

President Medvedev and the Contested Constitutional Underpinnings of Russia's Power Vertical

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Abstract: The author investigates Russian federalism and the constitutional underpinnings of the power vertical, looking specifically at the Constitutional Court's December 2005 case about the appointment of governors. The court's decision upheld the constitutional notion of a "unified system of executive power" as the primary legal justification for the power vertical. However, not all of the justices agreed with this reading of the Russian constitution, and the dissenting special opinions provide alternative interpretations of the Russian constitution's division of power. The author also analyzes President Dmitry Medvedev's November 2008 state of the nation address and Medvedev's unexpected call to reexamine and clarify the Russian constitution's requirement for a unified system of executive power.

Keywords: constitution, elections, federalism, governors, power vertical

In his November 2008 state of the nation address, Russian president Dmitry Medvedev boldly extolled the virtues of the Russian constitution. According to Medvedev, the Russian constitution "upholds freedom and justice, human dignity and welfare, protection of family and Fatherland, and unity of our multiethnic people—not just as common values but as legal concepts."¹ However, despite this effusive praise, during the speech Medvedev also announced his openness to certain "corrections" to the constitution. Most notable, Medvedev called for increasing the terms of the Russian president and Duma representatives to six years and five years, respectively, an amendment that was swiftly enacted into law. Medvedev raised the specter of less flashy but more fundamental legal reforms as well. Interestingly, in his inaugural address to the nation, Medvedev chose to revisit several pillars of the so-called *power vertical*, the term generally used to describe Putin's highly centralized, Kremlin-controlled political system.

Medvedev expressly called for a modification in the gubernatorial selection process, proposing that potential nominees should come from those parties that received the highest number of votes in the regional elections. Medvedev also raised Article 77 of the Russian

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constitution, one of the provisions that define the construction of Russia's federal structures. This article consists of two parts: Article 77.1 states that, subject to certain constitutional limitations, individual regions should be allowed to establish their own institutions of state power independently; Article 77.2 calls for a "unified system of executive power" over the subjects of the Russian Federation.² Medvedev specifically highlighted Article 77.2 in his state of the nation address and the need to clarify this provision's mandate for integrating Russia's federal and regional structures into a single system.

From a constitutional standpoint, although Article 77.2 currently serves as the cornerstone of the power vertical, this provision remains one of the most ambiguous and unexplored clauses in the constitution. What does a unified system of executive power mean in practice? How does one reconcile this single system with other constitutional provisions assigning specific rights and powers to the regions? Indeed, how does one reconcile the two parts of Article 77? The most comprehensive legal analysis of this issue—and the power vertical in general—can be found in the Constitutional Court's December 2005 landmark decision to uphold then-President Vladimir Putin's law on the appointment of governors.³ Along with the 1992 "Trial of the Communist Party" and the 1995 case on the legitimacy of the Chechen war, the 2005 appointment-of-governors case stands out as one of the court's most controversial political decisions in its nineteen-year tenure. Despite this decision's important legal and political ramifications, it has received only limited attention. Such neglect unfortunately has meant overlooking the court's (at times) convoluted reasoning in support of the power vertical and the ringing dissents filed against the majority opinion in the 2005 case. An in-depth exploration of this decision will illuminate the legal underpinnings of the power vertical and provide grounds for evaluating Medvedev's proposal to reexamine Article 77.2, the constitutional foundation of Putin's recentralized system.

The Legal Evolution of the Power Vertical

Russia has a long history of tumultuous center-periphery relations. For centuries, central authorities have appointed regional leaders to maintain their hold over the country. Imperial viceroys gave way to Soviet *obkom* party secretaries without sacrificing the underlying principle of central control over regional elites. Although Boris Yeltsin initially followed this tradition after the Soviet Union's collapse by appointing regional leaders, by 1997 all but one of Russia's governors were elected officials, a critical step in Russia's transition to a federal and democratic state. Yeltsin still tried to supervise regional elites by appointing presidential representatives to the regions,⁴ but as Russia's governors grew in stature and independence—largely because of their new electoral mandates—such oversight ultimately proved ineffective.

Putin also attempted to rein in Russia's governors when he assumed the presidency in 1999. He notably divided Russia into seven superregions—each headed by a presidential envoy—to reassert federal authority in the regions. However, the power vertical emerged in its current form only with the passage of the law on the appointment of governors by the Russian Duma on December 11, 2004.⁵ Whereas governors had been directly elected in open contests, they would now be nominated by central authorities and ultimately be approved by a majority vote of the regional legislature. If the regional legislature twice rejected the president's nominee or took no action, then the president reserved the right to disband the legislature and temporarily appoint an acting governor. The president also

reserved the right to dismiss a governor for failure to perform his or her duties, or if the governor lost the confidence of the president.

Putin insisted that he needed these additional powers in light of the September 2004 Beslan tragedy⁶ and the ongoing struggle against terrorism—despite the fact that since 2000, the Russian president had possessed the legal authority to dismiss a governor and disband the regional legislature. Even so, having secured these powers, Putin never exercised this right to fire the governor of North Ossetia after the Beslan events. The removal procedures established in 2000 proved quite cumbersome and time consuming for Russia's central authorities, so instead of following this process, Putin pushed through alternative appointment and removal procedures in the 2004 law.

The Constitutional Court played an important role in confirming the original removal procedures. In 2002, the court upheld the Russian president's right to dismiss regional executive and legislative bodies, but only with extensive judicial supervision of the process.⁷ In light of its later actions, the 2002 decision represented the court's attempt to fashion a political compromise over the removal of regional leaders. The 2002 case itself was instigated at the request of regional assemblies in Sakha and Adygeya on the basis of their constitutional right to appeal directly to the Constitutional Court. Only three years later, however, regional legislatures were notably absent among the plaintiffs objecting to the law on the appointment of governors. Russia's governors also declined to join this fight, even though they possessed the same right as regional legislatures to appeal to the Constitutional Court directly.

