



NATIONAL RESEARCH UNIVERSITY
HIGHER SCHOOL OF ECONOMICS

Ivan S. Grigoriev

**WHY DISMISS A GOOD CASE?
DUAL-PURPOSE JUDICIAL
INSTITUTIONS IN
CONSTITUTIONAL COURTS
UNDER AUTOCRACY:
EVIDENCE FROM RUSSIA**

BASIC RESEARCH PROGRAM
WORKING PAPERS

SERIES: POLITICAL SCIENCE
WP BRP 60/PS/2018

Ivan S. Grigoriev¹

**WHY DISMISS A GOOD CASE?
DUAL-PURPOSE JUDICIAL INSTITUTIONS IN
CONSTITUTIONAL COURTS UNDER AUTOCRACY:
EVIDENCE FROM RUSSIA²**

The Russian Constitutional Court (RCC) has over time developed a practice of adopting so-called “positive dismissals” (Pozitivnoe Opredelenie) which complements (but also undermines) the existent formal procedure of only delivering decisions on merits with Rulings (Postanovlenie). The paper explores the uses of this peculiar practice. I show that Positive Dismissals are used by the Court to overcome the rigidity of the formal procedure where this is necessary for reasons of intraorganizational or political expediency. To do that I construct and analyze quantitatively a unique comprehensive dataset of all decisions handed down by the RCC roughly in the first two decades of its existence (1995-2015, N=22334). I show that “positive dismissals” are used whenever the case is deemed too important to be simply dismissed (for example, if it is submitted by a powerful petitioner), or when the Court cannot dismiss a case but wants to keep low profile to avoid political risks (for example, with the politically salient cases during election years).

JEL Classification: K41, D73.

Keywords: Russian Constitutional Court; authoritarianism; constitutional review.

-
- 1 National Research University Higher School of Economics, St.Petersburg, Russia. E-mail: igrigoriev@hse.ru.
 - 2 The article was prepared within the framework of the Academic Fund Program at the National Research University Higher School of Economics (HSE) in 2016-2017 (grant number 16-01-0121) and supported within the framework of a subsidy granted to the HSE by the Government of the Russian Federation for the implementation of the Global Competitiveness Program. Interviews cited in this paper were collected in 2012 by the author together with Arina Dmitrieva. I also wish to thank Anna A. Dekalchuk and Kirill Zhirkov for their helpful comments on the manuscript.

Introduction

There are three types (or *genres*) of decisions, each used in the Russian Constitutional Court (RCC) for a specific purpose. Thus, when the Court intends to review the case on its merits, it adopts a Ruling (*Postanovlenie*). In theory, the only way the Court can communicate any substantial position concerning the legal controversy it is presented with, is with a Ruling. *Zakliuchenie* (or Conclusion) is a genre devised specifically for the impeachment procedure whereby the Constitutional Court has to give its conclusion as to whether the legal procedure of bringing accusations against the President has been complied with³. Finally, there is an *Opredelenie* (or Dismissal) – technically, a residual genre that the Court should use for all other purposes, but more specifically – for dismissing petitions when the Court finds them inadmissible (and therefore cannot evaluate their merits)⁴.

Article 71 of the Russian Constitutional Court Act which covers this distinction, is rather strict in distinguishing between these three genres and provides for adopting “*final* judgments on the merits of a case only with a Ruling” (which means the residual genre of Dismissals should be reserved for “non-final” non-merit decisions only). Surprisingly, the Court itself is not as strict. The more exotic genre of Conclusion aside, in practice the boundary between a Ruling and a Dismissal can sometimes become blurry, especially on the Dismissal's side. In particular, this is the case with the subgenre of so-called “Dismissals with positive content” (*Opredeleniia s pozitivnym sodержaniem*) – a legal innovation the Court came up with in the late 1990s and has been using extensively ever since. As the name implies, while using this subgenre the judges would find any given petition inadmissible and therefore dismiss it with an *Opredelenie*. At the same time, this *Opredelenie* would be charged by the Court with certain “positive content” (that is, essentially, a statement on the merits of the case), which would elevate such “Positive” Dismissal substance-wise almost to the level of a Ruling.

This confusing practice is well-known in the Russian legal milieu and has been a cause for

3 Conclusion proves a relatively rare genre. The only time there was even a remote possibility of impeaching the president in Russia (in 1998-1999) the motion came to a standstill on an earlier stage in the State Duma (the lower chamber of the Russian parliament), so the Court was never even asked to give its Conclusion.

4 Whereas translating *Postanovlenie* as Ruling should not be controversial (as it is common to refer to a decision on merits as ruling), there is no ready equivalent for the Russian *Opredelenie*. This poses a linguistic issue, especially since *Opredelenie* has no intuitive legal meaning in Russian either. The distinction comes from the structure of court decisions. Whenever the decision is positive, the wording that precedes the operative part is “The court rules”, hence the Ruling. If the decision is negative, the wording is “The court has determined”. As technically there is no ruling in this case – just the number of circumstances determined by the court, this type of decision should probably be called a Determination, but this translation is obviously clumsy. (In his authoritative treatment of the subject Trochev faces the same problem and prefers not to translate *opredelenie* at all, instead referring to it as an “unpublished decision, which dismisses a case without hearing” [2008, 94].) In view of these difficulties in this paper I will both use the Russian “*Opredelenie*” and its closest English-language equivalent – Dismissal.

much criticism (Витушкин 2005; Ершова 2009; Петров 2010а, 2010б). As is often the case with legal criticism, mostly the critiques focus on the very fact that this practice contradicts the formal distinction between the so-called “final” and “non-final” types of judgment imposed by the article 71 of the Constitutional Court Act.⁵ This may seem a narrow and even formalist grounds for criticism. The problem with this practice is not merely technical though. First, by using Dismissals instead of Rulings to deliver judgments on the merits, the Court deprives litigants of their procedural right for an open trial (as the RCC Act does not oblige it to conduct hearings to adopt a Dismissal). Second, and perhaps more importantly, Russian general courts tend to read the RCC Act literally and thus do not accept the Positive Dismissals as belonging to the category of “final” judgments of the Court which they should comply with. Arguably, this leads the general courts to ignore the Positive Dismissals altogether (Петров 2010а, 26), which only aggravates the compliance issues, already quite serious in Russia (Burnham and Trochev 2007; Trochev 2008, 207–57).

All of this should make adopting Positive Dismissals rather impractical for the RCC. Yet despite all the criticism and the attempts to rectify this practice through the reform of the RCC legal procedure in 2010, the practice pertains. It seems as though judges found this somewhat awkward instrument useful, and for some reason do not want to let it go. In this article I describe the origins of Positive Dismissals as a legal instrument, and show how this instrument is used (and which tasks it serves) by analyzing quantitatively the universe of judgments passed by the RCC in 1995-2015 (N=22334). This allows me to explain why the Court needs this hybrid intermediary subgenre at all, and by so doing to show the more general compatibility between the Russian political context that the RCC is embedded in, and the way the RCC functions.

As I show below, the practice of producing Positive Dismissals is partly explained by the fact certain cases are deemed too important by the judges to dispose of with an ordinary Dismissal; or too risky to be given a Ruling (even though maybe deserving it). When there is a border-line case like that, there is a temptation in the Court to deal with it with a genre not provided for by the Constitutional Court Act, but rather invented by the judges themselves – the Positive Dismissal. The answers I give thus partly belong to the area of legal organization and intra-court politics, and partly contribute to research of judicial politics under autocracy. Importantly, the Positive Dismissals are not only interesting as a feature of the Russian constitutional justice, but also as an example of an institutional invention devised by a court to

5 As Alexei Mazurov notes in his authoritative commentary to the RCC Act, article 71 “does not seem to restrain the RCC in any way” as it keeps delivering “final” judgments in the form of Dismissals with positive content (which makes these “Positive” Dismissals “identical to the regular Rulings, especially since neither are appealable”) (Мазуров 2009).

resolve specific problems it cannot handle given the instrumental arsenal it is formally provided with.

The paper proceeds as follows. In the first section I theorize evolutionary development of dual-purpose judicial institutions – internal norms and practices (often merely technical in their primary function) that the judges repurpose to be able to advance their collective political and organizational goals. The institutional feature that induces this development is the court collegiality: the fact the judges need to resolve coordination and collective action problems pushes them toward adapting the internal judicial institutions to optimize the work of the court and accommodate external challenges it encounters. The second section provides an illustration of the kinds of challenges courts might face by describing the conditions the RCC exists in, as well as its functioning and the procedure it follows to determine the genre of a judgment it delivers on any given petition⁶. The third section advances three hypotheses as to why the Court uses the Positive Dismissals. To test these hypotheses I construct a unique comprehensive dataset covering the universe of all RCC judgments adopted in 1995-2015. The third section also describes the data collection. The fourth section discusses the method used to analyze the data and presents the results.

Strategic use of internal judicial institutions

It is common to operationally define internal judicial institutions as rules governing interactions between judges of the same court in specific stages of the decision-making process. Epstein and Jacobi suggest that specific internal institutions could be located in either of the two general stages of judicial decision-making: as the judges select cases, or as they render decisions on their merits (2010, 346), but of course these stages can be segregated more specifically. Thus, an intermediary stage of opinion-writing could be singled out as a stage following case selection yet preceding a decision on the merits, and it could moreover be itself divided into substages as Maltzman et al. do in their analysis of the US Supreme Court (Maltzman, Spriggs, and Wahlbeck 2000, 6–10).

The ultimate goal of dividing the process of judicial decision-making into a series of relatively self-contained stages is to single out the institutions, both formal and informal, which may affect the outcome at each stage, and to analyze how these institutions influence interactions

6 This description is informed by a series of in-depth interviews conducted in the RCC in 2012, supplemented with on-site observation from within the Court. The number of interviews is thirty three (thirty five hours in total), including eleven interviews with the RCC judges (two of them in retirement at the time of the interview), six with high-rank officials of the RCC legal service (generally referred to as the RCC Secretariat), five with judicial clerks, and eleven with the legal service clerks.

between the judges. This “cataloging” of the internal institutions has become an important part of the research agenda associated with the strategic approach (Epstein and Knight 2000), and over time many specific institutions have been analyzed this way⁷.

It should be noted however that the US Supreme Court stands out as the only constitutional tribunal to have become a subject of this kind of institutional inventory. Of course, the reason might be that the US Supreme Court is just generally researched well enough and supplies enough empirical data for scholars to wish to deal with the minutiae of internal judicial politics. But it also matters that the US Supreme Court is sufficiently protected from potential external pressures to be considered the major driver behind its own policies, and therefore to attract scholarly attention to its internal institutions (which, absent any systematic external influence, do become an important influence on the judicial outcomes).

Indeed, the more “endogenous” the judicial decision-making is to a constitutional court as organization, the more scholarly interest it should attract, and the less attention should be devoted to the external political factors (deemed not very consequential for the day-to-day functioning of the court). And vice versa, the more “exogenous” are judicial decisions to the court itself, the more attention should be devoted to the extrajudicial political factors and institutions. It therefore only seems reasonable that with the less politically autonomous courts the scholarly attention shifts towards the external “institutional context” (Epstein and Knight 1998, 138) which holds more weight in these cases, while any attention to the internal institutional structure vanishes.

This is especially visible in research of constitutional courts under autocracy and during regime transition (for review see Moustafa 2014; Moustafa and Ginsburg 2008). These conditions make judicial politics more complicated as the courts have to take into account the interests of the government (which may otherwise threaten to curb the court, pack or disband it altogether, or even go after individual judges (Levitsky and Way 2002, 56)). Not surprisingly, the scholarly attention in these cases is attached to those conditions that allow constitutional courts to persist, and primarily to the willingness of the government to allow the court's existence: either in view of the economic necessity to attract foreign investment and credibly commit not to expropriate it (Moustafa 2007); or to maintain discipline within the ruling elite (Magaloni 2008); or in order to secure the ruler's own positions during regime transition (Ginsburg 2003; Magalhães 1999).⁸

7 Examples include the “rule of four” (Epstein and Knight 1998, 118–25), the rule governing majority opinion assignment (Epstein and Knight 1998, 126–35; Arrington and Brenner 2008; Johnson, Spriggs, and Wahlbeck 2005), and various institutions governing case selection (Perry 1991).

