In post-Soviet Russia, they assumed the key function of screening all new appointments for judges and all promotions of judges to higher courts and positions as chairs of courts. In addition, they were empowered to decide matters of judicial discipline, including the lifting of immunity from criminal prosecution and removal from office for cause. The Judicial Qualification Collegia operated both at the regional and federal levels (Solomon and Foglesong 2000, 31–36).

At the end of 2001, in response to concerns that the Collegia sometimes protected judges who had erred and gave the judiciary too much power, Russian lawmakers decided to broaden the membership of the Collegia. For every two judges there would be one member of the public, usually a jurist and chosen by a legislative body. In addition, each collegium would include one representative of the president. Although displeasing to some judges, this change brought Russian practice into line with European norms for such bodies and ensured the appearance that judges were accountable not only to their peers (Solomon 2002, 2004a). Over the next two years, most subjects of the Federation added members of the public, but often presidential representatives were not appointed (Trochev 2005).

The Mironov proposals of September 2004 promised to change the new version of the Collegia before it had been tested in practice. The proposals would further reduce the number of judges on the Collegia. Taking into account the

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member appointed by the president, judges would consist of less than half of the members (a violation of European norms). Thus, the Supreme Judicial Qualification Commission would consist of ten judges, ten members of the public, and one presidential representative. Moreover, the judge members would not be chosen by the judicial community, but would be presented by the president (on the suggestion of the Congress of Judges) for confirmation by the Federation Council. In addition, the quorum for meetings of the collegia, including the Supreme Judicial Qualification Collegium, would be reduced from two thirds to a simple majority, so that a convocation with no judges present could authorize firing of a judge (Zharkov and Gulko 2004).

On September 29, 2004, the Federation Council approved the Mironov proposals, one hundred and seventy-five votes for to two against and forwarded its draft law to the State Duma. Although the Duma staff classified the draft law as “priority,” a first reading of the bill did not follow as expected. To start, the plan provoked sharp criticism from a number of Russian judges and jurists. In addition, the Federation Council member from Lipetsk, Anatoly Lyskov, and some prominent members of the Duma, including Pavel Krashennikov, Sergei Popov, and Viktor Pokhmelkin, spoke out strongly against it (Barakhova 2004; Kommersant 2004; Kolesov 2004). The latter supplied an alternative plan for remaking the Collegia, which would eliminate the presidential representative and have the members of the public group chosen by the Congress and conferences of judges rather than the Federation Council and other legislative bodies (“Proekt” 2004a; Tkachuk 2004). On October 20, the heads of the three top courts registered their objections in a private meeting with the president, who assured them that nothing would happen before the Sixth Congress of Judges, which would meet in December (Zakatnova 2004; *Kremlin.ru* 2004).

In addition to the changes to the Judicial Qualification Collegia, Mironov also proposed that the Director of the Judicial Department, the agency providing administrative support to courts of general jurisdiction since 1998, be appointed by the president instead of the Chair of the Supreme Court with consent of the Head of the Council of Judges. The Judicial Department had been created to move judicial administration from the executive to the judicial branch, so subordination to the president would undermine the logic of its creation. But this proposal generated little discussion, and even among judges one could find supporters.

The origins of the Mironov proposals remain murky. Mironov kept insisting that they were his personal initiatives, worked out with his colleagues in the upper house of the legislature. If so, journalists speculated, had Mironov misread the president’s remarks after the Beslan hostage crisis about the need to overcome corruption in the courts? (Zharkov and Gulko 2004). Increasingly, informed sources indicated that Mironov had been working on behalf of officials within the presidential administration and that the proposals represented a trial balloon floated by the some of the *siloviki* (power group) close to the president, with the approval of Viktor Ivanov, deputy head of the presidential administration (Filippov 2004; Korolkov 2004). Whatever the proposals’ actual origins, members of the Federa-

tion Council seemed to assume that they would serve the president's interest in perfecting the power vertical and adding the courts to his coordinated system of governance (Solomon 2005).