In many ways, the reluctance of Russia's regional leaders to engage on this issue was understandable. Putin had already delivered several blows against Russia's regional elite, most notably through his decision to create the system of regional presidential envoys and the removal of Russia's governors from the Federation Council. Moreover, in many ways, the appointment process represented an unexpected lifeline for Russia's sitting governors. Term limits, introduced in October 1999, imposed theoretical end dates for Russia's governors, despite a generous interpretation by the Constitutional Court.⁸ The appointment process offered a way around these term limits for Russia's regional elite, even if it meant exchanging their local mandates for increased centralized control.

Because Russia's regional institutions proved unwilling to fight the new law, individual citizens appealed to the Constitutional Court. B. F. Grishkevich, a former member of the liberal political party Union of Right Forces (SPS), filed the first protest, claiming that Sergey Sobyenin's appointment as governor of Tyumen oblast violated Grishkevich's constitutional rights.⁹ More than fifty SPS members later joined the protest as individual plaintiffs. In the appointment law's aftermath, several regional SPS branches attempted to organize local referenda regarding the violation of their electoral rights, but these efforts were blocked by local electoral commissions. The SPS complaint was filed by individual members using their right as Russian citizens to appeal violations of laws to the Constitutional Court under Article 125.4.

The Constitutional Court heard oral arguments in the appointment-of-governors case on November 15, 2005. "I twice voted in the election for the Tyumen governor, but now I am deprived of this right," argued Grishkevich. He continued: "Therefore, for me, in the near future I will not have the opportunity to back anyone whom I support. And elections of a governor in the legislative assembly will take place under the threat of [the assembly's] dismissal, and therefore there is no freedom of choice, or even an element of choice."¹⁰

Another plaintiff insisted that the law violated his “constitutional right to live in a federal state.”¹¹ Arguing on behalf of the Duma, Elena Mizulina emphasized the Beslan tragedy. “Russia is not Switzerland, unfortunately,” she noted, stating that in the name of political stability, “we must agree with the costs associated with the introduction of the new system of appointment of governors.”¹²

Controversy continued to follow the case in the gap between the oral hearings and the final decision issued five weeks later on December 21, 2005. The Duma began considering legislation calling for the transfer of the Constitutional Court from Moscow to St. Petersburg. Putin also met with several of the Constitutional Court justices a few weeks before the court issued its final determination. The contents of this conversation remained confidential. Nevertheless, critics at the time viewed both the Duma’s and Putin’s actions as less-than-transparent efforts to put political pressure on the court and influence the final outcome of the case.¹³

Overall, the Constitutional Court has succeeded in sidestepping such pressures and finding a middle ground in major political cases.¹⁴ This general ability to keep a low profile (especially after its reinstatement in 1995) has enabled the court to issue numerous important rulings involving Russia’s political, economic, and social rights.¹⁵ No such compromise emerged during the appointment-of-governors case, however. Instead, the court split dramatically on such fundamental constitutional issues as federalism, electoral rights, and Russia’s hierarchy of laws.¹⁶

The Majority Decision

The court began its decision on the revised law on appointing governors by sharply restricting the number of issues under review. Specifically, the court agreed to consider only the actual procedures for nominating and confirming the governors—those provisions directly affecting the rights and freedoms of individual citizens and therefore subject to constitutional review pursuant to Article 125.4. Other aspects of the appointment law (e.g., the president’s right temporarily to appoint the head of a region and disband the local legislature) had not yet been tested in practice, and the court therefore decided that those aspects could not yet be challenged by individual citizens pursuant to their limited right of direct appeal under the constitution. The court added, however, that those aspects could be raised by other state institutions—including regional organs of executive and legislative power—under Article 125.2.¹⁷ As previously noted, however, none of these bodies chose to exercise this option.

Next, the court addressed the fundamental question of whether the federal legislature possessed the authority to pass the appointment law in the first place. Such a question went to the heart of Russian federalism and the opaque division of power outlined in Articles 71–73. The constitution established three areas of jurisdiction—federal, joint, and regional—with specific topics assigned under federal and joint federal-regional jurisdiction. All other matters not specified under these provisions theoretically belong to the exclusive jurisdiction of the regions. The topics under joint federal-regional jurisdiction include the protection of human rights, family issues, public health, the demarcation of state property, and the establishment of the “general organizing principles of the system of organs of state power.”¹⁸ It was this latter clause, argued the court, that justified the passage of a federal law on the appointment of governors.¹⁹ The majority opinion failed to explore the limits of these “general organizing principles” and how they related to the

constitution's specific requirement for the division of powers. Nevertheless, on the basis of this clause, the court concluded that the law on the appointment of governors fell within the federal legislature's domain.

The issue of federalism remained central as the justices turned their attention to the nature of this system of organs of state power. According to the court, the constitution not only assigns the right to establish the general organizing principles of this system to federal law, but it also calls for this system to be "unified." The court proceeded to list those constitutional provisions that to one degree or another referred to a unified system of state power. Most notably, the court cited Article 77.2, which states in full:

Within the authority of the Russian Federation and the powers of the Russian Federation on issues within the joint authority of the Russian Federation and the subjects of the Russian Federation, the federal organs of executive power and the organs of executive power of the subjects of the Russian Federation shall form a unified (*edinyi*) system of executive power in the Russian Federation.²⁰

The majority opinion never defined this unified system's underlying essential characteristics, instead simply asserting that the regions could not exercise any authority that potentially undermined the unity of state power. This unified system of executive power, however, provided the primary legal justification for the power vertical. Russia's governors, the court asserted, were not simply regional leaders but also pseudofederal officials who served as the critical "linchpin" (*zveno*) in Russia's single system of unified executive power.²¹ Moreover, on the basis of the governors' status as the highest appointed officials in their regions, governors were subordinated directly to the Russian president, who, as head of state and guarantor of the constitution, oversaw the smooth operation of all organs of state power.