8 This body of research can be related to a broader current of autocratic institutionalism – a research agenda

The court's own role under these conditions effectively boils down to survival through clever maneuvering: the judges have to pick their battles both not to irritate the government too much, and to be able to advance their own agenda. This “tactical balancing”, or the practice of “balancing a discrete set of considerations – justices’ ideologies, their institutional interests, the potential consequences of their rulings, public opinion, elected leaders’ preferences, and law” – while judging (Kapiszewski 2011), is what makes the theory of judicial survival under autocracy complete: we know why the government allows the court to exist, but we also know that the court does its part of the job accommodating the preferences and concerns of the government and not letting it down⁹.

The problem with this understanding is that the court's collegiality – in Maltzman et al.'s words, “perhaps the most important institutional feature of the court” (2000, 15) – makes such “tactical balancing” too complicated as it implies that individual judges are capable of carrying through such a sophisticated concerted action consistently. So far the common approach has been to disregard collegiality and treat courts as unitary actors¹⁰. However practical, this approach is also clearly artificial. Indeed, all constitutional courts are collective entities, which means that the judges would often face coordination and free-riding problems typical of collective decision-making.

To see what problems free-riding presents for tactical balancing, consider a stylized situation where (1) the court as a whole is better off displaying moderation in deciding some particular case (in order to avoid confrontation with the government), but (2) the court majority's sincere preferences actually go against those of the government.¹¹ The judges would face the choice of either complying with the court policy of not challenging the government on this particular issue, or dissenting. Obviously, in this situation any individual judge has an incentive to free ride and dissent: if the costs of her destructive behavior are distributed uniformly among all the members of the court, then she only bears a relatively small share of the costs while

which aims to explain the origins and role of institutions under autocracy (Pepinsky 2014). From this perspective a constitutional court is just another institution which is for some reason allowed by the autocrat to exist: either because it brings her some benefits (apart from those already mentioned, these can also be regime legitimization or information acquisition), or because it is too costly to get rid of (Brancati 2014).

9 Helmke (2002) develops a somewhat similar argument in her analysis of the Argentine Supreme Court's “strategic defection” in periods of regime transition in Argentina.

10 Kapiszewski (2011, 481) spells this out as an assumption underlying her theory when she writes of courts as “goal-oriented entities... that seek to maximize their interests” and that are capable of a “purposive, autonomous decision making... (similar to rational choice analysis in which states or political parties are the unit of analysis)”. Note this is also a typical feature of most formal models describing court-executive and court-legislature relations (see e.g. Eskridge 1991; Gely and Spiller 1990).

11 These seem to be the two necessary prerequisites for tactical balancing, for otherwise either an issue is not as important for the government (and therefore not as risky for the court as a whole) for judges even to twist their own sincere preferences; or, if the majority on the court sincerely agrees with the government, there is no need to be tactical about it.

receiving concentrated benefits of realizing her own preferences (and, probably, even some additional satisfaction of distancing herself from the rest of the court, too compliant to the government). Free-riding thus makes tactical balancing highly problematic in the short run. In the long run, and given their different preferences and interests, the judges would also face an asymmetrical coordination problem: they would have a hard time playing out the sophisticated choreography of submitting to the government on some issues while promoting their own agenda on the others, as it would be difficult for them even to decide which issues (and whose preferences) to sacrifice at what time.

Relaxing the unitary actor assumption thus leaves us wondering how the courts even manage to do the trick of tactical balancing, which brings us back to internal institutions. Indeed, it has been established that it is primarily by virtue of the internal institutions (which facilitate coordination between judges and sanction non-compliance and free-riding where necessary) that the judges are generally capable of coordinating efficiently and overcoming the collective action problems (Epstein and Knight 1998, 115–17). It is only natural to assume that the internal institutions should play a similar leading role in making it possible for courts in inhospitable environments to exercise longer-term sophisticated organizational strategies, including tactical balancing and strategic defection (Kapiszewski 2011; Helmke 2002).

Methodologically, this leads us to a somewhat paradoxical conclusion that it is namely with the politically more challenged courts (where the precarious external institutional environment should seem to matter more) that a closer analysis of the internal institutions should provide us with a better understanding of the court-executive accommodation.¹² Substantively, and more importantly, this also means that under these more precarious external conditions any internal institution can in fact prove a dual-purpose device, which, besides performing certain organizational functions consciously sought after by individual judges, also enables the court as a whole to deal with the external challenges it faces by facilitating tactical self-restraint where necessary (perhaps even without judges being aware of that)¹³.

From the organizational standpoint the “good” internal institutions should be those

12 A relevant sports metaphor would be to compare the problems constitutional courts face under democracy and autocracy to multi-person rowing and whitewater rafting, respectively. With the multi-person rowing the main issue is what direction the boat takes, and how far and fast it goes. (Imagine the nine justices of the Supreme Court arguing whether to turn to the left or to the right, and rowing each in their preferred directions.) This makes interaction between the rowers an important subject. The whitewater rafting, however, is not as much about taking directions, as it is about surviving the waves and rapids, and therefore about the rafters' ability to react quickly and concertedly, which clearly takes much more collective effort and teamwork to succeed. Whereas in rowing the rowers could in principle do without teamwork at all and still get somewhere, in rafting the teamwork is critical for even keeping afloat.

13 We could as well formulate this in terms of such institutions' manifest and latent functions (Merton 1967, 73–138).

contributing to the court's adaptation to the harsh political environment it is embedded in. The question remains though, how would the court end up using exactly these clever dual-purpose institutions? Unless the judges, while formulating their internal routines and procedures, consciously opt for one operational rule over the other because it makes it more comfortable for the court to submit to the government, the only path such institutional development could take is evolutionary. The internal judicial institutional environment is typically rather dense, with many institutions (both formal and informal) potentially available in the form of established procedures, bureaucratic routines and legalistic doctrines. Despite this potential multitude of institutional solutions, collective evolutionary rationality should push the judges towards adopting and using those institutions that would help them avoid collision with the government. As it happens random institutions (probably devised initially for completely different purposes, or simply by accident) would be drawn from the institutional “garbage can” (Cohen, March, and Olsen 1972) and mobilized by the judges to solve specific problems they face in their day-to-day activities. The ones that would prove more useful in the critical situations (e.g. where avoiding conflict with the government is a priority), would later take root as the preferred approach to conflict avoidance. Over time individual judicial demand for such institutions would make them entrenched even despite all potential flaws and criticism.

In theory, almost any internal institution can be instrumentalized this way and serve the purpose of adapting the court to the external environment. Thus, using some form of qualified majority voting or unanimity (instead of a simple majority) while deciding on the merits should make the court more moderate, evasive and sluggish; similarly, allowing the court chairperson to view the other judges' votes during conference discussions before voting herself provides her with a better grip on the court. A comprehensive “institutional inventory” of a court should allow to single out the dual-purpose internal institutions which contribute to the court's successful adaptation to the external environment.

In this paper I analyze one such institution – the practice of adopting Positive Dismissals in the Russian Constitutional Court. As I show below, this practice proved extremely robust even despite all criticism and attempts to formally reform it exactly because it performed a useful latent function the judges did not want to give up.

Genre selection and role of the Positive Dismissals in the RCC

The first Russian Constitutional Court was created in 1991 and heard its first case in 1992. By late 1993 it got enmeshed in the power struggles between the then President of Russia Boris

Yeltsin and the Russian parliament. When the struggle took a violent turn in October 1993, the Court (which supported the parliament) was disbanded by the President.

When the Court reconvened in 1995 (after a year of drafting and adopting the new Constitutional Court Act) its judges were already experienced in transitional politics and knew full well that the threats the Court faced were real and could take different forms. Thus, apart from suspending the Court in 1993¹⁴ the government also narrowed the Court's powers and packed the Court with six more judges (allegedly loyal to the President and capable of tilting the balance on the bench in his favour) (Trochev 2008, 76–79). None of the thirteen judges who were on the bench as of September 1993 (and thus had a firsthand knowledge of the political risks that constitutional courts face during transition) were dismissed at the time. Moreover, they retained the majority on the bench and influenced the Court's broader political agenda up until April 2002 when judge Tamara Morshchakova resigned and the number of acting judges appointed in 1991 became nine (out of 19).

After the 1993 shutdown the Court faced similar (if less pronounced) existential threats three times. The first one came in 2001 when amendments were discussed and even approved by the Duma committee to only allow the Court to register whether a contested legal norm conforms to or contradicts the Constitution, without providing its binding interpretation or giving any prescriptions to other courts, citizens or state authorities – the powers that the judges seemed to value a lot (Газета “Коммерсантъ” 2001). It took some effort by the Court to fence off this attack (Trochev 2008, 88). The second was not as much an existential threat as an act of pointless coercion, when in 2008 the Court was relocated from Moscow to St.Petersburg despite the judges bitter resistance. The third materialized when in 2009 the amendments introduced to the RCC Act provided for a presidential nomination (with the approval by the Federation Council, the upper house of the Russian parliament) of the Court chairperson instead of her direct election by the judges themselves.¹⁵

14 It was debated briefly if the Court should be shut down for good, its powers transferred to the Supreme Court (Trochev 2008, 75).

15 The abolition of the chairperson's election in favour of a presidential nomination is obviously rather controversial from the standpoint of autonomy of the Constitutional Court. The reform took away some important powers of judicial self-organization from the Court (which by 2009 remained the only high court in Russia which elected its own chairperson) and enhanced the means of control that the President has over the Court through its chairperson who now becomes more responsive to the wishes of the executive (at least as long as she aspires for renomination after her limited six-year term as chairperson is over). As a matter of fact, though, the then Court chairman Valery Zorkin would have no such incentives as he would have anyway approached the retirement age of 70 in 2013. This is why in November 2010 the chairperson was exempted from the retirement age limits with yet another amendment to the RCC Act, thus allowing Zorkin to stay and even making him especially interested in retaining the position of chairman, which became his only chance not to retire. And indeed in February 2012 Zorkin was renominated by the then president Medvedev for another six-year term.

The threats the Court faced throughout this period were obviously different in type and extent. Indeed, compared to the risk of complete shutdown or restaffing in 1993, the 2001 reform proposals (which could alter the Court's operation and diminish its significance) were somewhat milder, while the 2008 relocation was only a matter of the Court's prestige and the judges' comfort and well-being, and the 2009 reform – a more sophisticated measure to make the Court more controllable through its chairperson. Yet all of these instances, their differences notwithstanding, are indicative of the general unfriendliness and precariousness of the environment the Court operates in.

Exposure to this uneasy environment was also amplified by the fact that the Court used to have many enemies who could in principle support an attempt to curb its powers if given the opportunity. These at some stages included the regional authorities (and especially the powerful regional governors) (Kahn, Trochev, and Balayan 2009), and the regular courts which for a long time questioned the RCC's authority to rule over the constitutionality of the law enforcement practice and sometimes obstructed the implementation of the Court rulings (Burnham and Trochev 2007). With a lapse of time many of these threats diminished in significance as the political order stabilized and was rearranged around the figure of the powerful federal executive who now established a firmer control both over the judiciary (Solomon 2008) and the regional authorities (Golosov 2011). As this happened, though, the Court itself became increasingly more dependent on the executive which, as long as it commands constitutional majority in the State Duma (the lower chamber of the Russian parliament) can amend the RCC Act at its own will – the opportunity which it actually took benefit of 15 times since Putin came to power in 2000.