On the eve of the Sixth Congress of Judges in December 2004, the top judges met with the president once again, and the press release on the meeting did not mention the Mironov proposals (*Strana.ru* 2004). The Congress itself heard a large number of speeches criticizing them (including from the chairs of the top courts), and its main resolution included strong condemnation of the proposals (Katanian 2004; "Postanovlenie" 2004). Inter alia, the resolution declared that they contradicted the constitutional principle of independent judicial power, the requirements of the federal constitutional law of the judicial system that no laws be issued that might lessen the independence of judges or courts, and the requirements of the European Charter on the status of judges (approved in Strasburg 1998) that any body that deals with the appointment, promotion, or termination of a judge must consist of no less than half judges. The Congress's resolution might have added that throughout Europe, both the West and the former East, the norm for such bodies was two thirds. The outliers were Lithuania (where the judicial discipline body was composed only of judges) and Portugal (where the Higher Council of the Judiciary had nine judges out of seventeen members. Note that there is no country in Europe where either the executive or legislative branches take part in the appointment of most of the judge members on their judicial councils (Guarnieri and Pederzoli 2002).

For his part, the president came to the Congress and pleased the judges by promising significant increases in judicial salaries (one to start immediately) and to raise the age of mandatory retirement from sixty-five (introduced in 2002) to seventy. His posture on the Mironov proposals, however, was sphinx-like: "the formation of the collegia must be aimed at raising the effectiveness of the judicial system and cleaning its ranks without violating the principle of separation of powers." Although these words suggested that the Mironov proposals would not be adopted in their current form, it did not rule out a version of them, leaving judges and supporters of a self-governing judiciary in a state of nervous suspense (Stanovaia 2005). The psychological burden of this uncertainty seems greater when one places the Mironov proposals in the context of other counterreform proposals and negative discourse about the courts.

### Three Counterreform Initiatives

The first challenge to a core element of Russian judicial reform under Putin came in 2000, when security of tenure through life appointments came under attack. In spring 2000, Vladimir Putin asked Minister of Economic Development German Gref to develop economic planning documents, and Gref's group chose to include "strong and trusted courts" among the requirements for increased investment and economic growth. Among a set of reforms proposed by the group was the *replacement of life appointments of judges* by nonrenewable terms of fifteen years, so that judges would have incentives to perform well. As it was, Gref explained, the Russian judiciary had become a "closed club, closed off from public criticism,

public supervision and the needs of the economy,” and were accountable to no one (Solomon 2004a).

Legal scholars and judges spoke out strongly against the proposal, in the press and at a meeting of the Presidential Council on the Improvement of the Administration of Justice in October. They objected not only to the idea of fifteen-year terms, which they insisted would undermine judicial independence, but also to the manner in which the Gref reform package had been developed—in a think tank and behind closed doors. Despite public support from a jurist who had helped Gref, the furor led President Putin to remove the question of judicial accountability from the domain of economists and establish a presidential commission under Dmitry Kozak to address the question on its own and consider all the options. The Kozak Commission on the Administration of Justice (which met in winter of 2000 to the spring 2001) had representation from all interested parties (especially judges) and, by the end of the year, led by the end of the year to changes in the composition of the Judicial Qualification Collegia (to include one-third non-judges and a presidential representative) and enhancements of the system of disciplining judges. For some judges, even these changes represented a step backwards, but the most serious counterreform threat was checked (Solomon 2004a).

The year 2001 witnessed another counterreform incident, this time an attack on judicial power instead of judicial independence, in particular the power of the Constitutional Court of the Russian Federation (Trochev 2002). The origins of the attack lay, paradoxically, in proposed amendments to the Law on the Constitutional Court to ensure compliance with its decisions, especially by regional authorities whose legislation had been ruled unconstitutional by the Court, sometimes stipulating what changes were required. As the changes were being debated in the State Duma, individual legislators (Valery Grebennikov, Oleg Utkin, Boris Nadezhdin) and the Committee on State Development (under Lukianov) began attacking the *right of the Court to issue rulings binding upon other branches of government*, not to speak of creating legal norms. Some Duma deputies defended the Constitutional Court's prerogatives, but the play of politics produced a dangerous situation. In November 2002, the Duma committee actually approved proposals that would deprive the Court of its essential power and convert it into an advisory body.

