

## Accountability and Discretion of the Russian Courts

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### Abstract

Judges are much more likely to rule against the government in non-criminal cases than they are in lawsuits brought by state procurators. The difference lies in the relationship between judges and the law enforcement agencies and other agencies of the government. Their closer ties with the law enforcement agencies makes it harder for the judges to oppose their requests, whereas judges have fewer connections to other parts of the government and therefore have greater freedom in opposing them.

### A Puzzling Duality

The two decades of judicial reforms in Russia have produced a puzzling duality of judicial behavior. On the one hand, little has changed in the way judges handle criminal cases, as indicated by the pre-trial detention and acquittal rates. On the other hand, Russian judges have been increasingly ruling against the federal government in cases brought by individuals and companies, something unimaginable in the Soviet period.

One source of this duality is the contradiction between what Richard Sakwa described as constitutionalism and the arbitrariness of the administrative regime in Putin's Russia. However, this contradiction rarely touches upon the work of ordinary Russian judges, who are well integrated into the regime.

Instead, judges face a host of formal and informal incentives, most of which center on corporate and bureaucratic accountability. In handling criminal cases, this accountability strongly ties together the interests of the law-enforcement officials, investigators, prosecutors, trial-level judges, and appellate judges, with whom judges interact on a daily basis.

In the court cases against the Russian Federation, this judicial accountability is weaker given that the defendants are officials from different government agencies with whom judges may interact only a few times a year, and, most importantly, who do not face any job-related problems or financial loss for losing cases. Therefore, judges feel much freer when deciding lawsuits against the federal government as compared to criminal cases, in which exoneration or acquittal may mean demotion, lack of salary bonuses and other career-related sanctions to many law-enforcement officials.

### Wholesale Approval of Pre-Trial Detention

Russian judges are systematically biased in favor of state prosecution in the criminal justice system. Similar to the period of "developed socialism," the first twenty years of postcommunism demonstrate that Russian judges consistently show the Soviet-era "accusatory bias" and side with the state prosecutors in both the pretrial and trial stages of criminal proceedings. The appellate courts

encourage the amicable relationship between judges and prosecutors. In Russia, judges received the exclusive power to detain the accused persons in July 2002, but this monopoly to detain failed to produce any significant change in the practice of pretrial detention. As Table 1 shows, Russia's judges approve 90 percent of pre-trial detention requests (see Table 1 on p. 8). Russia's judges also prolong 97 percent of detentions. In 2008, the Human Rights Ombudsman Vladimir Lukin openly complained to President Medvedev that judges automatically approved detention requests. The accused persons and their attorneys appeal about one-tenth of the detentions and win 3 percent of the appeals. Russia's procurators have a much higher chance of having the denied detentions overturned by appellate courts. Procurators win about 20 percent (246 out of 1,131 in 2013) of appeals in this category of cases.

The chairs of the oblast-level courts serve as the tribunals that hear the appeals, and they encourage the Soviet-era practice of deferring to state prosecutors in criminal justice. Every other chair of these courts received his law degree during the 1970s and has worked in the court as a judge or a court clerk prior to becoming a chair. Meanwhile, only a quarter of them worked in the Procuracy or in the police force prior to appointment to the bench. These seasoned career judges carry over deference to the procurators, even though the latter now hold much lower status within the legal system. For example, in November 2008, Chair of the Volgograd Oblast Court Sergei Potapenko succeeded in dismissing Marianna Lukianovskaia, a judge working in the same court, from the bench for refusing to extend the detention of a person accused of extorting five thousand rubles (\$190 U.S.). She ordered the accused released on the grounds that the latter was unlawfully deprived of the right to an interpreter during the detention hearing. The procurator, however, arrested the accused again and wrote to Potapenko that Lukianovskaia had to extend the detention. She was fired from the court, and the Russian Supreme Court, the court in which Potapenko served as a judge between 2002 and 2005, confirmed her dismissal in the fall of 2009.