Existing under these constraints and in an inhospitable environment like that dictates certain survival policies. Yet, as I suggest in the theoretical section above, to be able to concertedly implement these policies (which we could generally define as seeing beyond the legal substance of the case the Court is presented with, taking note of the political implications of different courses of action, and acting accordingly) the judges turn to the internal institutions they are provided with, or try to circumvent and modify these institutions if they prove too rigid for the Court to be able to “tactically maneuver” around the hurdles it faces.

The strict procedure regulating the choice of genre for a Court decision is in fact a perfect example of such rigidity. In this procedure the genres essentially serve as labels indicating whether a decision has some important “constitutional substance” (and is handed on the merits), or if it is merely something more technical – most probably, a dismissal of an inadmissible petition. (In this latter case it can be safely assumed that the case lacked any merits because the

RCC has a non-discretionary docket and therefore cannot dismiss a case as long as it complies with certain legal criteria established by the RCC Act.) The genre is therefore very consequential.

At the same time, Ruling and Dismissal as genres also imply using completely different procedures. First, Dismissals are a product of closed judicial deliberation, whereas Rulings could only be adopted after a public hearing which would allow all the parties to the case to present their positions¹⁶. The *publicity* (along with adversarial nature of the trial) are listed as two of the five fundamental principles of constitutional justice in Article 5 of the RCC Act. These are supplemented with a minor principle of *continuity* of the trial (Article 34) which would not allow the Court to take up another case before it hands down its ruling on the pending one.

The principles of publicity and continuity obviously limited the throughput capacity of the Court, and indeed the judges began to feel this as soon as in the late 1990s as the Court started to accumulate a backlog of cases it accepted but could not deal with (Митюков and Станских 2006). Dismissing these cases was not an option as, indeed, they were worthy of consideration and contained a “constitutional controversy”. At the same time, Dismissal *as a genre* clearly presented some benefits as it did not necessitate a lengthy oral procedure and, moreover, allowed to deal with as many cases at a time as the Court needed to because the *continuity* did not apply to Dismissals.

The only drawback was that the RCC Act does not allow to hand down decisions on the merits with a Dismissal. But given the fact that the Court was anyway forced to choose what cases it could handle physically, and then dismiss all the others (since there would be no way to produce enough Rulings given the procedural constraints), the Court decided to give article 71 (which describes types of decisions and their purposes) a broader interpretation and find a way to distinguish between the ordinary, or Negative (*Otkaznye*) Dismissals, and the Positive ones, and to use the latter as quasi-Rulings. This is how judges themselves explain the genesis of Positive Dismissals and their goal.¹⁷

The question though is not what goal an institution is generally assumed to serve – or what rationalization actors use to resort to this institution – but rather what it is in fact used to do, what purpose it actually serves. And there are some grounds to believe that even if the considerations of the Court's throughput capacity could have been the rationale for introducing this practice, it

16 The past tense here owes to the fact this procedure was reformed at some point. See below for details.

17 Indeed, that is the explanation provided by the then chairman of the Court Valery Zorkin in an interview in 2003 (Зорькин 2003). It is also fully corroborated in our interviews with 10 judges and five judicial clerks conducted in 2012, which suggests that this is at least the official version (although we have no reasons to doubt the informants' sincerity).

was not the only (nor maybe even the main) purpose this practice ended up serving.

One indication of this is that when in the mid-2000s the number of the Rulings the Court handed down decreased quite significantly, this did not result in the Court's dropping its more problematic practice of adopting Positive Dismissals in favour of the legally more sound one of producing regular Rulings. To the contrary, these years saw further proliferation of Positive Dismissals. Of course, it might be argued that it was namely the opening of the procedural avenue for Positive Dismissals that resulted in the normalization in the number of cases the Court decides to hear, hence the drop in the number of Rulings. But in fact the 2005-2008 period (with the number of Rulings adopted hitting an all-time low of 10, and the number of Positive Dismissals skyrocketing to 95 in 2006) is far below the likely annual norm for the number of Rulings adopted, which has on average been around 30 per year in the 2010s, and 20 per year in the 1990s, but only 12 per year in 2005-2008 (and on average 16 for the 2000s in general).

What seemed to happen was that by the mid-2000s the Positive Dismissals have somewhat crowded out the Rulings as a means of taking decisions on the merits. An understanding evolved at the Court that Positive Dismissals could be issued simply for their own sake, essentially as a full-fledged genre of its own. Initially a formal justification for Positive Dismissals was that they allowed to avoid wasting time when there already existed an applicable legal position established by the Court in an earlier Ruling which could be transposed to the case at hand (thus relieving the Court of the burdensome need to hold the full-blown hearings and follow all the procedure with the more trivial cases). This formal justification must have served as a formal restraint not to abuse Positive Dismissals to the Rulings' detriment. But then at some point the Court has "acquired a taste" for Positive Dismissals and sometimes, when handing down a Positive Dismissal, even did not bother to refer to any of its earlier Rulings (the only possible source of a pre-existing legal position), one of the judges we interviewed confided. Seeking to make the Positive Dismissals more visible, the Court then devised a special labeling scheme and started to tag the Positive Dismissals with letters OP in 2007 (which stands for *opredelenie pozitivnoe*, a Positive Dismissal). The OP Dismissals entered the RCC lingo (used mainly within the Court and by the constitutional lawyers, both practicing and academic) as "*opochki*" which can be reasonably accurately translated as "oopsies".

As I have already mentioned in the introduction the major substantive problem with the Positive Dismissals is that they are neglected in the regular courts (which, unlike the Constitutional Court, tend to read article 71 of the RCC Act literally and refuse to comply with anything short of a Ruling). From the interviews we know that the RCC has for some time been

lobbying for a reform of the RCC Act which would legalize the Positive Dismissals as a binding source of constitutional law (on an equal footing with the Rulings). Indeed, draft amendments to achieve that have been prepared at the Court as early as in 2004 (Venice Commission 2004), but it was only at the 2009 annual meeting with the then President Dmitry Medvedev that a group of the judges officially suggested to amend the RCC Act.

Yet when the Presidential Administration introduced its amendments to the Duma in 2010, it took a different approach to the problem and introduced a whole new simplified written procedure (known as Article 47.1 procedure), while also relaxing the principle of continuity. Thus, instead of legalizing the solution already devised by the Court, the 2010 amendments gave it an alternative (though maybe even a more straightforward) route to deal with the procedural issue it faced.

Curiously, the Court did not quite accept the reform.¹⁸ For sure, it stopped tagging the Positive Dismissals separately from the regular Negative ones (the O-P tags were gone from the case numbering in the early 2011). The Court also began using the Article 47.1 written procedure to hand down some Rulings. Yet it did not abandon Positive Dismissals. Thus, when observing the new post-reform typology of the Court decisions the then deputy head of the Court legal service (generally referred to as the Secretariat) Vladimir Sivitsky notes that although the old Positive Dismissals were gone, the new subgenre of quasi-Positive Dismissals is now used at the Court (Сивицкий 2012, 66). Moreover, the Court's official commentary to Article 43 of the RCC Act (written by judge Sergey Knyazev) has it that introducing the new Article 47.1 written procedure does not mean “the practice of adopting Positive Dismissals should be dropped” (Гаджиев 2012).

Our interviews conducted in 2012 showed that this was not an idle theoretical speculation: both the judges and their clerks still perceived adopting Positive Dismissals as a totally viable and relevant case trajectory, and in fact after a brief period of moderation in 2010 (when only 22 Positive Dismissals were adopted) this subgenre saw a full-scale renaissance with 42 Positive Dismissals adopted on average every year in the 2010s (and a whopping 76 in 2014).

All of this suggests that Positive Dismissals are not merely a technical tool devised with a specific goal of dealing with the heavy caseload given the unfortunate procedural constraints the

18 It should be noted that the Article 47.1 procedure was not the only novelty introduced by the 2010 amendments, and the judges were not very happy about the reform in general. The most controversial element of the reform was the abolishment of the two judicial chambers which made the plenary hearings (with all 19 judges participating) the only mode of review. This obviously made the decision-making more difficult. “Imagine, you have to make 19 people come to a consensus instead of just nine or ten as it were when we had chambers”, the judges told us in the interviews. The chamber reform was absolutely uncalled for; all of the judges we talked to report it was a complete surprise, and an unpleasant one come to that.

Court faced. As the constraints were lifted, the Court did not abandon this practice. Of course, this might simply be an instance of organizational inertia (the Court “acquiring a taste for the Positive Dismissals”). But even then the question is what are the grounds for this inertia? Why does the Court need the Positive Dismissals? What does it use them for?

Hypotheses and data

What are the conditions when the judges could want to circumvent the existent rigid procedure of genre selection they are provided with according to the RCC Act, and opt for a hybrid genre of a Positive Dismissal instead? Such conditions could relate to at least three properties of the case reviewed by the Court.

The first one is the petitioner. Who brings the case should obviously matter for the judges. On the one hand, the judges might want to show bigger respect for certain figures (such as the president or members of the parliament as compared to the regular citizens, for instance) simply out of political tactfulness. On the other hand, certain class of petitioners (such as the regular courts) might prove systematically better at bringing the cases of better quality. In both cases the figure of a petitioner should prove a significant predictor of whether a Positive Dismissal is adopted instead of a usual (negative) *Opredeleenie*.

The second property is the reporting judge. According to the procedure, before the Court takes any decision concerning the case the chairman assigns it to a reporting judge who examines the case and advises the rest of the Court about it. We could expect some judges to prove more authoritative or skillful at persuading the rest of the Court that the case they examine merits review. The Court would then be inclined to take more cases from certain judges (out of respect for them, or because they manage to push the cases they review through more effectively).

Both when a Positive Dismissal is adopted because of the higher-rank petitioner, or of a more “powerful” reporting judge, we could say that the case is “promoted” from a mere (Negative) Dismissal. It could be, however, that certain cases are “demoted”, too. In particular, that could happen when the constitutional problem raised in a case as such deserves a Ruling, but is not safe for the Court to resolve since the solution it would find might not please the powerful actors concerned. The risks the Court faces here are that its decision is not complied with (Vanberg 2001) or is overridden by the legislature (Eskridge 1991) (which damages its authority), or that the executive punishes the Court afterwards or coerces it into deciding in its favour beforehand (Clark 2009) (which damages the Court's integrity). Giving such a case a Positive Dismissal instead of a Ruling should in principle allow the Court to deal with the

problem substantively, while keeping a low profile formally. The third property of a case – its (potentially troublesome) legal substance – could be a predictor of such development.

Note, however, that the substantive riskiness of a case for the Court is entirely conditional upon the actual position taken by the Court regarding the issue it examines. Indeed, the risks of non-compliance, legislative override or executive punishment only materialize if the position taken by the Court differs from that of the government. Yet there is a general expectation that in time the ideological distance between these two should decrease, and the judges should realign with the government.¹⁹ As this happens, the subjects that used to be risky to engage in cease to be so, and the Court grows more willing to go into hearings and adopt Rulings even on the issues it previously found controversial.

The three general hypotheses I will test are therefore that a Positive Dismissal is likelier to be handed down when the case is brought by a more important and influential petitioner; when it is examined preliminarily by a more authoritative or skillful reporting judge; and when the subject matter of the case is deemed riskier to deal with by the Court. The latter effect might however be conditioned by time: as time passes, the Court should see less risks in dealing with certain previously risky areas, and the effect of the “controversial subject” should gradually dissipate. Time might also moderate the other effects we observe since the way the Court uses Positive Dismissals (the subgenre it has invented and introduced into practice gradually) should follow a learning curve.