Despite this expansive reading of presidential authority, the court recognized that the appointment powers assigned under the new law were by no means described, or even anticipated, under the constitution. However, this absence did not matter because, according to the court, nothing in the constitution prohibited the federal legislature from assigning this authority to the president as part of legislation establishing the general principles for organizing the executive organs of state power.²² The actual appointment procedures under the law itself remained compatible with the principles of federalism, the court continued, because the regional legislative branch ultimately ratified the president's nominee for governor.

The court rejected claims that this position somehow undermined the democratic principles set forth in the constitution, or the rights and freedoms of individual Russian citizens. Although the Russian constitution defines Russia as a democratic state, it contains only general principles regarding how individual citizens actually exercise these democratic rights. For example, the constitution states that the Russian people shall exercise their power both directly and through organs of state power and local government.²³ The constitution further granted Russian citizens the right to elect those in and be elected to institutions of state power.²⁴ Despite the democratic implications of these provisions, the court declared that the Russian constitution contained no absolute right for its citizens to participate in the direct election of Russia's highest regional officials. As an example, the court referred to the law on election to the Federation Council, which allowed for indirect elections to Russia's upper house.²⁵

In reaching this conclusion, however, the court chose not to apply its own judicial precedent. In 1996, the Constitutional Court rejected the Altai Legislative Assembly's attempt to assign itself large powers over the regional administration, including the right to elect the head of the administration. The court objected to this arrangement in part because it meant executive leaders would fail to receive their mandate directly from the electorate.²⁶ In its 2005 decision, however, the court insisted that the Altai precedent never precluded the possibility of evaluating alternative electoral procedures under a different regulatory scheme. In a dramatic reversal, the majority opinion concluded that because the constitution did not specify that direct elections were the only means by which to elect Russia's highest officials, the indirect procedures established under the law on the appointment of governors represented an equally acceptable method of election.²⁷

The Dissents

The court was by no means unanimous in reaching the previously discussed conclusion, however. The court only upheld the decision by a twelve-to-six vote, and two justices—Anatoly Kononov and Vladimir Yaroslavtsev—filed blistering dissenting special opinions.²⁸ Constitutional Court justices hold lifetime tenure (until mandatory retirement at seventy), so they are uniquely positioned within the Russian political system to speak their minds if they so desire. Kononov, who joined the court in 1991 after serving as a deputy from Democratic Russia in the Russian Soviet Federative Socialist Republic's Congress of People's Deputies, enjoys a particularly well-earned reputation as a vigorous dissenter, and his special opinion in this case was particularly blunt.²⁹ Can one truly claim, he asked, that the right of the federal government "to dictate to subjects of the Russian Federation the appointment 'from above' of its highest official 'in and of itself' does not violate the principles of federalism and the division of powers?"³⁰

Kononov proceeded to rebut the majority opinion's analysis of Russian federalism point by point. According to Kononov, the constitution explicitly granted subjects of the Russian Federation the right to form their own organs of state power. He cited Article 77.1, which states:

The system of organs of state power of republics, territories, regions, federal cities, autonomous regions, and autonomous areas shall be established by the subjects of the federation independently in accordance with the fundamentals of the constitutional system of the Russian Federation and the general principles of organization of the representative and executive organs of state power as envisioned by federal law.³¹

By focusing on the requirement for compliance with federal law (the final clause), the majority decision had, Kononov complained, crafted a one-sided and highly selective reading of the constitution. Kononov instead highlighted the first clause and the right of the regions to independently establish their own organs of state power. The appointment procedures under the law, Kononov insisted, could not be reconciled with the principles of federalism.

Kononov further criticized the majority opinion's interpretation of Russia's division of powers under Articles 71–73. According to Kononov, the constitution's grant of joint jurisdiction powers extended only to establishing the general principles of the system of organs of state power, not the specific procedures for appointing officials. Moreover, Article 77.2 stated that the unified system of executive power only extended to those topics explicitly listed under the constitution's grant of joint jurisdiction.³² The notion of a unified execu-

tive branch under the Russian constitution, Kononov insisted, was partial, not absolute, and all powers not assigned under joint jurisdiction—and all procedures that exceeded the general principles for the establishment of a system of organs of state power—belonged exclusively to the regions. Thus, Kononov rejected the majority opinion's interpretation of Russia's division of powers, claiming that by relying on this undefined notion of a unified system of state—and executive—power, the court converted an independent wing of regional government into a “subdivision of federal structures.”³³

Kononov and Yaroslavtsev further criticized the court's interpretation of Russian democracy, insisting that any limitation of the right to elect (and be elected to) organs of state power violated the founding norms and principles of the constitution. Any leader selected under the appointment process, Yaroslavtsev argued, would not be considered an independent representative of executive power.³⁴ According to Kononov, the appointment process further denied the local population the right to hold their officials accountable and defend their interests on a regional level. Kononov added that the role of the legislative branch was minimal, limited to approving the president's nominee under the direct threat of dissolution.³⁵ It would be the height of cynicism, Kononov concluded, to suggest that the Russian people had the right only to elect “one representative of the executive branch—the President of the Russian Federation—and that he appointed all the others.”³⁶