Moreover, even when the procurators uncover wrongful detentions and release illegally detained persons from custody, the perpetrators are rarely criminally prosecuted. The official number of registered unlawful arrests and detentions (criminal offenses under Article 301 of the Russian Criminal Code) is minimal and declining from the record high of 73 in 1997 to 14 in 2006. By contrast, experts estimate the number of wrongful detentions in Russia in the thousands. Between 2008 and 2010, judges placed merely 921 persons under house arrest, even though the Justice Ministry estimated that some 20,000 persons were eligible for this measure instead of custody. In short, strong ties between prosecutors and judges make it quite safe for judges to approve detention requests: they are encouraged from above to arrest criminal suspects and face virtually no risk of being punished for automatic approval of detention requests even when some criminal cases are clearly fabricated.

### Avoidance of Acquittals

Russia's courts have not acquitted more than 1 percent of defendants in the past two decades—the same proportion of acquittals as in the 1980s in the USSR. However, the proportion of acquitted doubled from 0.4 percent to 0.8 percent between 1992 and 2013. The number of acquitted persons has also increased: 4,183 persons were acquitted in 1994, 9,179 persons were acquitted in 2009, and 5,624 in 2013. However, more than two-thirds of these acquittals (3,981 acquitted persons in 2013) have been the outcomes of minor criminal cases of private prosecution (libel, battery, etc.), in which state prosecutors are not required to take part and there is no pretrial investigation. This means that judges can and do hand out acquittals in these minor criminal cases in which state prosecutors are not involved without accusatorial bias.

When state prosecutors are involved, they see each and every acquittal as a failure, accuse judges of being too lenient or on the take, and appeal every acquittal even if they have a weak case against the defendant. The 2002 Russian Criminal Procedure Code allows unlimited appeal of acquittals. State prosecutors know that they have a chance, just as they appeal denials of their detention requests. On average, between 1996 and 2007 procurators won one out of three appeals against acquittals they had filed, as compared to the 2.4 percent success rate of appeals filed by convicted defendants. In 2009, appellate-level courts overturned the acquittals of a total of 981 persons (10.7 percent of all acquitted persons), including 99 persons in cases of private prosecution, and 47 persons acquitted by juries. In 2013, appellate-level courts overturned the acquittals of

a total of 1,008 persons (18 percent of all acquitted persons), including 465 persons in cases of private prosecution, and 25 persons acquitted by juries. These figures send a clear message to trial-level judges: do not hurt your “stability of sentencing” indicator, inherited from the Soviet era, by issuing acquittals.

The return of criminal cases to procurators for supplementary investigation by judges—another Soviet legacy of avoiding acquittals and giving state prosecutors a second chance—does not show signs of extinction. In the late 1980s, judges in the USSR returned some 4–5 percent of criminal cases for supplementary investigation instead of handing down acquittals. In 2000, Russian judges returned the cases of 22,827 persons, while in 2004, judges returned cases to the prosecutors for 38,913 persons while acquitting only 4,100 persons. In 2009, Russia's judges returned to the procurators 21,325 cases (2 percent of all completed criminal cases) involving 27,763 persons—three times the number of those acquitted. In 2013, the figure declined to 9,356 returned cases. Although judges return most cases before the opening of a criminal trial, they are clearly more comfortable giving a second chance to the prosecution than proceeding to acquittal.

As Dmitry Medvedev openly explained, the avoidance of acquittals was the problem of the conscience of judges who were ashamed of acquitting an innocent person and challenging the law enforcement agencies (*Neue Zürcher Zeitung*, January 26, 2013). Even though a new generation of judges, investigators and prosecutors who never worked during the Soviet era has entered the scene, the old habits of mutual agreements and cover-ups among them persist. These habits effectively protected judges from then President Medvedev's insistence on raising the number of acquittals: “I hope that every year we will have more and more acquittals because this is absolutely correct. We should not be shy in issuing them” (January 26, 2012). Judges, especially retired ones, do frequently and openly criticize the poor quality of state prosecutors' work. Yet, when it comes to deciding criminal cases, judges tend to cover up such sloppiness or give law enforcement officials a second chance, thus, rejecting the very idea that the acquittal rates could serve as legitimate indicators of judicial performance. Those rare judges who reveal that they receive orders from government officials to avoid acquittals, like Judge Vakhid Abubakarov of the Supreme Court of Chechnya, face threats of dismissal and accusations of corruption.