To test these hypotheses I construct a unique dataset covering all decisions (both Rulings and Dismissals) adopted by the RCC in 1995-2015 (N=22334). Two major sources of data are used. One is the online case catalogue provided by the RCC on its official website. The catalogue lists all the cases along with their full titles and dates of adoption.²⁰ Most of the time the data on the catalogue alone suffice to establish certain features of the cases, such as the *case number*, *date of adoption*, *genre of the decision* (Ruling or Dismissal), *type of the Dismissal* (Negative or Positive), *category of the petitioner*, and the *legal norm* she contests. The tables were downloaded from the RCC Website using the *iMacros* software. All the data needed for

¹⁹ One natural mechanism of such realignment is the judicial rotation. As the government appoints new judges, it brings the median judge's ideal point closer to its own. As a result, “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities” (Dahl 1957, 285). Another mechanism, which probably plays a bigger role under autocracy or during transition towards autocracy, is that with a lapse of time even the initially less sympathetic judges learn to reconcile their views with those of the executive through internal institutions and doctrines which allow them to support the government concertedly and without sacrificing their views and reputations too explicitly. For example, this can be achieved through writing opinions on subjects where the Court might be challenged in a more ambiguous language (Owens, Wedeking, and Wohlfarth 2013).

²⁰ These tables are available on the RCC Website here: <http://www.ksrf.ru/ru/Decision/Pages/default.aspx> (accessed August 11, 2017).

analysis were extracted from the tables using automated queries in *Microsoft Excel* software.

The second source of data is the texts of decisions themselves (also available on the RCC website). These were downloaded from the website using the *iMacros* software, converted into the *txt* format using *Xpdf*, and then queried using *grep* command. The main reason the full texts of the decisions were used is that the name of the *reporting judge* (and whether there is in fact one assigned to any given case) can only be found out there. The full-text database was also used to fill in the voids when it came to other information which normally should have been listed on the catalogues but for some reason was omitted. (Thus, for instance, prior to 1998 the case titling practice have not yet settled down, and the information needed for our analysis would not always be supplied in the titles of the cases. This is why all the cases adopted before 1999 were also cross-checked through the full-text database.)

Using these two sources I construct the variables used in the analysis. A number of binary variables are built to describe the genre of each case. *Ruling* is coded 1 if the case ends up with a Ruling and 0 otherwise. Similarly, *Positive Dismissal* is coded 1 if the case ends up with a Positive Dismissal. Following the existent understanding that both Rulings and Positive Dismissals are charged with certain “positive content” (*pozitivnoe sodержanie*), a composite *Positive Content* variable is constructed which is coded 0 if neither *Ruling* nor *Positive Dismissal* is 1 (this means that the case ended up with a regular “Negative” Dismissal), and 1 otherwise. These are used as dependent variables in the analysis below.

Petitioner is a categorical variable which is assigned integer values from one to seven: 1 = natural persons (Russian or foreign citizens); 2 = organizations; 3 = courts; 4 = regional authorities; 5 = federal or regional ombudsmen (*upolnomochennye po pravam cheloveka*); 6 = federal authorities; 7 = local authorities. These categories are mutually exclusive and comprehensive. The only issue with this classification is that cases are sometimes merged by the Court. *Petitioner* is then coded according to the first petitioner mentioned in the case title. To check if introducing the merged cases into the analysis influences the results I also construct a binary control variable (*Multiple petitioners*) coded 1 when the petitioners bringing the case belong to more than one category and 0 otherwise. Note that these cases are few (N = 138), and omitting them from the analysis proved not to affect the results.

Reporting judge is a categorical variable which takes values from one to 32 (that is the number of judges to ever serve on the Court: 16 of these are still on the bench as of August 2017, while the other 16 have retired). This variable is coded N/A when no reporting judge is assigned to the case.

To test the hypotheses about the influence of the reporting judge I also construct two additional variables used in the analysis as proxies for the judge's influence: first is the reporting judge's *Length of service* calculated as the difference between the year any given decision (Ruling or Dismissal) is handed down and the year the judge assigned to report on the case joined the bench. The *Length of service* is therefore the number of full years served by each reporting judge by the time of submitting her report on the given case.

I also divide all the judges into four *Cohorts* depending on the year they joined the bench: 1 for judges nominated in 1991; 2 for judges nominated in 1994-1999; 3 for the Putin judges (nominated in 2000-2007) and 4 for the Medvedev judges (2008-2012).²¹ It must be admitted that no empirical research into differences between the judges in different cohorts, and into cohesion within individual cohorts, exists. The importance of the cohorts is therefore merely my assumption. This assumption, however, is informed by two factors.

First is the difference between the procedures and actual political processes of nominating the judges in different cohorts: the first cohort was entirely nominated by the parliament of the first Russian republic in late 1991 through a protracted and politicized multiround election process. This made the 13 first-cohort judges more ideologically diverse, but also more pronouncedly ideological (which ultimately brought the Court to a shutdown in 1993) (Trochev 2008; Григорьев 2013); the second cohort (1994-1999) was already nominated according to the 1994 RCC Act jointly by the President and the Federation Council which at the time was composed of the regional governors and heads of the regional legislatures, and heavily oppositional to the then president Boris Yeltsin. The Federation Council has put a lot of effort into not allowing Yeltsin bring into the Court his supporters, and instead only settled on the most neutral compromise candidates (Trochev 2008) – hence a very depoliticized second cohort. Then, although the nomination procedure did not change in 2000, following Vladimir Putin's federal reforms the composition of the Federation Council did. The Council was vacated of the regional governors (the governors and the regional legislatures now send their delegates instead), and the members of the Council grew much less powerful politically and, importantly, lost their independence from the federal executive. As a result, the judges nominated in Putin and Medvedev times were effectively appointed by the president himself, and only formally rubber-stamped by the Federation Council.

As the pressure to neutralize the presidential connection vanished, the candidates appointed to the Court after 2000 often prove to either have previously worked with, or to have studied law

21 As of February 2018 no more judges were nominated, even though there are three vacancies on the bench.

together with the nominating president, which is especially visible with the Medvedev judges – Knyazev, Aranovskiy, Kokotov and Boytsov (all but Kokotov studied and/or worked together with Medvedev in the Leningrad State University). This “personalization” also makes up for the second factor informing the emphasis on cohorts – that the third and, especially, the fourth cohorts prove markedly stronger connected to the two most influential political figures of Russia, and might therefore also be more cohesive within.

A special effort was devoted to constructing a variable which would categorize the legal norm contested in each case. This was accomplished through querying the full titles of the cases (which should specify the contested norm) for keywords referring to specific legislation. As a result a set of 40 dummy variables was built each indicating whether the given thematic keywords are present in the case title. The strategy chosen to generate the keywords was first to attribute all the cases as belonging to the “Other” category, and then to sift cases out of this category by picking the keywords characteristic of any next case within the category, querying for these keywords in all the case titles, ascribing all cases containing these keywords to a new category, and then repeating the procedure with the next case within the “Other” category. This way the number of uncategorized cases (belonging to the “Other” category) was reduced to just 11.4% of all cases when the procedure was stopped as no more keywords common for a significantly large number of cases remained visible at this point. It is fair to assume that the “Other” category does indeed contain a number of other smaller categories.

The resulting categorization is rather uneven: along with some relatively big categories (such as the “criminal” cases which made up more than 27% of the docket) there are very small ones (such as those pertaining to international agreements – 8 cases in 1995-2015, and only 0.04% of the docket), and reflects the actual thematic unevenness of the RCC docket. The categories also do overlap. To eliminate the overlaps an additional integrated categorical variable *Legal subject matter* is constructed which assigns values from 1 to 40 to different “pure” categories as specified above (including the “Other” category), but also singles out a separate “Multiple” category for cases belonging to more than just one category, and also contains five additional categories describing the existent stable overlaps (such as the “pensions” + “military” overlap – these are the cases apparently brought by the military pensioners). I expect the legal subject matter of a case to affect the decisions taken by the Court and use the *Legal subject matter* as a control variable in the analysis below. It should be admitted though that the variable, given the number of categories in it, is rather bulky and would be hard to interpret as such.

The categorization according to the legal norm contested in a case (although itself only

used for controls) is also used to construct one more important variable. The case is considered *Political* if the norm it contests belongs to one of the following categories: “Elections”, “General principles” (several important pieces of legislation regulating separation of powers in Russia are labeled “On the general principles of organization of...”), “Arms”, “Interpretation of the Constitution”, “Rallies”, “State secret”, “Regional charters”, “Civil service”, “Religion”, “Extremism”, and “Repression”. The resulting attribution was double-checked to exclude observations which, although formally belonging to the said categories, in fact pertain to non-political issues (such as the case 74-O/1995 which belongs to the “constitution” category since it concerns interpretation of the constitution, but in fact deals with the Customs Code).

The main reason this specific procedure to isolate the “political” cases was chosen is that it allows to process the large amount of observations most efficiently. Indeed, reading each single case and hand-coding it as a more labour-intensive approach would not be practicable here, especially since it would be hard to secure consistency of the coding. The approach chosen is also reflective of the way the Court itself probably perceives its own docket: given the overall high workload, when the petition is brought, the judges must be able to make up their minds concerning the petition by a number of simple and easily observable criteria. The contested norm is obviously one of these criteria, and if the judges are susceptible to political salience of a case (which remains to be established), then the first estimate of such salience might actually come from their expectations regarding the specific subject matter the case covers. That said, our approach to identify “political” cases reflects the understanding of politics as either pertaining to power struggle, to political rights or to state organization, and does not necessarily single out controversial cases or the ones particularly sensitive for the executive.

One last variable I construct is *Year*. When used as an interval variable it allows to establish linear time effects. Yet, when we do not expect the effect to be linear the *Year* variable may also be used as a control categorical variable fixing the unobservable effects characteristic of any particular year. To make these effects interpretable I also construct an additional categorical variable which divides the whole dataset in four categories depending on the period any given Court decision is taken: 1995-1999, 2000-2004, 2005-2009 and 2010-2015. Following the Russian political tradition these five-year periods (as well as the latter six-year period) are referred to as *Piatiletkas*.

Analysis and interpretation

Any petition that eventually gets a Ruling should first go through these four stages: it has

to be accepted by the legal service as formally admissible (Grigoriev 2018); it should be picked by an interested judge for a judicial report (for otherwise it is rejected out of hand with a Negative Dismissal); following the report, it should be decided to proceed with towards a full merit review (alternatively, if the reporting judge sees no controversy in the case, it is simply dismissed); and then it should be decided that the case actually deserves a Ruling (or else be given a Positive Dismissal).

To establish how and when the Court invokes the Positive Dismissals I focus on the last two stages of this process. What happens during these two stages is the judge assigned to examine the case in more detail (the *reporting judge*) presents her findings to the rest of the Court and can either recommend simply dismissing the case, or proceeding with it and giving it some form of a ‘positive’ decision (that is, a decision which deals with the substantive issue raised by the petitioner). In the latter scenario, and if the reporting judge is convincing enough, the Court agrees to proceed with the case, but it still remains unclear at this stage what specific genre the ‘positive’ decision will take: only after the Court examines the case in more detail it decides to either give it a Ruling or a Positive Dismissal.

What this means substantively is that there really exists no moment in this procedure when the Court decides to hand down a Positive Dismissal specifically. This decision is never taken. Instead, the Court first forms a more general pool of potentially ‘meritorious’ (or ‘good’) cases, and then decides to take some of these “into hearings”, while leaving out the rest as Positive Dismissals. The latter thus essentially appear to be a residual subgenre, and whether a case ends up with a Positive Dismissal is therefore a combination of these two factors:

- first, if the case is considered *good enough* to enter the ‘meritorious’ pool (either because the reporting judge finds it genuinely good and manages to communicate this to the Court, or because some other features of the petition intervene and affect the Court’s preliminary judgment about the potential merits of the case);

- and, second, if at the same time it is then found *not good enough* to be given a Ruling (either because the Court has overrated its value initially, and put it on the ‘positive’ pool by mistake; or because it appears at this stage that the case, although genuinely good, should not be given a Ruling on account of some extralegal considerations).