Members of the Constitutional Court (Baglai, Sliva, Morshchakova) were forced to campaign against the threatened changes in both public forums and directly with the president. They explained that any limit to the binding force of Constitutional Court decisions would represent the end of constitutional justice in Russia. Morshchakova warned that should the changes be introduced, they might be challenged in the Constitutional Court, which was likely to invalidate them. Resistance to potential undermining of the Constitutional Court proved successful when the relevant Duma factions forced the authors of the offending amendments to withdraw them (Trochev 2002). What happened behind the scenes, including the role of the president in this process, is unknown. But this



was not the first time in young life that the Constitutional Court had to fight for existence (Sharlet 2003; Trochev 2005a).

Twice in the first two years of Putin's presidency, the judiciary in Russia confronted major challenges to the independence and power of the courts. In the same period, the president also gave support to the impressive plan for increasing the financing of the courts, which led to increases in judges' salaries, expansion of the number of judges, addition of new staff for courts, and modernization (including computerization) of court facilities. But for the leaders of the judiciary (the chief judges of the top courts and head of the Council of Judges) the need to counter threats had become a regular, if unwelcome, part of their jobs. They would not have to wait long before facing a new threat, the proposal to move all three top courts (Supreme, High Arbitrazh, and Constitutional) from Moscow to St. Petersburg.

The author of the idea of moving the courts was Valentina Matvienko, who became presidential envoy for the northwest region in March 2003, and then governor of St. Petersburg in October. The speaker of the Federation Council had proposed moving some federal government agencies to St. Petersburg in early 2002, and the president seemed to support the idea, especially as the tercentennial of his home city drew near. But it was Matvienko who began focusing on the courts in March 2003, as institutions that would bring luster to Russia's traditional "second capital." Apparently, the president also believed that courts made good candidates for moving, on the grounds that courts at a distance would be less dependent on federal authorities and that the Germans had placed their Constitutional Court outside the capital.

Of course, buildings would have to be found for the high courts, but the transfer in December 2002 of three historic buildings in the center of St. Petersburg (including of the Senate and the Synod) to the control of the presidential administration, at least two of which could be redesigned as courts, made this seem possible. In preparation for the transfer of the courts, without the issue having been resolved or consent of the judges obtained, preparations were made to move out the current occupants of these buildings, including the main State Archive with materials on Tsarist history. One of the other occupants, the Institute of Plant Growth, successfully resisted the plan and retained its building. The archival administration brought a suit to the Supreme Court of the Russian Federation, but lost and was forced to move to another building (Babichenko 2004; Kommersant 2004).

Upon election as governor of St. Petersburg in October 2003, Matvienko began speaking openly about the move. Reports of the preparation of a "conception" for the move and a presidential decree led the media to take on the issue. A series of articles and even a radio program soon demonstrated the strong opposition to the idea, not only among judges and staff of the courts, but also among officials of the government and the public in the city of St. Petersburg (Shesterina 2003; Zakatnova 2003; Grigorev 2003). For government officials, the extraordinary financial costs of moving not only the courts but also their judges and at least some of the staff (estimating at one billion dollars) mattered, not to speak of months or years of disruption of adjudication. For natives of St. Petersburg, bring-

ing the federal government to their midst threatened to spoil the quality of their city and disrupt the lives of many residents. A poll of Petersburgians revealed that 43 percent of respondents were against and only 12 percent were in favor of the move (Torocheshnikova 2003). But judges and jurists generally were the most strenuous opponents.

Jurists advanced both legal and practical arguments against the move. The legal ones included that the statutes of two of the three high courts (Constitutional and High Arbitrazh) had Moscow fixed as their sites; and that the constitution itself makes Moscow as the capital and provides no legal basis for moving federal functions from it. The practical arguments were more compelling.