In addition to undermining such fundamental concepts as federalism and democracy, the decision, Kononov averred, also weakened the constitution's leading position within Russia's hierarchy of laws. The constitution represented Russia's highest body of law and legally should be given precedence over statutes, presidential decrees, court decisions, and other sources of law. However, if the constitution served as the supreme law of the land, wondered Kononov, how could a mere change in legal regulation change the meaning, both in substance and in spirit, of the constitution?³⁷ By casting away the Altai precedent, the court essentially had abandoned its previous interpretation of the right to elect and be elected to organs of state power even though the constitution's text remained unchanged.³⁸ Kononov writes, “The Constitutional Court's argument, if you can call it that . . . completely overturns the generally accepted proposition of the supremacy of the Constitution, its relationship to legislation, the limits of its interpretation, and the express legal position of the Constitutional Court, which freely can change in the ‘spirit of the time.’ From this point of view, of course, one can justify everything as one likes, but this goes beyond the limits of law.”³⁹

Whether Kononov's special opinion foreshadows change (as is sometimes the case in U.S. Supreme Court dissents) or ultimately is relegated to some obscure scholarly footnote remains to be seen. As the experience of the United States demonstrates, it can take years, if not generations, for individual dissents to connect with broader social and political movements and ultimately lead to new legislation.⁴⁰ In the interim, however, Kononov's special opinion stands out as the strongest rebuttal of the power vertical on Russia's public record. Although Medvedev may not have read this dissent, his speech nevertheless seemed to recognize (at least implicitly) the weak constitutional underpinnings of the power vertical that Kononov identified in his opinion.

President Medvedev's Address to the Federal Assembly

Medvedev specifically raised Article 77.2 and the unified system of executive power in his state of the nation message. He opined that Russia had not yet found the ideal structure for

the regional organs of executive power or determined how these federal and regional organs should interact with each other. "Let me remind you," Medvedev added, "that in accordance with Paragraph 2 of Article 77 of the Constitution, federal executive authorities and the executive bodies of the Federation's Regions are part of an integrated system."⁴¹ However, Medvedev continued, this constitutional norm "had not yet been implemented in full."⁴²

Such a statement, especially coming from Medvedev, seems puzzling, since Article 77.2 has provided the power vertical with its primary legal justification. Indeed, without this provision, the Constitutional Court would have found it virtually impossible to stitch together the legal arguments to uphold the law on the appointment of governors. Yet in his speech, Medvedev made no attempt to place Russia's governors at the center of this unified system of executive power or to otherwise defend the current interpretation of Article 77.2 as it relates to the appointment process. Instead, Medvedev called on the Russian government to study this issue and "submit the necessary proposals."⁴³ As Kononov's dissent demonstrates, however, such proposals would immediately confront numerous constitutional issues, starting with the need to reconcile the appointment process with the constitutional guarantee that individual regions can independently establish their own institutions of state power. Any governmental review of Article 77.2 would also somehow have to address which specific matters fall under the jurisdiction of this unified executive power and which matters are left directly to each region's discretion. Thus, whether intentional or not, by raising Article 77.2 in his state of the nation speech, Medvedev theoretically opened up the power vertical to renewed scrutiny.

Medvedev also used his state of the nation message to address another keystone of the power vertical, namely the legitimacy of indirect elections. Medvedev proposed in the speech that from now on, nominees for governor should only come from "parties that have won the biggest number of votes in the regional elections, and by no one else."⁴⁴ This change, Medvedev continued, represented a significant increase in public involvement in the selection process, because, henceforth, "only public, open, political organizations representing the bulk of the country's population would have the right to put forward candidates for these posts."⁴⁵ Medvedev's new selection process can be seen as an attempt to experiment with aspects of the power vertical's structure without fundamentally challenging the legitimacy of Russia's current system of indirect elections. In reality, the motive behind Medvedev's proposal appears to have little to do with promoting democracy; instead, it more likely seeks to solidify the regional power base of *Edinaya Rossiya*, which currently controls seventy-nine of the eighty-three regional legislatures.⁴⁶

Medvedev's proposal to revise the procedures for indirect elections and his call to clarify Article 72.2 can be seen as a subtle recognition on Medvedev's part that the power vertical still lacks a strong constitutional foundation. However, although Medvedev appears willing to tinker with Putin's original conception of the power vertical, he evidently has no intention of overhauling the entire system. Approximately two weeks after the state of the nation speech, Yuri Luzhkov, the mayor of Moscow, suggested in a television interview that Russia should return to the system of direct elections for its regional leaders. Medvedev responded swiftly, stating that anyone who wanted to return to the system of direct elections of Russia's regional leaders was welcome to submit his resignation. Luzhkov quickly backtracked from his statement.⁴⁷

Medvedev further revealed his willingness to use the assigned powers under the appointment legislation when, on February 17, 2009, he summarily fired four governors (those

representing the Orel, Pskov, Voronezh, and Nenets regions).⁴⁸ This act is a departure from Putin's rare use of his dismissal powers during his tenure in office.⁴⁹ Other firings seem likely as Medvedev attempts to use the existing levers of the power vertical to establish his own political base in the regions.⁵⁰

The fact that Medvedev apparently has no substantive plans to change the power vertical begs the question: why did he mention Article 77.2 in his address in the first place? Much has been made of Medvedev's legal background and perhaps the law professor in him wants to see this ambiguous legal concept—the creation of a unified system of executive power—actually clarified and implemented into law. Medvedev also may have wanted to demonstrate his independence from Putin by proposing changes to the power vertical, although his announced reform of the gubernatorial nomination process appears primarily to benefit the political party headed by his predecessor.

A final possible explanation for Medvedev's decision to highlight Article 77.2 focuses on the central division that split the Constitutional Court in the appointment-of-governors case, namely what does Russian federalism actually mean in practice? Luzhkov, after all, was not the first prominent leader to call for the return of direct regional elections; President Mintimer Shaimiev of Tatarstan made a similar appeal in June 2008.⁵¹ The August 2008 events in Georgia further complicated center-regional relations, and Russia's ethnic republics have noted Russia's decision to recognize the independence of South Ossetia and Abkhazia.⁵² Luzhkov and Shaimiev may not be genuine democrats, but their aspiration for greater regional autonomy remains real and will not disappear anytime soon.