The strategy I use to observe the correlates of these two events is to test pairs of logistical models predicting, first, if the case is considered ‘good’ by the Court preliminarily (this model can be tested on all cases with a reporting judge assigned, the predicted outcome being if the case ends up with a ‘positive’ decision rather than an ordinary Negative Dismissal); and then if it

is found to merit a Ruling (this is tested on the narrower set of all ‘good’ cases – the ones which were assigned a judicial report, and were not then dismissed with a regular Negative Dismissal).

In the further exposition I will focus on specific groups of predictors (as specified in the *Hypotheses and data* section above): the reporting judge; the petitioner; and the political subject-matter of the reviewed case. Time variables are introduced in all models as controls, but sometimes also within interaction terms. The interpretation of each pair of models (one predicting that the case is considered ‘good’ after the judicial report and not dismissed; another – that it is ultimately given a Ruling) is that the same determinants may first work towards encouraging the Court to “promote” any given case, but then lose significance at the next stage as we model adopting Rulings (meaning that their effect is only limited and, importantly, does not extend to determine the Court’s inclination to hand down Rulings), or even contribute to “demoting” the case during this latter stage by urging the Court to only adopt a Positive Dismissal (instead of a Ruling).

Older reporting judges get their cases into ‘meritorious’ pool, but not “into hearings”

I start by modeling the effects of the reporting judge on the trajectory of the case she reports on. The two effects I expect to observe are, first, that the longer she stays on the Court, the more authority she enjoys among her peers, and consequently the higher her chances of moving the case into the pool of ‘good’ cases should be (but not necessarily of landing up a Ruling); and, secondly, that these effects should differ by cohort, with the earlier cohorts probably being more powerful (the old-timer effect). The models presented in Table 1 test this expectation.

TABLE 1. Effects of the reporting judge on case outcome

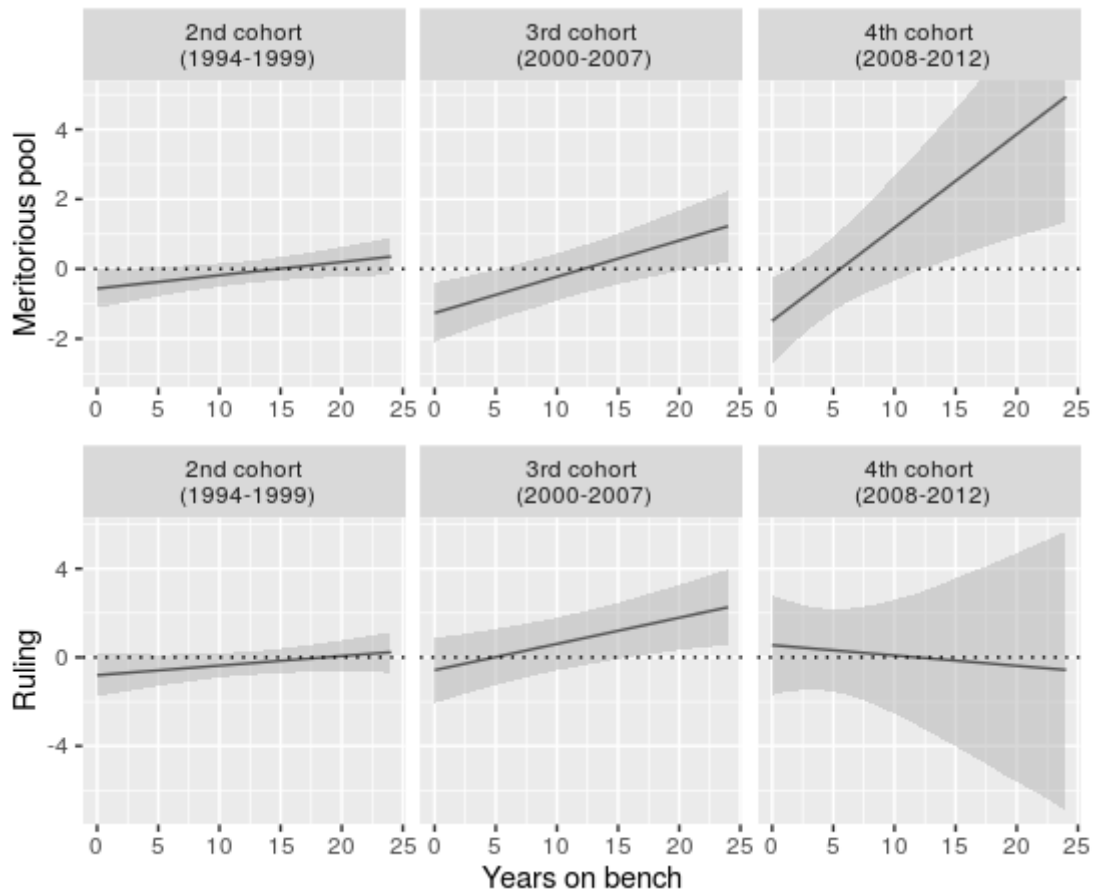
	<i>Dependent variable:</i>			
	Case enters the ‘meritorious’ pool		Case gets a Ruling	
	(1)	(2)	(3)	(4)
Reporting judges’ cohort:				
2 nd cohort (1994-1999)	-0.017 (0.160)	-0.557** (0.278)	-0.256 (0.270)	-0.808* (0.487)
3 rd cohort (2000-2007)	-0.186 (0.331)	-1.260*** (0.420)	0.571 (0.586)	-0.604 (0.753)
4 th cohort (2008-2012)	-0.052 (0.509)	-1.472** (0.627)	0.849 (0.887)	0.509 (1.139)

Reporting judge, years on bench	0.011 (0.026)	-0.036 (0.030)	0.048 (0.047)	0.001 (0.054)
Cohort x Years on bench:				
2 nd cohort		0.038** (0.018)		0.043 (0.033)
3 rd cohort		0.105*** (0.026)		0.120*** (0.045)
4 th cohort		0.265*** (0.086)		-0.045 (0.154)
Intercept	-0.318* (0.169)	0.181 (0.222)	-1.082*** (0.279)	-0.630* (0.368)
Observations	2,953	2,953	1,224	1,224
Log Likelihood	-1,846.174	-1,833.775	-676.854	-673.049
Akaike Inf. Crit.	3,816.348	3,797.551	1,473.708	1,472.098

Note: Generalized linear model (logit). Standard errors in parentheses. Besides the variables reported in the models, all models include as control variables: *Year* (interval, normalized to 0-1 range), *Petitioner*, *Multiple petitioners* and *Legal subject area*. Significance levels: *p<0.1; **p<0.05; ***p<0.01.

Model 1 shows no results: all the covariates of interest are insignificant here. (Neither does Model 3, similar to Model 1 in every other respect but the dependent variable.) It may seem then that neither the experience of the reporting judge (measured in the number of years she spent on the bench), nor her cohort influence the trajectory of the case. But interacting these two variables gives a different result (Model 2): it appears that both being nominated with an earlier cohort, and having a longer experience on the Court do increase the reporting judge's capacity of landing her cases in the 'meritorious' pool, if one takes into account the possibility that a reporting judge belonging to any given cohort could gradually 'strengthen' her positions as she spends more time on the Court, even despite possibly being 'weaker' in the very beginning. And indeed, in Model 2, the *Cohort* variable's negative coefficients indicate that despite all cohorts starting off significantly weaker than the base category (the first cohort judges, nominated in 1992) when only arriving at the court, they do get 'stronger' with every other year of experience (as the significantly positive interaction term coefficients suggest). The results in Model 2 are robust for model respecification, for introducing additional control variables and, importantly, for year fixed effects. I also plot these effects on Figure 1 below.

FIGURE 1. Effects of reporting judge on case outcome: interaction terms



Note: Interaction effect estimates with 95% confidence intervals (based on Table 2: models 2 and 4).

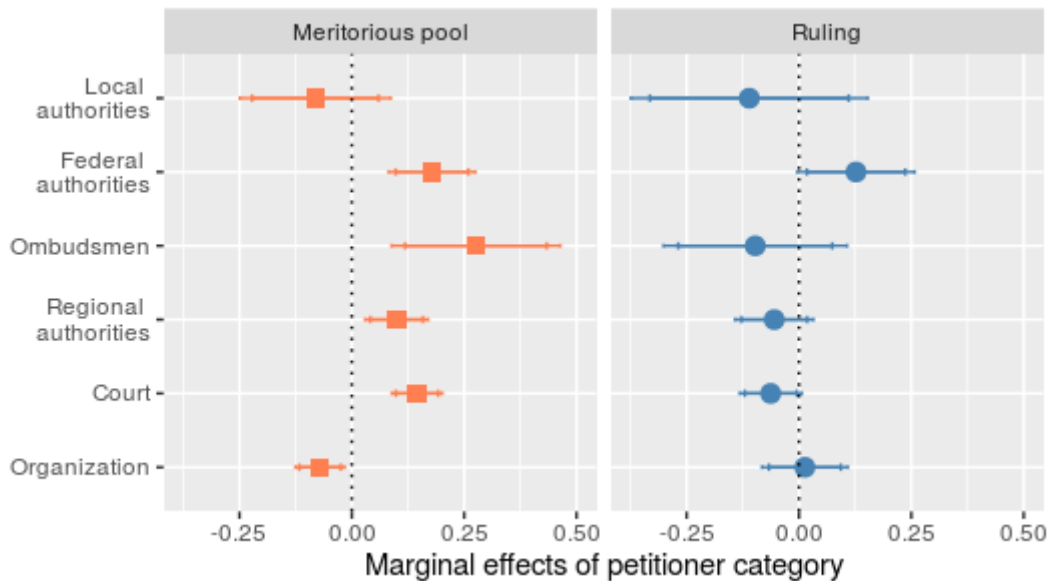
But compare these results to Model 4 (predicting whether a case is eventually given a Ruling) where introducing the same interaction term does not seem to produce that effect. Although the model suggests a negative effect of belonging to the second cohort (significant at 90%), and a positive effect of longer experience for the third cohort specifically (the “Putin judges”), none of these prove robust to model respecification, and especially to introducing year fixed effects into the model. Thus, although belonging to an older cohort, and having a longer experience on the bench does increase the chances of pushing the case into the ‘meritorious’ pool, it does not matter when it comes to deciding whether the case should be given a Ruling.

Privileged petitioners get their cases into ‘meritorious’ pool, but not into hearings

Just like the more experienced judges nominated within an older cohort seem to have more influence in making the cases they report on get into the ‘meritorious’ pool (but not necessarily “into hearings”), so should the more authoritative petitioner categories: the *Federal* and *Regional authorities*, regular *Courts* and the *Ombudsman*. As Figure 2 attests, this is in fact the

case: these four ‘privileged’ categories do have better chances of their cases getting a merit review and not being discarded with a regular Negative Dismissal immediately after the judicial report.

FIGURE 2: Estimates of effect of petitioner on case outcome (marginal effects)



Note: Effect estimates with 95% (thin) and 90% (bold) confidence intervals based on the logit regression models. Control variables include: *Multiple petitioners*, *Piatiletka*, *Legal subject matter*.