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The operation of the courts would be disrupted, not only by the move itself, but also because some judges and much of the staff would refuse to move. Despite Matvienko’s belief that St. Petersburg had enough legal talent to staff the courts, jurists explained that this was far from the case. For decades, Moscow has had the

bulk of the top legal scholars in the country, and it was precisely these cadres on whom the high courts depended when there was so much new legislation that needed to be understood and absorbed. According to one commentator, St. Petersburg was not even the number two city for legal talent; that honor went to Ekaterinburg, a distant second. In addition, “access of justice” would be harmed by the move, because the transportation system of Russia did not include direct air or train links to St. Petersburg from many locations, so people would have to travel through Moscow. Some said that with the high courts in St. Petersburg, the Procuracy and MVD, would also have move (Torocheshnikova 2003; Babichenko 2003; Nikitinsky 2004).

For judges and judicial reform more generally, the worst aspect of the plans to move the courts was that they were developed among a few politicians without consulting the judges. In fall 2003, a judge on the Constitutional Court said “no one asks us.” Lawyer Petr Barenboim captured best of all what was so terrible about the plan: “The idea of moving the courts to St. Petersburg shows a significant lack of respect for the courts and represents an attempt to put pressure on the judicial branch” (Torocheshnikova 2003). To many of the judges on the high courts in Russia (whose private views of the initiative were reportedly too graphic to appear in print), once again the executive branch was acting as if it was above the courts and seeing the judges merely as their playthings. Where was the independence of the judicial branch? Where was the principle of separation of powers? According to one jurist, the biggest failure of judicial reform to date lay in the continuing lack of respect for the principle of judicial independence in Rus-

sia. The actions of Matvienko and persons in the presidential administration seemed to confirm this (Torocheshnikova 2003).

Reportedly early in 2004, the government drew up an operational plan for the move, and by spring some of the judges had visited St. Petersburg to see what housing was already available. But in the spring, discussion of the move stopped, perhaps because of the appointment of a new prime minister and the preoccupation with reforming the ministries. Reports of fall discussions between the top judges and the president and of the Sixth Congress of Judges included no mention of it. One might speculate that the events in Beslan and President Putin's new concern with institutional stability have put the whole plan into a holding pattern, from which it may never emerge. As of June 2005 it seemed that no decision had been made one way or the other about moving one or more the courts to St. Petersburg. What is clear is that judges on the high courts and the judicial community as whole faced three years of tension and open condescension to them on the part of the leaders of the executive branch (Kornia 2004).

### **Counterreform through Resistance: The Manipulation of Juries**

In addition to attempts to change legislation in ways that hurt judicial independence or power without justification, judicial counterreform may also take the form of attempts to avoid or reverse the impact of judicial reforms in the course of implementation. Resistance to innovations in policies is a normal part of policy change, but when it is so extreme as to undermine a reform, it may be understood as counterreform. The implementation of the new Criminal Procedure Code of 2001 offers many examples of normal resistance. The accompanying monitoring process was aimed as educating the law enforcement officials charged with its implementation and introducing adjustments to make the Code work (Solomon 2005a). The use of trial by jury in political cases, however, put judicial reform and the interests of security personnel on a collision course.

Trial by jury was introduced as an option for accused persons in five regional courts in 1993 and four more in 1995, and was available for any case heard by those courts. Dealing mainly with cases of murder and sexual assault, juries complicated the lives of law enforcement personnel by holding evidence to a higher standard than was the case in bench trials and acquitting some 15 percent of accused. Many of these verdicts were reviewed and changed on appeal, but at least 60 percent of them held; the resulting 9 percent of acquittals greatly exceeded the rate of 0.4 percent in bench trials.

In 2002, President Putin ordered the spread of jury trials to all parts of the country, and by mid-2004 they were available in regional, republican, and even military courts everywhere except in Chechnya. In 2003, jury trials represented 9 percent of all trials heard in courts of the subjects, with huge regional variations; in Ivanovo region, juries took part in 53 percent of eligible cases. The rates of acquittal across the country still averaged 15 percent (Solomon 2005a; Kornia 2004a).