The federal question, and particularly its constitutional basis, dominated the Russian political agenda throughout the 1990s and persisted through Putin's first term of office, as he struggled to bring regional laws into accordance with federal law and the constitution. The introduction of the power vertical largely silenced this debate, although as Luzhkov's and Shaimiev's statements suggest, this issue continues to percolate just beneath the surface. Several possible scenarios, including economic crisis and developments in the near abroad, could suddenly thrust center-regional relations back into the forefront of Russian politics. Thus, Medvedev's oblique reference to Article 77.2 in his speech may reflect a growing realization among Russia's leaders of the power vertical's weak constitutional underpinnings and the need to address this issue now, before future events spin out of control.

Conclusion

Medvedev's state of the nation message stands out as a personal homage to the Russian constitution. As Medvedev proclaimed, "The Constitution paves the way for Russia's renewal as a free nation and a society that holds law and the dignity of each individual as its highest values."⁵³ However, Medvedev's actions suggest a more utilitarian, and less idealistic, view of the constitution. Based on his speech, Medvedev at least implicitly recognizes the weak constitutional underpinnings behind the power vertical; hence the proposal in his speech to reexamine Article 72.2, the constitutional foundation of the power vertical, and his readiness to tinker again with the system of indirect elections of governors. However, even though Medvedev's speech seemed to open the power vertical just a crack, he quickly slammed this door shut in his subsequent exchange with Luzhkov.

Short of further constitutional amendments, Medvedev can continue to rely on the Constitutional Court's controversial decision in the case of the appointment of governors as the primary legal justification for the power vertical. Whereas the Constitutional Court

attempted to find a middle ground on the appointment and removal issue in 2002, the court's 2005 decision provided vital legal cover to Putin and his recentralization efforts. From a legal standpoint, the court concluded that the ambiguous call for a "unified system of executive power" trumped all other constitutional provisions regarding regional autonomy and the division of powers. The court also abandoned its own precedent to uphold Putin's power vertical and Russia's undeclared transformation from a federal state to a unitary state.

Alongside the majority decision, however, the court's official records published the special opinions of the dissenting justices. Kononov's special opinion particularly resonates, not only because it provides a strong legal refutation of the power vertical, but also because it identifies a path back to direct elections and genuine federalism under the Russian constitution. At a time when the arena for serious public political debate has been shrinking in Russia, Kononov's dissent takes on great importance. Like Medvedev, he wishes to pay homage to the Russian constitution, but in a spirit of democracy and decentralization of executive power.

It would, of course, take a dramatic about-face in Russian politics to see Kononov's interpretation of the constitution realized in practice, and neither Medvedev nor Putin shows any sign of making such a swing. Russia further possesses no tradition of transforming judicial dissents into law, so Kononov's special opinion still sounds like a lone cry in the wilderness, as opposed to a general call for action. Nevertheless, Russia appears to have entered a new period of uncertainty regarding the balance of domestic power, one that may spark renewed interest in Kononov's arguments and make them part of a national discussion. Therefore, Medvedev's decision to return the constitution to the center of Russia's political discourse may yet bring him face-to-face with Kononov's special opinion and the weak constitutional pillars underlying the power vertical.

NOTES

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3. "Postanovlenie Konstitutsionnogo Suda RF ot 21 dekabrya 2005 g. N 13-P po delu o proverke konstitutsionnosti otdelnykh polozhenii Federalnogo zakona 'Ob obshchikh printsipakh organizatsii zakonodatelnykh (predstavitelnykh) i ispolnitelnykh organov gosudarstvennoi vlasti subektov Rossiiskoi Federatsii' v svyazi s zhalobami ryada grazhdan" [Decision on the Appointment of Governors], *Sobranie Zakonodatelstva Rossiiskoi Federatsii (SZ RF)*, no. 3 (2006): item no. 336, http://ksportal.garant.ru:8081/SESSION/S__8G3n31Gi/PILOT/main.html (accessed April 20, 2009).

4. Helge Blakkisrud, "The Rise and Fall of the Russian Governor: Institutional Design vs. Patron/Client Relationships," in *Elites and Democratic Development in Russia*, ed. Anton Steen and Vladimir Gelman, 71–88 (New York: Routledge, 2003).

5. "Federalnyi zakon ot 11 dekabrya 2004 N 159-FZ o vnesenii izmenenii v Federalnyi zakon 'Ob obshchikh printsipakh organizatsii zakonatelnykh (predstavitelnykh) i ispolnitelnykh organov gosudarstvennoi vlasti subektov Rossiiskoi Federatsii' i v Federalnyi zakon 'Ob osnovnykh garantyakh izbiratelnykh prav i prava na uchastie v referendumakh grazhdan Rossiiskoi Federatsii,'" *Rossiiskaya gazeta*, December 15, 2004, <http://www.rg.ru/2004/12/15/gubernatory-dok.html> (accessed March 19, 2009). For an overview of Putin's relevant reforms between 2000 and 2005

in pursuit of the power vertical, see Jeffrey Kahn, *Federalism, Democratization, and the Rule of Law in Russia* (Oxford: Oxford University Press, 2002), 234–78; Cameron Ross, “Federalism and Electoral Authoritarianism under Putin,” *Demokratizatsiya* 13, no. 3 (2005): 347–71; and Gordon Hahn, “The Impact of Putin’s Federative Reforms on the Democratization of Russia,” *Post-Soviet Affairs* 19, no. 2 (2003), 114–53.

6. For background on the Beslan tragedy, see Peter Baker and Susan Glasser, *Kremlin Rising: Vladimir Putin’s Russia and the End of the Revolution* (Washington, DC: Potomac Books, 2007), 15–37.