At the same time, *Local authorities* (admittedly, the least powerful level of government in Russia (Gel'man and Ryzhenkov 2011)) fare as good as *Citizens* – the base category in this analysis; while *Organizations* actually prove to even have significantly less chances of getting their cases accepted into the ‘meritorious’ pool. This is instructive: the reason why *Organizations* prove to have even worse chances at this stage than *Citizens* is that there exists a systematic bias in their favour on the earlier stage – when judges pick cases for reports. Statistical analysis (not reported here) shows that judges are significantly more interested in preparing judicial reports on cases brought by *Organizations* (maybe expecting these cases to be better quality since they are often prepared by professional lawyers), so they tend to pick too many of these. This systematic generosity means the likelihood of mistakenly accepting a case brought by an *Organization* for judicial report is higher. And indeed, as the judges delve into the cases while preparing their reports, they will sometimes discover that their earlier enthusiasm is premature, and will systematically get rid of the cases falling short of their expectations with Negative Dismissals.

Note, however, that *Organizations* are not the only petitioner category privileged during the earlier stage of picking cases for judicial reports – the cases brought by the *Courts*,

Federal/Regional authorities, and *Ombudsman* also have significantly better chances of getting a judicial report assigned to them. And yet, as Figure 2 attests, unlike the *Organizations*, the earlier systematic generosity towards these categories is not corrected after the judicial reports are submitted. This can mean either that the judges are so much more perceptive towards these categories when choosing to report on the cases brought by them, and hence make no mistakes (in which case one wonders why not do the same with the cases brought by *Organizations*); or that the Court has a policy not to correct earlier mistakes in relation to petitions brought by those petitioners by simply rejecting them with a regular Negative Dismissal, and instead moves them up into the next level.

Importantly, at the next level (when the Court is only left with the ‘good’ cases it did not reject with a Negative Dismissal), and as follows from the right-hand side panel in Figure 2, the only privileged petitioner category to still get the premium is the *Federal authorities*, while all other categories at this last stage prove indistinguishable from the *Citizens*, and *Courts* actually fare worse (at 90% significance), this variable’s significantly negative coefficient indicating that the cases submitted by the regular courts end up with Positive Dismissals systematically. This reflects the fact the RCC routinely uses Positive Dismissals to draw attention to merit cases that it examines brought by the regular courts and falling short of qualifying for a full-blown Ruling.

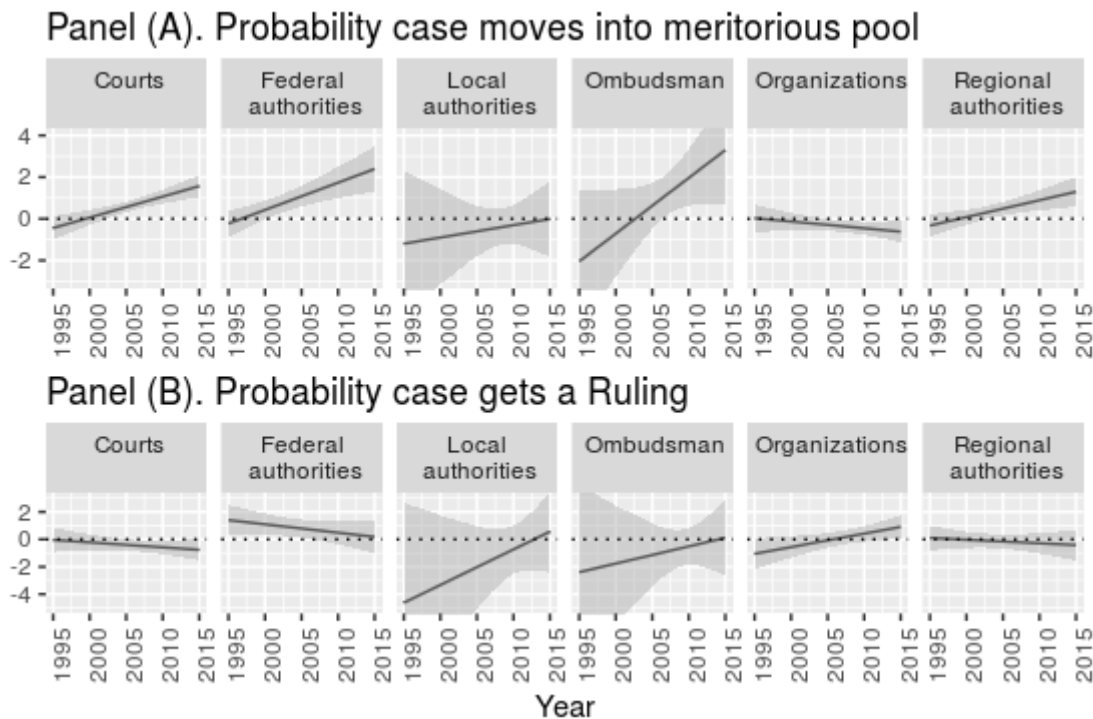
Overall, this means that the Court uses the subgenre of Positive Dismissals as a backup option for the cases brought by the privileged petitioners (*Courts*, *Federal/Regional authorities*, and the *Ombudsmen*). Even already after the judicial reports elucidate the actual value of each petition to the Court, the judges still prove biased against dismissing these cases with regular Negative Dismissals. On the one hand, they know they will still retain the option to dismiss the case later on when deciding whether the case merits a Ruling, and do not want to act hastily. On the other, since Positive Dismissals are insistently characterized by the Court as equipotent to Rulings, using them instead of the regular Negative Dismissals might be considered as more respectful – a factor worth reckoning when dealing with the privileged petitioners.

Using Positive Dismissals to reward privileged petitioners evolves over time

We also expect that, since Positive Dismissals as a genre (and the very practice of first discarding ‘bad’ petitions with Negative Dismissals, forming a pool of all ‘good’ petitions, and then separating this pool into Rulings and Positive Dismissals) only evolved incrementally, the petitioner effects we observe in Figure 2 might have strengthened over time. I test this hypothesis by complementing the models above with interaction terms which show whether the

relationship between petitioner category and likelihood of the Court putting the case into the ‘meritorious’ pool (and later handing down a Ruling) is moderated by time variables. The results are presented in Figure 3 below.

FIGURE 3. Change in case outcomes over time by petitioner category



Note: Interaction effect estimates with 95% confidence intervals. The estimates (both panel A and B) calculated based on logit regression models. Covariates in both models include: *Petitioner*, *Year*, *Multiple petitioners* and *Legal subject area*.

The moderator variable here is *Year*. This reflects our expectation that the variation over time should be linear (although a more accurate way to model the learning process over time should probably be a sigmoid.) As we can see in Figure 3.A, the four privileged categories (*Courts*, *Federal authorities*, *Regional authorities*, and *Ombudsmen*) started off on an equal footing with the *Citizens* (the base petitioner category), but have over time significantly improved their chances of getting into the ‘meritorious’ pool. Just like in the models presented in Figure 2, the *Local authorities* appear to be no different from *Citizens*, and *Organizations* become less likely to get into the ‘meritorious’ pool over time. (Observe that this actually happened against the background of *Citizens*, the base category, also having their chances of getting into the pool significantly deteriorate between 1995 and 2015. This can be inferred from the significantly negative coefficient of the *Year* variable in the model plotted on Figure 3.A, not represented on the graph.)

That the petitioner categories seem to have achieved such a separation between the privileged and non-privileged categories only with the lapse of time is indicative of the evolutionary nature of this process. This dynamics is also visible in the similar model which uses time-litigant interaction terms to predict the likelihood of a Ruling (Figure 3.B). Although here we observe no clearcut distinction between the “privileged” and “non-privileged” petitioner categories, there is a visible diminishing trend with the cases brought by the two most important interlocutors of the RCC: the *Courts* and *Federal authorities*. Indeed, as the practice of giving Positive Dismissals consolidates, the courts’ chances of receiving a Ruling (initially no different from the base category) deteriorate, and by 2015 the *Courts* appear to be significantly more likely than *Citizens* to get a Positive Dismissal (rather than a Ruling). Similarly, the *Federal authorities* which initially have significantly better chances of getting a Ruling, with a lapse of time become no different from *Citizens*. Both of these transformations are attributable to the evolution of Positive Dismissals as a distinct subgenre: as the RCC developed understanding that Positive Dismissals are equivalent to Rulings in their value, it felt it could start using them routinely to hand down decisions on the cases brought by the courts while still signaling their importance to the rest of the judiciary; and it stopped shying away from giving dismissals to Federal authorities (since these would be marked as Positive, and therefore, in the judges’ opinion, equivalent to a Ruling).

Another notable trend is how, as the practice of giving Positive Dismissals to cases not good enough for a Ruling, but coming from a privileged petitioner, took roots; and consequently as the chances of getting into the ultimate stage deteriorated for the *Organizations* – how the *Organizations’* chances of getting a Ruling actually increased over time. One reason that happened is that, as the Positive Dismissal subgenre evolved, it was more and more the case that when a case brought by an organization was decided to be good enough not to be dismissed with a Negative Dismissal after a judicial report, there was no hidden agenda to this decision: the case actually had merits and a constitutional controversy to be resolved. Its chances of getting a Ruling therefore increased over time.²²

Avoiding Rulings in 2000-2009

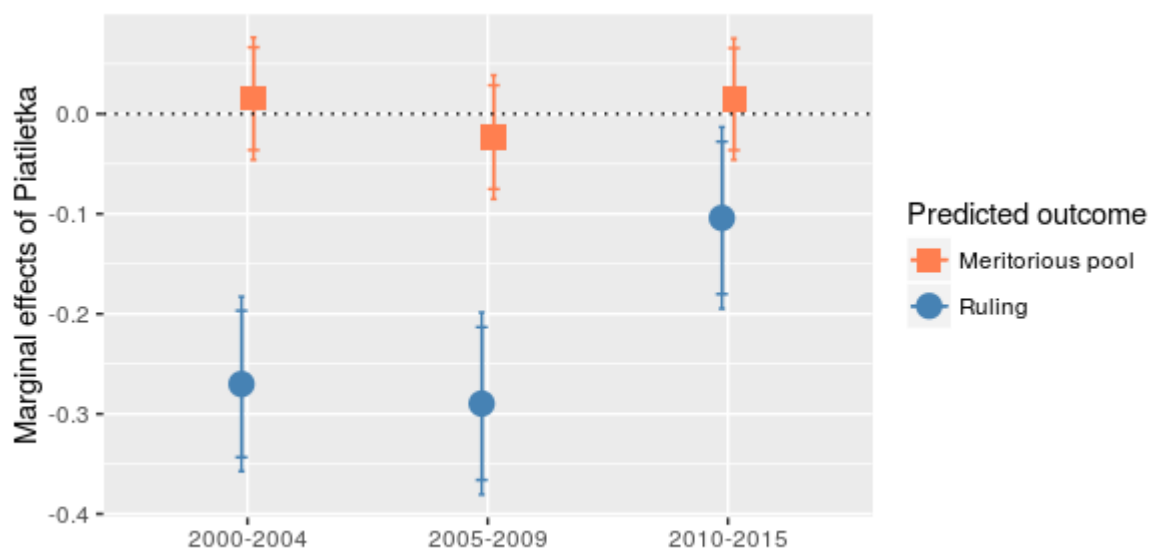
Another type of temporal dynamics that we expect to observe has to deal with the fact

22 The fact the likelihood increases significantly over that of the base category (*Citizens*) is probably also reflective of yet another learning process – the one within the Russian legal profession. As the lawyers learned to work with the RCC, and the quality of the cases they brought gradually increased (both as they were framing their cases better, and as the practice of the RCC accumulated and it became clearer which cases were likelier to be accepted by the Court), so did their chances of getting a Ruling.

Positive Dismissals could be used to accommodate the discrepancy between the judges and the government during the first years of authoritarian consolidation. The reason for this is primarily that during these years the bench is still filled with the judges nominated during the previous democratic period and possibly unsympathetic towards the new policies (a simplified vision would be to suggest that in the RCC these would be the judges belonging to the first two cohorts). Unwilling to support the governmental policies during this period (because of the temporary mismatch between the government and the median judge), but also in order to avoid a direct confrontation, the Court would try to keep a lower profile on as many cases as possible. One way to do that would be to refrain from adopting Rulings by handing down more Positive Dismissals instead. If the tentative timeframe for this transition were to be inferred from the judicial composition dynamics, then in case of the RCC this period would have to last approximately until 2010 when the majority on the bench was at last retained by the Putin and Medvedev judges.