But the big change was that, starting in 2003, juries became involved in cases of crimes against the state, that is "special cases" (*spetsdela*) investigated by the security police (FSB). In December 2004, a jury in Krasnoïarsk acquitted

physicist Valentin Danilov of spying for China on the grounds that the information he conveyed was no longer classified. At the same time, a judge and jury in the Moscow City Court began hearing a new trial of Igor Sutyagin, also accused of espionage by giving away state secrets.

Although there had been instances of judges issuing acquittals in political cases (for example, the extraordinary case of Alexander Nikitin, where judges refused to defer to the FSB in the absence of evidence to convict), usually the FSB had been able to secure convictions in political prosecutions (Johnson 2000; Solomon and Foglesong 2000a). Jury trials represented a new challenge, for, although most judges understood what was expected of them and chairs of courts could direct cases to mature ones, juries were unpredictable. Even in cases of crimes against the state, they might well deliver acquittals. Admittedly, appeals would still be available, and the appeal in the Danilov case led to an order for a new trial.

But FSB officials were not content to leave things at that. One response was a proposal in February 2004, to remove cases of crimes against the state (especially treason and spying) from the purview of juries, which would require a change in the Criminal Procedure Code (Minklukha 2004). This was the same approach as had been adopted by Tsarist officials after some years of unsatisfactory performance by juries in cases involving revolutionaries. But in the absence of response from the legislature, FSB officials initiated a process of influencing the selection of jurors and the judges who would preside over trials of crimes against the state with jurors. The best-known example to date was that of Igor Sutyagin. In November 2003 a veteran judge of impeccable credentials swore in a jury to begin hearing the case. But in the new year, just weeks after the Danilov acquittal, the judge inexplicably resigned in favor of a new judge who had specialized in politically sensitive cases and who proceeded to empanel a brand new jury. The new jury was chosen in a non-transparent way and according to knowledgeable observers included a number of retired, if not also current, employees of the FSB. As I have detailed elsewhere, the new judge and jury delivered according to expectations (Solomon 2004b; *Ezhaedelnyi Zhornal* 2004; Alimov and Digges 2004; Ekho Moskvy 2004).

The apparent attempt to manipulate jury trials represented a challenge to one of the cornerstones of post-Soviet judicial reform. As Sergei Pashin, the prime advocate of juries, understood, juries were bound to operate at arm's length from the authorities and represented an effective instrument for combating the accusatorial bias that had been central to Soviet criminal justice. But when juries became involved in cases that mattered to powerful officials, it turned out that they also were subject to manipulation. If, in future jury trials of political sensitivity, there are attempts made to handpick the jurors or judge or to otherwise influence outcomes, that would be a clear example of judicial counterreform through resistance. Early in 2005, the press also noted instances of attempts to influence juries in nonpolitical cases, or to exert reprisals upon them after giving acquittals (Nikitinsky 2005).

Of course, it remained possible that the jurisdiction for jury trials would be restricted, as the FSB proposed in 2004 and as the Tsarist government did in 1879.

For a while at least, the desire to prevent damage to Russia's reputation abroad was likely to prevent this outcome, assuring that the "correlation of forces" would determine when jury trials in cases of state crimes were fair.

### **Talk about Judicial Corruption and Its Consequences**

One of the main justifications for the Mironov proposals was the allegation that corruption among judges was rife and that the judicial community had proven unable to deal with the problem. The president himself legitimized the charge in his post-Beslan television remarks, which included the following statement: "We have allowed corruption to affect the judiciary and law enforcement systems" (Prezident 2004). During the next six months, partly at the prompting of the media, a series of public figures spoke about this problem, the cumulative effect of which might prove detrimental to judicial reform. There was also a chance that the new discourse of judicial corruption would have positive effects.