### Ruling against the State

The stably high rates of detention and conviction in criminal cases go hand in hand with the consistently high number of court cases lost by government agencies. As

Table 2 on p. 9 shows, judges promptly handle several hundred thousand lawsuits filed by citizens against all federal and regional government agencies, often rule in citizens' favor, and award citizens levels of compensation that average three to four times as much as the average awards won by the government in lawsuits it initiates against individuals. Indeed, the Russian Supreme Court blames the government for overloading the courts of general jurisdiction with lawsuits (between two and five million cases annually) over minuscule amounts—for example, 2 kopecks. Until 2010, it cost 100 rubles (\$3) for an individual to file suit against any unlawful action by a government official. In 2010, the court fee was doubled. Companies pay 2,000 rubles (\$66) in filing fees in such cases. Judges have discretion to reduce or eliminate court fees in individual cases.

As Table 3 on p. 9 shows, the courts of general jurisdiction handle a large number of cases against the legality of government actions and rule against the government more than half of the time. The courts have handled an increasing number of lawsuits against decisions and actions by election commissions since 1999, a year of national parliamentary elections. Between 2008 and 2011, litigants won about one-third of lawsuits filed against election commissions, which have been under the tight control of the ruling United Russia party. Even though local and top courts tend not to interfere in salient election disputes, judges no longer hesitate to cancel election results in electoral precincts and districts. Witness the judicial cancellation of the 2003 State Duma election results in Electoral District 207 (St. Petersburg), of the 2007 State Duma election results in Electoral Precincts 1500 and 1501 (Kemerovo), and of the 2011 State Duma election results in Electoral Precincts 65 and 371 (Vladimir), not to mention regional and local elections. Note that the judicial cancellation of election results was taboo until the Russian Constitutional Court in 2002 ordered the courts to take a more active stance in this regard.

Zooming in on the court cases against the federal government, one can also see that taking the Russian government to court makes sense. In 1999, when Vladimir Putin became Russia's prime minister after his meteoric rise through the Kremlin hierarchy, the Russian government was named as a defendant in 29,300 court cases (including tax-related ones), which resulted in a total of 2.43 billion rubles (\$0.1 billion [all figures in dollars refer to U.S. currency]) awarded to successful plaintiffs. In 2008, when the highly popular President Putin finished his two terms in office and returned to the prime minister's seat, courts ordered the Russian government to pay 33.2 billion rubles (\$1.1 billion) to 137,359 plaintiffs who successfully sued Russia in just

two kinds of lawsuits: for damages caused by wrongful actions of government officials and for the failure of federal government agencies to perform their contractual obligations. In 2012, the year when Putin returned to the Kremlin, courts ordered the Russian government to pay 31.9 billion rubles (\$1 billion) in these two kinds of lawsuits. Even more surprisingly is that the Russian government is grudgingly, yet increasingly, paying out this court-ordered compensation. If in 2002, the Russian government paid only one-fifth of court-ordered amounts, in 2009—the year of the financial crisis—it paid about 90 percent. Moreover, Russia's budget annually allocates billions of rubles to pay court-ordered awards as a way of coping with this avalanche of lawsuits against the federal government.

Judicial insistence, even if often inconsistent, on the government's obligation to honor its promises explains much of this difference. Indeed, government officials repeat that judges made them realize that they had to pay in a systematic way: the 2005 Russian Constitutional Court decision on streamlining the procedure of paying court-ordered awards, the hundreds of cases lost by Russia in the European Court of Human Rights, and the thousands of domestic court decisions in favor of the Chernobyl clean-up workers, who demanded a better healthcare subsidy, and of the retiring military officers, who demanded a housing subsidy. To be sure, government officials have not been happy with this court-ordered generosity. Between 2008 and 2009, federal Treasury officials complained that Dagestani judges were too generous in awarding compensation (1 billion rubles annually) to the wrongfully convicted. The Defense Ministry has lobbied the Russian Supreme Court to narrow the range of military retirees eligible for the housing subsidy. The Finance Ministry insisted that courts should not award larger amounts of compensation to the Chernobyl clean-up workers "in order to eliminate social inequality" and that those who sue the state viewed the "federal treasury as a bottomless barrel." Aleksei Kudrin, then Russian Finance Minister, complained in 2009 that in lawsuits against the federal government, courts most often sided with plaintiffs when the law was vague enough to hold out "hope or the chance of demanding something." Russian judges withstood these criticisms more often than not. Why?