To test if that was the case I evaluate the fixed effects of the four *Piatiletkas* (five-year periods) on likelihood of the Court moving the case into the meritorious pool, and then giving it a Ruling. The results for both models are presented in Figure 4 (the base category here is the first *Piatiletka*, 1995-1999).

FIGURE 4: Estimates of effect of *Piatiletka* on case outcome (marginal effects)



Note: Effect estimates with 95% (thin) and 90% (bold) confidence intervals based on the logit regression models. Control variables include: *Petitioner*, *Multiple petitioners*, *Legal subject matter*.

It is immediately visible that there is no temporal dynamics in the way the ‘meritorious’ pool is formed: the differences between *Piatiletkas* are small and insignificant. The judges’ willingness to send a case into the ‘meritorious’ pool thus does not change over time. At the same time, the chances of getting a Ruling vary widely and significantly across *Piatiletkas*. One thing to notice is all the coefficients presented in Figure 4 are negative. The reason for that is, since the very practice of producing Positive Dismissals only started to develop by the late 1990s, the first *Piatiletka* was essentially a time when, once the Court decided the case had merits, it was more certain to give it a Ruling because no other options existed. Once such options (namely, the subgenre of Positive Dismissals) are developed, the chances of getting a Ruling decrease quite dramatically, which is reflected in the significantly negative *Piatiletka* coefficients in the Ruling model.

Another notable observation to make is that the chances of getting a Ruling are worse during the second and third *Piatiletkas* (so, in 2000-2009) both as compared to the first and the fourth *Piatiletka* (1995-1999 and 2010-2015, respectively). Chances of not getting a Ruling and, therefore, of getting a Positive Dismissal during these ten years are significantly higher than any time before that or afterwards. This resonates with our expectation that as autocracy consolidates in Russia in the 2000s, the judges would be inclined to try to avoid handing down Rulings, and would keep a lower profile by adopting Positive Dismissals instead. These results are also robust to model respecification, although adding the reporting judge related variables (*Judicial experience* and *Cohort*) makes the effects somewhat less crisp: there is still a statistically significant dip in the second and third *Piatiletkas* as compared to the first one, but the difference between the fourth and the first is no longer statistically significant, suggesting that after a decade of avoiding Rulings in favour of Positive Dismissals the Court went back to normal in the 2010s. Positive Dismissals fulfilled their mission and backed off.

Avoiding handing down Rulings during elections

Another time the Court might find it attractive to keep a lower profile by handing down more Positive Dismissals instead of Rulings is during elections. Indeed, it has been observed that election years are less safe for courts politically (Widner and Scher 2008, 259). The reasons for this are twofold. On the one hand, elections serve as a focal moment for the government to show its full strength, reveal and publicize the support for its policies and renew its political mandate for the next term. This is obviously not the right time for the Court to label governmental policies as unconstitutional. On the other hand, it is during the electoral campaign that the

opposition should try particularly hard to use the Court as an arena for political struggle. Again, from the perspective of institutional survival the Court should rather avoid politicization during this time.

Note that since the problem here is not the ideological divergence between the positions of the Court and the government as such, but rather the risks of politicizing the Court's activities at the wrong time, it is not all the cases that the Court should try to sweep under the rug during the election years, but only the more ticklish 'hard' cases pertaining to politics. To test if this actually happens I use the *Political subject matter* variable indicating whether any given case might potentially hold any political salience (I describe the construction of this variable in the Hypotheses and Data section above). I also single out the Duma election years – 1995, 1999, 2003, 2007 and 2011 – and construct a year-level dummy variable to indicate whether the Court reviewed any given case during these election years.²³ The results of the analysis are presented in Table 2.

TABLE 2. Effects of time (*Piatiletka* and *Duma election year*) on case outcome

	<i>Dependent variable:</i>					
	Case enters the 'meritorious' pool			Case gets a Ruling		
	(1)	(2)	(3)	(4)	(5)	(6)
Political subject matter	0.338*** (0.121)	-0.309 (0.241)	0.344** (0.139)	0.760*** (0.186)	0.536 (0.386)	0.966*** (0.213)
<i>Piatiletka</i> (1 st is base category)						
2000-2004	0.390** (0.172)	0.208 (0.184)	0.408** (0.173)	-1.435*** (0.269)	-1.437*** (0.293)	-1.595*** (0.276)
2005-2009	0.425* (0.237)	0.239 (0.244)	0.448* (0.239)	-1.615*** (0.397)	-1.671*** (0.410)	-1.764*** (0.403)
2010-2015	0.514 (0.316)	0.370 (0.319)	0.538* (0.317)	-0.285 (0.541)	-0.295 (0.546)	-0.402 (0.544)

23 The reason the Duma rather than the presidential election years are used to construct this variable is that up until the 2011/2012 electoral cycle the gap between the two elections was just a few months, resulting in the two electoral campaigns essentially merging into one (Sakwa 2000). The Duma elections come earlier, and there is just a few months before the presidential elections in March then, so much of this single campaign would happen during the Duma election year. Besides, since the outcome of the presidential elections tended to be preordained most of the time (especially after the Duma election results were in), there is more at stake for all the participants in the Duma campaign, making it more contested, more intensive and, therefore, more risky for the Court to interfere with.

Duma election year			0.078 (0.103)			-0.268 (0.184)
Piatiletka X Political subject matter						
2000-2004		0.764** (0.337)			0.027 (0.518)	
2005-2009		1.014*** (0.343)			0.456 (0.540)	
2010-2015		0.805** (0.331)			0.377 (0.507)	
Duma election year x Political			-0.025 (0.260)			-0.800* (0.414)
Intercept	-0.165 (0.218)	0.028 (0.227)	-0.194 (0.221)	0.016 (0.355)	0.095 (0.369)	0.165 (0.362)
Observations	2,953	2,953	2,953	1,224	1,224	1,224
Log Likelihood	-1,899.302	-1,894.121	-1,898.992	-685.953	-685.343	-681.036
Akaike Inf. Crit.	3,836.604	3,832.242	3,839.983	1,409.906	1,414.686	1,404.072

Note: Generalized linear model (logit). Standard errors in parentheses. Besides the variables reported in the models, all models include as control variables: *Petitioner*, *Multiple petitioners*, *Cohort of the reporting judge*, *Reporting judge's experience*, and *Cohort x Experience* interaction. Significance levels: * p<0.1; ** p<0.05; *** p<0.01.

There seems to be no particular relationship between time and how the Court treats politically salient cases when it comes to moving the case into ‘meritorious’ pool. The interaction between the interval *Year* variable and *Political subject matter* (not reported in Table 2) is only weakly significant and, as follows from the *Piatiletka x Political subject matter* interaction (Model 2) rests largely on the fact the Court grew significantly more inclined to move cases with some political substance into the ‘meritorious’ pool after the first Piatiletka (so, around 2000) with not much variation afterwards. The Court also proves generally more interested in moving politically related cases into the ‘meritorious’ pool (Model 1), and makes no exceptions in this respect for the Duma election years (Model 3). Overall, the only dynamics we observe refers to apparent depoliticization of the ‘meritorious’ pool during the first *Piatiletka* (as compared to the other three), and is probably to be explained simply by the organizational learning effects: it took the Court some time to standardize the application of its Positive Dismissal subgenre and the related practice of first forming the ‘meritorious’ pool, and in particular to figure that it should only put the cases containing a constitutional controversy into

the pool (including the more politicized ones).

The relationship between case timing and its political salience is somewhat more subtle when it comes to giving Rulings. As Model 4 shows, cases pertaining to politics generally have better chances of getting a Ruling. There is, however, no specific temporal dynamics: the Court is quite even in its preference for the politically charged cases, and its preference does not vary between *Piatiletkas* (Model 5), or (linearly) across the observed period (which we know from interacting the *Political subject matter* and *Year* variables in a model not reported here since the interaction term proved statistically insignificant). However, the Court proves significantly (at 90% confidence) averse to giving Rulings on political cases in election years (Model 6). The effect is quite strong: judging by the relative sizes of the two coefficients, the Court's general interest toward "political" cases seems to be suppressed almost entirely during the Duma election years. This effect is robust to model respecification, and the significance is just a little shy of 95% ($p < 0.053$), suggesting that the judges do channel the politically charged cases into Positive Dismissals strategically during election years.

Conclusion

Conventional wisdom has it that the Positive Dismissals' only rationale was to overcome the rigidity of formal judgment procedure that the RCC was provided with originally and allow the Court to hand down more decisions on merits even though its capacity to produce Rulings specifically was inhibited by procedural constraints. Yet, even despite the fact the procedure was reformed to facilitate processing the cases and adopting Rulings, the Court still preferred to keep its options open and has not dropped the practice of handing down Positive Dismissals. One reason for that might be organizational inertia: it is impossible to get rid of Positive Dismissals as long as it remains the common practice at the Court to first form a pool of all potentially meritorious petitions and then take some of these into hearings, while discarding the rest. This residual (even if not labeled deliberately as it used to be in 2007-2011) will still contain cases that were considered meritorious initially and that must therefore have bigger legal value than the cases dismissed out of hand with regular Negative Dismissals.

However, my analysis shows the organizational inertia is not the only reason the Court clings onto Positive Dismissals. Indeed, a neat mechanism to circumvent the existent rigid genre structure as they are, they prove to have many more clever applications the Court could take benefit of. In particular, the RCC uses Positive Dismissals to reward more respected and powerful petitioners when they bring subpar cases that fall short of being given a Ruling, and to

pay tribute to the older and more celebrated judges when they report on such cases. The Court also uses Positive Dismissals to disguise its decisions on politically charged cases in Duma election years, and to contain its production of Rulings in the 2000s following consolidation of autocracy in Russia and as the bench composition lagged behind the new regime's changing policies.

These two latter uses are probably most revealing from the perspective of judicial politics under autocracy. Indeed, both during the Duma election years and in the 2000s the Court risks getting into trouble, although maybe for different reasons. In the 2000s, it cannot avoid taking the decisions by simply discarding the potentially risky petitions which are otherwise perfectly fine – the judges do not find that acceptable. But they are not certain rule in favour of the government either, because this would often run contrary to their ideological stances (since the median judge has not yet aligned with the position of the government). And they'd rather not take their chances in finding against the government as they fear possible retributions, but also expect this to only aggravate non-compliance. Using the subgenre of Positive Dismissals to disguise the compromises the Court has to make from the public, or the opposition to policies promoted by the new government – from the government, proves a useful instrument that helps the Court weather these uncomfortable years with minimal reputational losses and minimal political hazard. A very similar mechanism is at work when the Court avoids handing down Rulings on politically charged cases in Duma election years: again, Positive Dismissals provide the Court with an option to downplay its political engagement when such engagement may be risky, without significant reputational losses.

In both cases the Court creatively repurposes an informal institution initially devised to circumvent the rigidity of the formal genre repertoire it is provided with. But reducing political risks is not the only task the Court has to resolve, and not even the most pressing one in the shorter run, so the very same instrument is used by the Court for structuring its internal deliberations and maintaining the informal hierarchy within the Court (as it allows to pay formal respects to the older and more celebrated members of the Court), and for developing cooperative ties with the more influential 'privileged' petitioners: regular courts, the ombudsmen, federal and regional authorities. Maintaining good working relationship with these petitioners is important as it allows the Court to secure better access to information about the state of the legal field and law enforcement practices, to enhance compliance with its decisions, but also generally to be in these petitioners' good books.