The issue itself was not new, nor were indications that the judiciary showed a negatively perceived readiness to respond to the influence of money and power in rendering decisions. Recent surveys from polling firms such as the Public Opinion Foundation (FOM) and special studies by the INDEM foundation gave this diagnosis a solid basis and had already led leaders of the judiciary to inquire into why the public image of the courts was worse than the reality (Eniutina 2001; Satarov 2003; Burger 2004; Ilichev 2004). Blaming the media for overly negative reporting was one response (Vasileva 2004), and then seeking ways to improve court-media relations, including the establishment of press attachés at more courts (Sovet sudei 2005). Another approach called for increasing the transparency of the courts, including the posting of more decisions on Internet sites, to demonstrate to the public the positive achievements of judicial reform and overcome the gap between perception and reality (Solomon 2003; Verkhovnyi Sud 2004).

Public perceptions of corruption do not necessarily correspond to the realities; likewise, talk about corruption (not to speak of anti-corruption campaigns) may have a life of its own, subject to use (even manipulation) by friends and foes of courts alike. Three recent contributions to the discourse on judicial corruption may serve as cases in point, although the particular pretexts matter less than the cumulative impact of the statements.

In an interview published in *Izvestiya* on October 25, 2004, Chair of the Constitutional Court RF Valerii Zorkin asserted that, "according to research, our courts are mired in corrupt relations with business. Bribe-taking in courts has become one of the most corrupt markets in Russia . . . built on various corrupt networks operating at various levels of the power structure." This statement came up in the context of reflections upon the gap between public opinion and the accomplishments of judicial reform and led Zorkin to call for more study of judicial corruption to find ways of combating it (Ilichev 2004a). However, judges on the Supreme Court RF took Zorkin's words as a direct attack upon them and their colleagues on the arbitrazh courts and responded with a resolution of the Court's Presidium calling upon Zorkin to back up his statement with

concrete evidence that the Court could investigate (Kolesov 2004a; Ilichev 2004b). Leaders of the Supreme Court chose to place Zorkin's comments in the context on the ongoing dispute between the two high courts. In a reply in *Izvestiya*, Zorkin tried to defuse the controversy, insisting that he had made no accusations and that he wanted only to get his colleagues to deal openly with issues that affected the stature of the courts in the public eye (Zorkin 2004).

In late January, former deputy head of the presidential administration in charge of judicial reform, Dmitry Kozak, made similar allegations in public. Speaking in his capacity as presidential envoy to the Southern Federal District, to a meeting of the presidential representatives on the regional and republic Judicial Qualification Collegia of the district, Kozak spoke of a "catastrophic and threatening situation in the judicial system," which, like other parts of government, was "suffering from corruption," representing "the start of the collapse of government." Kozak also referred to public opinion surveys, and used his remarks to promote a "literate cadres policy" and facilitation of investigations of judges whose decisions were "clearly unjust" (Dadaeva 2005). No doubt Kozak was frustrated with the manifestations of corruption in the North Caucasus, reputedly worse than in most other parts of the Russian Federation. Still, such intemperate remarks from the normally calm and pragmatic Kozak did not bode well for the courts.

Ten days later, former judge on the Moscow City Court, Olga Kudeshkina, gave an interview to *Komsomolskaia Pravda*, in which she made sweeping statements about the moral character of Russian judges. More than a year before, Kudeshkina had not only refused to fulfill the directions of the Chair of the court regarding a particular case, but she had also become a whistleblower, publicly denouncing the attempt to interfere in a case. The saga ended with Kudeshkina's dismissal from the judiciary for conduct unbecoming a judge, but the dismissal only strengthened her resolve to continue exposing the negative sides of judicial reality, including in an open letter to President Putin (Kolesov 2005; Kudeshkina 2005). In the interview in question, Kudeshkina sounded more like a dissident than a judge, but journalistic license added spice. Although Kudeshkina had said that "we have a lot of managed judges" (meaning judges who take direction in the occasional case that matters to powerful people) and that "90 percent of judges lack the moral right to be judges," the headline implied that most judges were in fact corrupt—"90 percent of our judges are bought or managed" (Baranova 2005). A year ago, Kudeshkina claimed that, as a judge in the provinces, she had never encountered the pressures that she would experience in Moscow.