7. “Postanovlenie Konstitutsionnogo Suda RF ot 4 aprelya 2002 g. N 8–P po delu o proverke konstitutsionnosti otdelnykh polozhenii Federalnogo zakona ‘Ob obshchikh printsipakh organizatsii zakonodatelnykh (predstavitelnykh) i ispolnitelnykh organov gosudarstvennoi vlasti subektov Rossiiskoi Federatsii’ v svyazi s zaprosami Gosudarstvennogo Sobraniya (II Tumen) Respubliki Sakha (Yakutiya) i Soveta Respubliki Gosudarstvennogo Soveta—Khase Respubliki Adygeya,” *SZRF*, no. 15 (2002): item no. 1497, http://ksportal.garant.ru:8081/SESSION/S__hlAdj7ua/PILOT/main.html (accessed April 20, 2009). Support for this decision was not unanimous, and four Constitutional Court justices (Nikolai Vitruk, Gadis Gadzhiev, Tamara Morshakova, and Vladimir Yaroslavtsev) filed special opinions in this case.

8. “Postanovlenie Konstitutsionnogo Suda RF ot 9 iyulya 2002 g. N 12–P po delu o proverke konstitutsionnosti polozhenii punkta 5 stati 18 and stati 30.1 Federalnogo zakona ‘Ob obshchikh printsipakh organizatsii zakonodatelnykh (predstavitelnykh) i ispolnitelnykh organov gosudarstvennoi vlasti subektov Rossiiskoi Federatsii,’ stati 108 Konstitutsii Respubliki Tatarstan, stati 67 Konstitutsy (Osnovnogo Zakona) Respubliki Sakha (Yakutiya) i chasti tretei stati 3 Zakona Respubliki Sakha (Yakutiya) ‘O vyborakh Prezidenta Respubliki Sakha (Yakutiya),’” *SZ RF*, no. 28 (2002): item no. 2909. The court ruled that the law imposing a two-term limit on Russia’s governors applied only to terms after the date of the law’s passage on October 6, 1999. As a result, fifty-three out of eighty-nine governors theoretically were allowed to serve an additional one or two terms. Kathryn Stoner-Weiss, “Russia: Authoritarianism without Authority,” *Journal of Democracy* 17, no. 1 (2006): 111.

9. “Bespresedentnoe pravo,” *Kommersant*, November 16, 2005, <http://www.kommersant.ru/doc.html?docId=626810> (accessed March 19, 2009).

10. *Ibid.*

11. *Ibid.*

12. *Ibid.*

13. Anatoly Medetsky, “Court Backs Putin’s Right to Pick Governors,” *Moscow Times*, December 22, 2005, <http://www.themoscowtimes.com/stories/2005/12/22/011-print.html> (accessed December 22, 2005). Olga Redichkina, “Prezident imeet pravo,” *Gazeta*, December 22, 2005, <http://dlib.eastview.com/sources/printarticle.jsp?id=8783459> (accessed August 13, 2008).

14. In the Communist Party decision, the court reached a compromise verdict by upholding the abolishment of the party’s leadership structures but overturning the ban on the party’s right to organize on a territorial level (i.e., below the regional committee [*raikom*] within a city party organization). In the Chechen case, the court upheld the president’s authority to launch the attack but also declared unconstitutional certain actions taken by the Russian government as part of the invasion. The court also managed to sidestep the human rights protests in the Chechen case on jurisdictional grounds, resulting in several strong dissenting special opinions. The major exception to the court’s record of seeking compromise, of course, involves its activities leading up to the October 1993 events. Kathleen E. Smith, *Mythmaking in the New Russia: Politics and Memory during the Yeltsin Era* (Ithaca, NY: Cornell University Press, 2002), 18–28; William Pomeranz, “Judicial Review and the Russian Constitutional Court: The Chechen Case,” *Review of Central and East European Law* 23, no. 1 (1997): 9–48.

15. For an excellent review of the Constitutional Court’s judicial record, see Alexei Trochev, *Judging Russia: Constitutional Court in Russian Politics, 1990–2006* (New York: Cambridge University Press, 2008).

16. For a further review of the decision, see Aleksandr Blankenagel, “Skolko tsentralizma vyderzhit federativnoe gosudarstvo? Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii

o ‘naznachanii’ gubernatorov,” *Sravnitelnoe Konstitutsionnoe Obozrenie* 55, no. 2 (2006): 153–59; and Marat Salikov, “Pozitsii i pravovye pozitsii Konstitutsionnogo Suda Rossiiskoi Federatsii: Do i posle resheniya po delu o naznachanii gubernatorov,” *Sravnitelnoe Konstitutsionnoe Obozrenie* 55, no. 2 (2006): 160–66.

17. For a review of the court’s jurisdictional limits, see William Burnham and Alexei Trochev, “Russia’s War between the Courts: The Struggle over the Jurisdictional Boundary between the Constitutional Court and Regular Courts,” *American Journal of Comparative Law* 55, no. 3 (2007): 381–452.

18. “Constitution of the Russian Federation,” Article 72.1. The lack of clarity regarding the subject of joint jurisdiction has long been discussed. For one example, see Robert Sharlet, “The Russian Constitutional Court’s Long Struggle for Viable Federalism,” in *Russia and Its Constitution: Promise and Political Reality*, ed. Gordon B. Smith and Robert Sharlet, 39–40 (Boston: Martinus Nihoff, 2008).

19. “Decision on the Appointment of Governors,” para. 3. Article 76.2 places federal legislation above regional laws in regulating matters under joint jurisdiction.

20. “Constitution of the Russian Federation,” Article 77.2.

21. “Decision on the Appointment of Governors,” para. 4.

22. *Ibid.*, para. 6.

23. “Constitution of the Russian Federation,” Article 3.2.

24. *Ibid.*, Article 32.2.