The Court thus proves rather versatile in the uses it puts Positive Dismissals to. The

informal rationales behind this informal practice that I reveal contrasts the existent justification produced for it by the Court, but dovetails nicely into the understanding of internal judicial institutions as potential dual-purpose adaptation devices mobilized by the judges to mitigate coordination and collective action problems inherent in collegiality in times of need – when the external environment the court exists in becomes increasingly inhospitable.

It seems reasonable to assume that the development I observe – the repurposing of internal institutions initially devised to facilitate a relatively technical problem, but ending up as a tool of organizational adaptation to much more significant existential challenges – should occur more often under autocracy than in the more democratic settings, even despite the fact the latter too can sometimes present significant challenges to the judiciary, especially in the times of consolidation of power in the hands of just one party or one political group (Franck 2009; Gely and Spiller 1992). This is because under democracy the courts should not expect the challenging conditions they face to be permanent: if democracy persists, the imminence of rotation in power should both make the present ruler less likely to infringe on the court's autonomy, and, more importantly, make the court itself less interested in finding permanent solutions to what may seem like a temporary inconvenience. Under conditions of gradual authoritarianization and if all regime insiders can read the writings on the wall and have enough time to evaluate the situation, the courts are interested in finding a more systematic institutional solution to accommodate the new environment: facing a consolidated government, far from being a temporary glitch, becomes an essential fact of political reality under autocracy. As I suggest in the theoretical section above, the collegiality of decision making renders it vital that the solution the court finds is institutional. It must be acknowledged however that more evidence from other courts is needed to further substantiate this conjecture.

Acknowledgments

The article was prepared within the framework of the Academic Fund Program at the National Research University Higher School of Economics (HSE) in 2016-2017 (grant number 16-01-0121) and supported within the framework of a subsidy granted to the HSE by the Government of the Russian Federation for the implementation of the Global Competitiveness Program. Interviews cited in this paper were collected in 2012 by the author together with Arina Dmitrieva. I also wish to thank Anna A. Dekalchuk and Kirill Zhirkov for their helpful comments on the manuscript.

References

- Arrington, Theodore S., and Saul Brenner. 2008. "Testing Murphy's Strategic Model: Assigning the Majority Opinion to the Marginal Justice in the Conference Coalition on the U.S. Supreme Court." *American Politics Research* 36 (3): 416–32. <https://doi.org/10.1177/1532673X07308357>.
- Brancati, Dawn. 2014. "Democratic Authoritarianism: Origins and Effects." *Annual Review of Political Science* 17 (1): 313–26. <https://doi.org/10.1146/annurev-polisci-052013-115248>.
- Burnham, William, and Alexei Trochev. 2007. "Russia's War between the Courts: The Struggle over the Jurisdictional Boundary between the Constitutional Court and Regular Courts." *The American Journal of Comparative Law*, 381–452.
- Clark, Tom S. 2009. "The Separation of Powers, Court Curbing, and Judicial Legitimacy." *American Journal of Political Science* 53 (4): 971–89. <https://doi.org/10.1111/j.1540-5907.2009.00411.x>.
- Cohen, Michael D., James G. March, and Johan P. Olsen. 1972. "A Garbage Can Model of Organizational Choice." *Administrative Science Quarterly* 17 (1): 1–25. <https://doi.org/10.2307/2392088>.
- Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6 (2): 279–95.
- Epstein, Lee, and Tonja Jacobi. 2010. "The Strategic Analysis of Judicial Decisions." *Annual Review of Law and Social Science* 6 (1): 341–58. <https://doi.org/10.1146/annurev-lawsocsci-102209-152921>.
- Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington D.C.: CQ Press.
- . 2000. "Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead." *Political Research Quarterly* 53 (3): 625–61.
- Eskridge, William N. 1991. "Overriding Supreme Court Statutory Interpretation Decisions." *Yale Law Journal* 101 (2): 331–455.
- Franck, Raphael. 2009. "Judicial Independence under a Divided Polity: A Study of the Rulings of the French Constitutional Court, 1959–2006." *Journal of Law, Economics, and Organization* 25 (1): 262–84.
- Gel'man, Vladimir, and Sergei Ryzhenkov. 2011. "Local Regimes, Sub-National Governance and the 'Power Vertical' in Contemporary Russia." *Europe-Asia Studies* 63 (3): 449–65. <https://doi.org/10.1080/09668136.2011.557538>.
- Gely, Rafael, and Pablo T. Spiller. 1990. "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the 'State Farm' and 'Grove City Cases.'" *Journal of Law, Economics, & Organization* 6 (2): 263–300.
- Gely, Rafael, and Pablo T Spiller. 1992. "The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan." *International Review of Law and Economics* 12 (1): 45–67.
- Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge University Press.
- Golosov, Grigorii V. 2011. "The Regional Roots of Electoral Authoritarianism in Russia." *Europe-Asia Studies* 63 (4): 623–39. <https://doi.org/10.1080/09668136.2011.566427>.
- Grigoriev, Ivan S. 2018. "Law Clerks as an Instrument of Court–government Accommodation under Autocracy: The Case of the Russian Constitutional Court." *Post-Soviet Affairs* 34 (1): 17–34. <https://doi.org/10.1080/1060586X.2018.1408927>.
- Helmke, Gretchen. 2002. "The Logic of Strategic Defection: Court–executive Relations in Argentina under Dictatorship and Democracy." *American Political Science Review* 96 (2): 291–303.

- Johnson, Timothy R., James F. Spriggs, and Paul J. Wahlbeck. 2005. "Passing and Strategic Voting on the U.S. Supreme Court." *Law & Society Review* 39 (2): 349–78. <https://doi.org/10.1111/j.0023-9216.2005.00085.x>.
- Kahn, Jeffrey, Alexei Trochev, and Nikolay Balayan. 2009. "The Unification of Law in the Russian Federation." *Post-Soviet Affairs* 25 (4): 310–46. <https://doi.org/10.2747/1060-586X.24.4.310>.
- Kapiszewski, Diana. 2011. "Tactical Balancing: High Court Decision Making on Politically Crucial Cases." *Law & Society Review* 45 (2): 471–506. <https://doi.org/10.1111/j.1540-5893.2011.00437.x>.
- Levitsky, Steven, and Lucan Way. 2002. "The Rise of Competitive Authoritarianism." *Journal of Democracy* 13 (2): 51–65.
- Magalhães, Pedro. 1999. "The Politics of Judicial Reform in Eastern Europe." *Comparative Politics* 32 (1): 43–62.
- Magaloni, Beatrix. 2008. "Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico." In *Rule by Law: The Politics of Courts in Authoritarian Regimes*, edited by Tom Ginsburg and Tamir Moustafa, 180–206. Cambridge University Press.
- Maltzman, Forrest, James F Spriggs, and Paul J Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge University Press.
- Merton, Robert King. 1967. *On Theoretical Sociology: Five Essays, Old and New*. New York: Free Press.
- Moustafa, Tamir. 2007. *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*. Cambridge University Press.
- . 2014. "Law and Courts in Authoritarian Regimes." *Annual Review of Law and Social Science* 10 (1): 281–99. <https://doi.org/10.1146/annurev-lawsocsci-110413-030532>.
- Moustafa, Tamir, and Tom Ginsburg. 2008. "Introduction: The Functions of Courts in Authoritarian Politics." In *Rule by Law: The Politics of Courts in Authoritarian Regimes*, edited by Tom Ginsburg and Tamir Moustafa, 1–22. Cambridge University Press.
- Owens, Ryan J., Justin Wedeking, and Patrick C. Wohlfarth. 2013. "How the Supreme Court Alters Opinion Language to Evade Congressional Review." *Journal of Law and Courts* 1 (1): 35–59. <https://doi.org/10.1086/668482>.
- Pepinsky, Thomas. 2014. "The Institutional Turn in Comparative Authoritarianism." *British Journal of Political Science* 44 (3): 631–53.
- Perry, H. W. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Harvard University Press.
- Sakwa, Richard. 2000. "Russia's 'Permanent' (Uninterrupted) Elections of 1999–2000." *The Journal of Communist Studies and Transition Politics* 16 (3): 85–112.
- Solomon, Peter H. 2008. "Judicial Power in Authoritarian States: The Russian Experience." In *Rule by Law: The Politics of Courts in Authoritarian Regimes*, edited by Tom Ginsburg and Tamir Moustafa, 261. Cambridge University Press.
- Trochev, Alexei. 2008. *Judging Russia: Constitutional Court in Russian Politics, 1990-2006*. Cambridge University Press.
- Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45 (2): 346–61.
- Venice Commission. 2004. "Projet de Loi Constitutionnelle Fédérale Sur Les Modifications et Les Compléments à Apporter à La Loi Constitutionnelle Fédérale Sur La Cour Constitutionnelle de La Fédération de Russie." CDL(2004)077-f. Strasbourg: Commission de Venice. [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2004\)077-f](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2004)077-f).
- Widner, Jennifer, and Daniel Scher. 2008. "Building Judicial Independence in Semi-Democracies: Uganda and Zimbabwe." In *Rule by Law: The Politics of Courts in*

- Authoritarian Regimes*, edited by Tom Ginsburg and Tamir Moustafa. Cambridge University Press.
- Витушкин, Вячеслав Александрович. 2005. “Определения Как Вид Решений Конституционного Суда Российской Федерации.” *Журнал Российского Права*, no. 3 (99). <http://cyberleninka.ru/article/n/opredeleniya-kak-vid-resheniy-konstitutsionnogo-suda-rossiyskoj-federatsii>.
- Гаджиев, Гадис Абдуллаевич, ed. 2012. *Комментарий к Федеральному Конституционному Закону “О Конституционном Суде Российской Федерации.”* Москва: Норма.
- Газета “Коммерсантъ.”* 2001. “Судьи Недовольны Депутатами,” November 17, 2001.
- Григорьев, Иван. 2013. “Причины Провала Первого Проекта Конституционного Правосудия в Постсоветской России.” *Полития. Анализ. Хроника. Прогноз* 69 (2): 39–49.
- Ершова, Елена. 2009. “Правовая Природа Постановлений и Определений Конституционного Суда Российской Федерации.” *Трудовое Право*, no. 3: 79–94.
- Зорькин, Валерий Дмитриевич. 2003. “Интернет-Конференция Председателя Конституционного Суда Российской Федерации Зорькина Валерия Дмитриевича ‘К 10-Летию Конституции Российской Федерации.’” *Гарант*. November 26, 2003. <http://www.garweb.ru/conf/ks/20031126/index.htm>.
- Мазуров, Алексей Валерьевич. 2009. *Комментарий к Федеральному Конституционному Закону “О Конституционном Суде Российской Федерации.”* Частное право.
- Митюков, Михаил Алексеевич, and Станислав Николаевич Станских. 2006. “Проблема Письменного Разбирательства в Конституционном Судопроизводстве России в Контексте Зарубежного Опыта.” *Вестник Томского Государственного Университета*, no. 292.
- Петров, Алексей. 2010a. “Виды решений Конституционного Суда Российской Федерации, принимаемых в ходе осуществления конституционного судопроизводства: основания и некоторые проблемы классификации.” *Академический юридический журнал*, no. 1 (39): 22–27.
- . 2010b. “Определения ‘с позитивным содержанием’ в системе решений Конституционного Суда Российской Федерации.” *Академический юридический журнал*, no. 3 (41): 17–24.
- Сивицкий, Владимир. 2012. “О Динамике Типологии Решений Конституционного Суда Российской Федерации.” *Право. Журнал Высшей Школы Экономики*, no. 2: 57–73.

Ivan S. Grigoriev

National Research University Higher School of Economics.

Department of Applied Politics: Senior Lecturer.

E-mail: igrigoriev@hse.ru.

Any opinions or claims contained in this Working Paper do not necessarily reflect the views of HSE.

© Ivan S. Grigoriev 2018.