These three comments from prominent people represent examples of the discourse of judicial corruption that became part of the politics of the judiciary in 2005. It is too early to say for how long such corruption talk will continue and to what extent it will fuel further attempts at judicial counterreform. But it may also have positive effects.

Not surprisingly, the new chair of the High Arbitrazh Court Anton Ivanov, addressed the issue of judicial corruption in his first interviews and speeches.

On the one hand, he denounced the exaggerated claims about a wholly corrupted judiciary that were either made or implied in the public discussion (*Strana.ru* 2005). On the other hand, he gave full support to efforts to increase the transparency of the work of his courts. Specifically, he backed a project, promoted by the chairman of the St. Petersburg Charter Court, Nikolai Kropachev, (also Dean of the Law Faculty of St. Petersburg University and a personal friend of Vladimir Putin), along with representatives of the World Bank, to start posting all of the decisions rendered by arbitrazh courts of all levels with four of the seven federal districts on Web sites accessible to the public (Regnum 2005; Medvedeva 2005). Although called an experiment, this was a major undertaking that would involve a high level of computerization of more than half of the courts in the arbitrazh court system. This expensive proposition was to be underwritten by remaining funds from the legal reform loan provided by the World Bank in 2000 and is scheduled to be implemented by the end of 2006. According to Kropachev, the decisions of arbitrazh courts in his own Northwest district were already being posted, although not necessarily for public access. Decisions of the *okrug* (district) arbitrazh courts were available through electronic services, but only for substantial fees.

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***“. . . making the courts more transparent has the support of a wide range of players with different interests and perspectives on the courts.”***

As explained by Justice Ivanov, this new openness should raise public trust in the courts. In the absence of information, speculation was all too easy, including by journalists. “If the losing side sees analogous decisions in analogous cases, it will be harder to complain about ‘corruption’ or a ‘political order’” (Kozlova 2005). Moreover, the publication of decisions was bound to make judges more accountable, especially judges whose decisions were often changed by higher instances, not to speak of judges who did not write well or easily. Over the past few years many judges have resisted the idea of broad publication as generating unnecessary and unjustifiable extra work.

Although some arbitrazh court judges may resist the change, it seems that their new chief will promote it all the same. Moreover, making courts more transparent has the support of a wide range of players with different interests and perspectives on the courts. However unpopular with some judges, the publication of decisions represents a justified measure of accountability rather than a counterreform proposal.

It is worth noting that negative discourse about judges and courts can have perverse, counterproductive effects. For instance, it feeds the popular stereotypes about judges, limiting the impact on public opinion of the progress made in judicial reform. Moreover, corruption talk may even become a self-fulfilling

prophecy, giving some court workers an excuse for engaging in inappropriate conduct. Worst of all, the combination of negative talk about judges and the persistence of counterreform initiatives may constrain individual judges from rendering decisions or verdicts that are unconventional or controversial and place limits on their impartiality.

### **The Sources and Impact of Counterreform Threats**

In late Tsarist Russia, supporters of judicial counterreform consisted of an identifiable segment of upper ranks of the bureaucracy, which itself was divided on the subject of independent and powerful courts. The threats to the courts and judges in early twenty-first century Russia came from a variety of different sources, most of which did not support the initiatives of the others. The initiators of threats to judges that we have discussed included (1) the Ministry of Economic Development (eliminating judicial tenure for life); (2) deputies in the State Duma, especially from the left (crippling the Constitutional Court); (3) a political friend of the president (moving the courts to St. Petersburg); (4) the leadership of the Federation Council (the Mironov proposals); (5) the Federal Security Service (making juries convict); and (6) the “power players” (*siloviki* or former military and security officials) within the presidential administration (Mironov proposals). One could add to this list the government itself; in fall 2004, it tried (as it had unsuccessfully in the past) to repeal the rule that the budget for the courts could not be reduced without the consent of the judicial community (expressed through the Congress or Council of Judges) (Sterkin 2004). This represented a hard-won privileged status for the courts, which originated with a Constitutional Court decision of 1999.