25. “Decision on the Appointment of Governors,” para. 7. The constitution calls for two deputies from each subject (i.e., republics, oblast, krai, cities with federal status, autonomous areas, and autonomous regions) of the federation to serve as members of Federation Council: one from the representative bodies and one from the executive bodies of state authority. However, although the constitution explicitly calls for the election of Duma representatives, it leaves the selection of Federation Council members up to federal law. The first members of the Federation Council were elected in 1993, but this system was changed in 1995 when members were appointed *ex officio* by right of their positions as governors and heads of the regional legislative assemblies. A third selection process was introduced in 2000, with the regional legislature selecting one representative and the head of the highest executive state authority’s body in the subject of the Federation selecting the other representative. Interestingly, Medvedev suggested yet another selection process for the Federation Council in his November 2008 state of the nation message. He proposed that the Federation Council be composed only of people elected to the representative assemblies and deputies from the local self-government bodies of the regions in question. This proposal has already begun to work its way through the legislative process. See Victor Khamraev, “Duma ne vysoko otsenila Sovet Federatsii,” *Kommersant*, December 25, 2008, <http://www.kommersant.ru/doc.aspx?DocsID=1099294> (accessed March 19, 2009).

26. “Postanovlenie Konstitutsionnogo Suda RF ot 18 yanvarya 1996 g. N 2–P po delu o proverke konstitutsionnosti ryada polzhenii Ustava (Osnovnogo Zakona) Altaiskogo kraia,” *SZ RF*, no. 4 (1996): item no. 409, para 6.

27. “Decision on the Appointment of Governors,” para. 7. Other scholars have insisted that the Altai case was wrongly decided, albeit for different reasons. Aleksandr Blankenagel, for example, disputed the Altai decision on the basis of Article 77.1 and each individual region’s right to independently create its own organs of state power. According to Blankenagel, this provision theoretically allowed each region to establish either a presidential or parliamentary system of regional power, whereas the Altai decision basically restricted the regions to a presidential system of government. Blankenagel objected to the decision in the case of the appointment of governors, but he did so primarily on federalist, not electoral, grounds. Blankenagel, “Skolko tsentralizma vyderzhit federativnoe gosudarstvo,” 155.

28. Trochev, *Judging Russia*, 148. Russian law requires that dissenting special opinions become part of the Constitutional Court’s official record. See “Federalnyi zakon ‘O Konstitutsionnom Sude Rossiiskoi Federatsii,’” *SZ RF*, no. 13 (1994): item no. 1447, Article 76. For a further examination of the role of dissenting special opinions under Russian law, see Donald Barry, “Decision-Making and Dissent in the Russian Federation Constitutional Court,” in *International and National Law in*

Russia and Eastern Europe, ed. Roger Clark, Ferdinand Feldbrugge, and Stanislaw Pomorski, 1–17 (Boston: Martinus Nihoff, 2001); and Alexander Vereshchagin, *Judicial Law-Making in Post-Soviet Russia* (New York: Routledge-Cavendish, 2007), 157–66.

29. A. N. Vereshchagin, “Osobyie mneniya v rossiiskikh sudakh,” *Gosudarstvo i pravo*, 2008, no. 2:21. Kononov owes his seat on the court in part to the turbulent political environment that existed at the time of his appointment. The Russian legislature played the dominant role in the selection process when Kononov’s nomination was considered in 1991, with several parliamentary blocs putting forward candidates who ultimately ended up on the court. With the passage of the Law on the Constitutional Court in 1994, however, the executive branch regained the initiative in the nominating process. According to Article 9 of the Law on the Constitutional Court, multiple institutions (the Duma, the Federation Council, regional legislatures, high federal courts, etc.) may suggest potential candidates to the president. The president, however, is not required to consider these recommendations and may instead submit his own candidate to the Federation Council, which ultimately approves the nomination. Based on these new procedures, and Russia’s current political reality, it appears unlikely that someone as independent as Kononov would get through the vetting process today. For a review of the Constitutional Court’s nominating procedures, see Trochev, *Judging Russia*, 69–72, 81–85.

30. “Osoboe mnenie sudi Konstitutsionnogo Suda Rossiiskoi Federatsii A. L. Kononova po delu o proverke konstitutsionnosti otdelnykh polozhenii Federalnogo zakona ‘Ob obshchikh printsipakh organizatsii zakonodatelnykh (predstavitelnykh) i ispolnitelnykh organov gosudarstvennoi vlasti subektov Rossiiskoi Federatsii’ v svyazi s zhalobam ryada grazhdan,” *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii*, 2006, no. 1:para. 1.

31. “Constitution of the Russian Federation,” Article 77.1. Kononov also cites Article 11.2, which says that state power in the members of the Russian Federation shall be exercised by the organs of state authority formed by them. *Ibid.*, Article 11.2.

32. Kononov, “Osoboe mnenie,” para. 5. Kononov further objected to the majority decision’s interpretation of Article 5.3 and its call for a unity of state power. This provision states in full: “The federative make-up of the Russian Federation shall be based upon its state integrity, a uniform (*edinstvo*) system of state authority, the separation of jurisdiction and powers between the bodies of state authority of the Russian Federation and bodies of state authority of the Russian Federation, and the equality and self-determination of the peoples within the Russian Federation.” “Constitution of the Russian Federation,” Article 5.3. The majority opinion cited Article 5.3 as one of the provisions supporting the establishment of a unified system of executive power. Kononov bluntly rejected this selective interpretation of the constitution; although one clause within Article 5.3 may refer to a uniform system of state authority, Kononov noted, this provision itself did not justify a unitary system of government. Kononov instead argued that Article 5.3, as written, divided this uniform system into two distinct systems of state power—federal and regional—each with their own specific jurisdiction.