Judges seem to rule against the government because of diluted accountability. Unlike in criminal cases, where judges personally know the detectives, investigators, and prosecutors and where acquittal is a sign of failure, cases lost by the federal government are not a failure of anyone. These cases bring to courts representatives of the local branches of treasury and of other government agencies outside the narrow law-enforcement

community and representatives of the central apparatus of these agencies dispatched from Moscow, whom judges may never see again. Those who represent Russia in courts have no connection to the persons or agencies who violated rights of the plaintiffs. Meanwhile, these persons and agencies bear no responsibility when judges establish that the rights of plaintiffs have been violated by the governmental action or decision. Attempts to impose actual responsibility have largely failed. In April 2001, Kudrin warned of an “avalanche” of lawsuits against the federal government and demanded the imposition of individual responsibility on government officials who broke the law and caused harm to firms and individuals. His demand never became reality. The same year, the Russian Constitutional Court ordered the parliament to provide for the possibility of suing judges directly for breaking the law and causing harm. But the rest of the judiciary has openly resisted this order and nixed such lawsuits. This lack of individual responsibility allows judges a broad degree of discretion that they use to rule against federal authorities.

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### **Conclusion**

The Russian judiciary is a large and complex bureaucracy that has multiple faces, various degrees of discretion and operates according to its own internal logic, sometimes connected to the nature of the political regime, and sometimes disconnected from it. Criminal justice clearly operates under the incentives and thinking inherited from the late Soviet era, which resisted dramatic political transformation due to strong linkages of accountability and control within the law-enforcement community. Administrative justice is a new and growing area of judicial business because judges are much less accountable to the governmental officials involved in the litigation and to the officials who wrongfully harmed citizens. Court-ordered compensation is paid from the federal budget, not the pocket of a bureaucrat, and thus, is not considered a failure. This is why judicial discretion in the lawsuits filed against the federal government has been expanding in parallel with the closure of the political space in recent years.

**Table 1: Judge-Approved Detentions in Russia**

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Detention requests reviewed	231,149	228,000	284,000	272,000	247,500	230,269	208,416	165,323	152,028	147,784	146,993
Detentions approved	211,526	207,024	259,576	248,608	225,498	207,456	187,793	148,689	135,850	132,923	133,311
Percent of detentions approved	91.5%	90.8%	91.4%	91.4%	91%	90%	90.1%	89.9%	89.4%	89.9%	90.7%
Detentions appealed	-	24,200	27,500	28,600	21,900	20,545	20,220	17,417	17,857	19,265	19,238
Detentions canceled on appeal	-	2,700	2,800	2,800	1,400	1,187	1,129	1,053	859	859	589
Successful appeal rate	-	11.2%	10.8%	9.8%	6.4%	5.8%	5.6%	6%	4.8%	4.5%	3%

**Table 2: “Citizen Versus Government” Lawsuits in Russian Courts of General Jurisdiction, 2007–2013**

	2007	2008	2009	2010	2011	2012	2013
Cases filed	600,000	505,696	531,434	536,897	483,976	481,148	404,909
Cases handled	532,414	459,960	461,104	472,257	416,778	408,293	361,867
Cases won	485,799	399,022	416,301	410,093	363,617	344,146	308,504
Success rate (%)	91	87	90	87	87	84	85
Total awards (billions of rubles)	10.1	10.8	7.4	5.8	7.2	5.3	4.7
Average award (rubles)	20,800	27,145	17,837	14,249	19,749	15,270	15,296
Average award in suits brought by govt. against individuals (rubles)	4,800	5,021	5,978	5,902	7,345	15,189	12,873

Source: Judicial Department of the Russian Supreme Court ([www.cdep.ru](http://www.cdep.ru))

**Table 3: Lawsuits Against Unlawful Government Actions/Decisions at All Levels Handled by Russian Courts of General Jurisdiction (thousands)**

	1999	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Cases handled	135	162	118	90	75	66	66	59	74	126	145	121	121
Success rate (%)	-	-	-	-	-	-	-	59	55	63	65	55	54
Cases against election commissions	2	-	-	-	-	-	-	3	3	3	3	4	4
Success rate (%)	-	-	-	-	-	-	-	39	31	29	44	34	25