Officials within the presidential administration supported, directly or indirectly, three of the initiatives that we have discussed. They seem to have acted under the guidance of Deputy Chief of the Presidential Administration Viktor Ivanov who, in 2004, assumed responsibility for monitoring the courts on behalf of the president (Zakatnova 2004a) and improving their performance. Shortly after his appointment, Ivanov surprised judges by proposing that chairs of courts be returned as members of the Judicial Qualification Collegia, thereby threatening to undo an important achievement from 2001. As we have seen, journalists have associated Ivanov with the Mironov proposals in fall 2004.

Another repeat source of initiatives threatening judicial power or independence is the Ministry of Economic Development. Thus, in spring 2005, Ministry officials proposed in a draft program on socioeconomic development and a related action plan for 2005 to limit the right of the Presidia of the Supreme and High Arbitrazh Courts to interpret legal norms, in apparent contradiction of Article 127 of the Constitution (Kolesov 2005a).

Although the opposition to strong and empowered courts in Putin’s Russia was not as concentrated or consistent as it was under Tsars Alexander II and III, there was also no strong group of supporters of judicial power outside of the judges and the legal community themselves. To be sure, jurists on the Muraviev Commission played an important role in checking the most danger-



ous of Muraviev's proposals, but they had the support of enlightened bureaucrats within the Tsarist civil service who appreciated the value of strong independent courts. If such a constituency exists in Russian government, it is not sufficiently vocal. So far, it has been up to the top judges, with occasional help from legal scholars and liberal members of the Duma, to respond to and check the challenges of judicial counterreform. Arguably the media have also helped to oppose threats, especially liberal journalists, including those associated with the Guild of Legal Journalists. But the media also provide outlets for criticism of judges and courts, and the preponderance of coverage of the administration of justice has been negative.

The actual attempts of judicial counterreform in late Tsarist and early post-Soviet Russia also have much in common. Many were motivated by an urge to limit judgments and verdicts by judges that go against the interests of powerful persons (either through creating dependencies or narrowing jurisdiction). Some of the foci were the same—security of tenure of judges and trial by jury—precisely because they made control of judges difficult. In both periods, the most dangerous counterreform proposals were not realized, although their discussion may well have had an intimidating effect on judges. But the main achievements of judicial reform were preserved, if not also the momentum for further improvements, and in the Putin era the infusion of new money into the courts made some progress inevitable.

In Tsarist Russia, the tension between an authoritarian (autocratic) regime, even in liberal clothes, and independent and powerful courts, underpinned the struggles over judicial reform and counterreform. Under Putin, one could observe similar tensions. The urge to make judges more compliant and jury trials more predictable connect to the authoritarian tendencies that emerged in Putin's second term and especially after the Beslan crisis. Not only are democratic institutions in Russia weak, but in the name of security the leader is committed to building a system of power that is more consistent with authoritarianism than democracy. For a few years, Western scholars have described Russia as hybrid regime, or even liberal or pluralistic form of authoritarianism (Diamond 2002; Levitsky and Way 2002). The politics of judicial reform provide support for this assessment. This does not exclude impartial adjudication for a broad range of disputes, or that courts may have considerable power, especially in the area of administrative justice. It does suggest that bringing courts and law fully up to the standards of Western democracies will not happen soon.

Up to summer 2005, most threats of judicial counterreform in Putin's Russia have been checked, and the president himself deserves some of the credit. As we have seen, the very presence of threats can hurt judges and courts by itself. Still, the unrealized threats have not constituted the greatest impediment to the independence and power of judges. That prize goes to the continuation of informal practices and institutions that explain why—the achievements of judicial reform notwithstanding—powerful people may still find ways of influencing judges in cases that matter to them (Krasnov 2004; Gelman 2004). That is a subject for another time and place, however.

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