33. Kononov, “Osoboe mnenie,” para. 5.

34. “Osoboe mnenie sudi Konstitutsionnogo Suda RF V. G. Yaroslavtseva po delu o proverke konstitutsionnosti otdelnykh polozhenii Federalnogo zakona ‘Ob obshchikh printsipakh organizatsii zakonodatelnykh (predstavitelnykh) i ispolnitelnykh organov gosudarstvennoi vlasti subektov Rossiiskoi Federatsii’ v svyazi s zhalobami ryada grazhdan,” *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii*, 2006, no. 1:para. 1.

35. Kononov, “Osoboe mnenie,” para. 5.

36. *Ibid.*, para. 3.

37. *Ibid.*, para. 4.

38. *Ibid.* Kononov insisted that the law on the appointment of governors also violated Article 55.2, which prohibits the legislature from passing laws that deny or diminish the rights and freedoms of the individual and citizen.

39. *Ibid.*

40. For a comparison between U.S. Supreme Court dissents and Russian Constitutional Court special opinions, see William Pomeranz, “Postanovlenie Konstitutsionnogo Suda Rossii o naznachenii gubernatorov subektov Federatsii i osobyie mneniya sudei o rossiiskom federalizme,” *Konstitutsionnyi Vestnik* 19, no. 1 (2008): 272–83.

41. Medvedev, "Address to the Federal Assembly."
42. Ibid.
43. Scholars have attempted to flush out what they consider to be the essential features of a unified system of executive power. See B. S. Ebzeev, S. L. Krasnoryadtsev, I. V. Levakin, and V. I. Radchenko, *Gosudarstvennoe Edinstvo i Tselostnost Rossiiskoi Federatsii* (Moscow: Ekonomika, 2005), 273–84; and Aleksandr Blankenagel, "Kontseptsiya edinoi sistemii ispolnitelnoi vlasti, chast 2 stati 77 Konstitutsii Rossiiskoi Federatsii—kakaya sistema, a gde edinstvo?" *Sravnitelnoe Konstitutsionnoe Obozrenie* 54, no. 1 (2006): 123–28.
44. Medvedev, "Address to the Federal Assembly." Although Medvedev referred to the plural "parties" in his speech, it appears that only the majority party will submit nominations for governor to the president. This still-fuzzy formulation will be resolved only when the Duma passes final legislation on the new appointment process. Nikolai Petrov, "Preparing for Putin's Return to the Kremlin," *Moscow Times*, November 12, 2008, <http://www.themoscowtimes.com/articles/detail.php?ID=372281> (accessed March 24, 2009); Natalya Kostenko, "100 dnei na vybor," *Vedomosti*, December 23, 2008, <http://www.vedomosti.ru/newspaper/print.shtml?200812/23/174881> (accessed December 23, 2008); and Viktor Khamraev and Ilya Amladov, "Gubernatorov ustupayut partiyam," *Kommersant*, January 30, 2009, <http://www.kommersant.ru/doc.aspx?DocsID=1110176> (accessed March 19, 2009).
45. Medvedev, "Address to the Federal Assembly."
46. Irina Nagornyykh, "Prezident i premer razlozhat kadry," *Kommersant*, December 12, 2008, <http://www.kommersant.ru/doc.aspx?DocsID=1098935> (accessed March 19, 2009).
47. "Kremlin Guide to Dismissing Disobedience," *Moscow Times*, November 30, 2008, <http://www.themoscowtimes.com/articles/detail.php?ID=372637> (accessed November 30, 2008); and "Prezident prigrozil gubernatoram chastnymi litsami," *Kommersant*, November 19, 2008 <http://www.kommersant.ru/doc.aspx?DocsID=1074935> (accessed March 19, 2009).
48. Nabi Abdullaev and Natalya Kainova, "Kremlin Fires 4 Governors, Gordeyev," *Moscow Times*, February 17, 2009, <http://www.themoscowtimes.com/articles/detail.php?ID=374576> (accessed March 24, 2009).
49. Regional assemblies ultimately confirmed all of Putin's nominees for governorships, although Putin was apparently influenced by regional legislators during the prenomination selection process. Darrell Slider, "Putin and the Election of Regional Governors," in *Federalism and Local Politics in Russia*, ed. Cameron Ross and Adrian Campbell, 113–16 (New York: Routledge, 2009).
50. Medvedev's candidates almost certainly will be approved by the regional assemblies, although there were reports that local Communist deputies in Orel and Voronezh may oppose his nominees. "Polozhenie luchshe gubernatorskogo," *Kommersant*, February 18, 2009, <http://www.kommersant.ru/doc.aspx?DocsID=1122478> (accessed March 19, 2009); and Gleb Cherkasov and Natalia Bespalova, "Gubernatoram povysili gruppu riska," *Kommersant*, March 12, 2009, <http://www.kommersant.ru/doc.aspx?DocsID=1136908> (accessed March 19, 2009).
51. Irina Begembetova, Syuzanna Farizova, and Natalya Bespalova, "Mintimer Shaimiev otklonilsya ot vertikali," *Kommersant*, June 16, 2008, 1. Other Russian leaders, including President Murtaza Rakhimov of Bashkortostan and Governor Vladimir Chub of Rostov-on-Don, have issued similar statements calling for the return of direct gubernatorial elections. Diana Dadasheva, "Rostovskii gubernator vyskazalsya napryamuyu," *Kommersant*, September 11, 2008, <http://www.kommersant.ru/doc.aspx?DocsID=1023633> (accessed September 11, 2008); and Kira Latukhina and Natalya Kostenko, "Shaimiev ugadal," *Vedomosti*, June 17, 2008, <http://dlib.eastview.com/sources/printarticle.jsp?id=17617807> (accessed August 13, 2008).
52. Ellen Barry, "Russia's Recognition of Georgian Areas Raises Hopes of Its Own Separatists," *New York Times*, September 10, 2008, <http://www.nytimes.com/2008/09/10/world/europe/10separatists.html> (accessed March 19, 2009).
53. Medvedev, "Address to the Federal Assembly."