

Meddling with Justice

Competitive Politics, Impunity, and Distrusted Courts in Post-Orange Ukraine

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Abstract: Contrary to the theories of judicial empowerment that argue that the presence of strong political opposition is necessary for the development of an independent judiciary, the increasing fragmentation of power in today's Ukraine goes hand-in-hand with judicial disempowerment—dependent courts regularly provide important benefits to rival elites.

Keywords: fragmentation of power, impunity, judicial corruption, judicial independence, post-Communism, Ukraine

The judiciary in post-Orange Ukraine is in deep crisis.¹ By 2010, as Ukraine marked the fifth anniversary of the Orange Revolution, both domestic and foreign observers were decrying judicial dependence and corruption in the country.² The winner of the Orange Revolution, then-President Viktor Yushchenko, repeatedly blamed the judicial system for serving as a “brake” to the country's democratic development.³ After losing her bid for the presidency to the opposition leader Viktor Yanukovich in February 2010, then-Prime Minister Yulia Tymoshenko accused the High Administrative Court of dishonesty and pro-Yanukovich bias for their failure to expose electoral fraud. She went on to accuse the Constitutional Court of corruption and shamelessness for declaring pro-Yanukovich parliamentary coalition constitutional.⁴ President Viktor Yanukovich, newly elected, also vowed to get rid of pliant and corrupt judges.

Judges have used every occasion to complain in public that the judicial system is in crisis due to unprecedented pressure from public officials.⁵ Freedom House reported that the “judicial framework and independence” was stronger in the Ukraine of 1999 than it

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was in 2009. The World Bank also revealed that the Ukraine of 1996 had a better “Rule of Law” score than the Ukraine of 2008. Newspapers and TV shows have been full of stories about the growing prices of judgeships and judicial decisions. And Ukrainians themselves increasingly distrust the judiciary—only 4 percent of them approve of the performance of courts.

How and why does the Ukrainian judiciary suffer from greater pressure and dependence, deeper corruption, and public disdain while at the same time featuring highly contested, free and fair national and local elections; alternating parties in power; flourishing freedom of the mass media; heavy involvement of international donors in legal reform, and (up until the advent of the global financial crisis in the fall of 2008) high levels of foreign investment in the growing seven-percent-a-year economy? More generally, how and why do highly competitive elections and highly fragmented politics go hand-in-hand with the weakening of judicial power?

Addressing these questions is crucial for our understanding of the actual dynamics of judicial empowerment, because the experience of Ukrainian judicial politics runs against the predictions of the mainstream theories of judicial empowerment. These theories argue that the following three conditions are necessary, if not sufficient, for developing accessible, independent, and powerful judiciary: 1) strong political opposition, 2) fragmentation of political and economic power, and 3) vibrant “electoral” markets. Post-Orange Ukraine has all of these conditions, yet they exist simultaneously with an increasingly dependent judiciary.

This essay argues that increasingly competitive elections and highly fragmented politics accompany weaker courts in Ukraine because rival elites continue playing power politics in order to gain and/or remain in power. The high stakes of political competition force rival elites to use all available resources (including courts) to win elections, to hold onto power, or to undermine the political and economic bases of rivals. Politicians and economic magnates can get away with this clearly criminally punishable behavior due to the entrenchment of impunity, which subservient courts only strengthen. Fearing no sanctions for obstructing justice, the powerful feel that they can intervene in any judicial trial. As a result, highly competitive elections and fragmented politics, coupled with well-entrenched impunity, are associated with increasing judicial dependence.

To show how and why the rulers and the opposition have faced strong incentives to capture the courts (which in turn were expected to provide important benefits to their patrons) and acted upon these incentives to meddle with judicial decision-making, this essay proceeds to examine the key indicator of judicial disempowerment—the improper interference with judicial decision-making. This indicator has to do with actions of politicians and businesspeople aimed at disrupting the lawful administration of justice and pressuring individual judges to issue “correct” decisions and to revoke ‘incorrect’ ones. Thus, it deals with blatantly illegal actions rather than with the words, empty threats or perceptions of powerholders. These actions, if well-entrenched, may become routine formal practices—e.g., sacking a judge for issuing an unfavorable decision—or informal practices, like telephoning judges or storming the courthouses. Proliferation of improper interference with judicial decision-making directly shows that courts are not insulated from outside pressure in the context of vibrant elections and fragmented politics. Lack of this interference in this context means that the powers that be really insulate courts and let judges decide important cases instead of telling them how to decide cases that matter. But first, it is necessary to explain why the mainstream theories of judicial empowerment are

inadequate at explaining the trajectory of judicial disempowerment in Ukraine, and why exploring Ukrainian judicial politics is important for this explanation.

Competitive Politics, Impunity, and Judicial Dependence

Mainstream approaches to post-authoritarian judicial empowerment in societies as diverse as Japan, Mexico, Korea and Bulgaria propose to focus on the structure of political party systems and the nature of electoral competition.⁶ These theories argue that, in the uncertainty of democratization, politicians who fear electoral loss create a strong and independent judiciary to protect themselves from the tyranny of election-winners in the future. Weak political parties or several deadlocked ones are likely to produce powerful, independent, and accessible judicial institutions. Here, the ruling elites are strategic: they forego the immediate benefits of making courts dependent. Without specifying benefits provided by pliant courts, the mainstream theories claim that the incumbents entrench judicial independence now to ensure that the future ruling majorities do not issue orders to courts to punish election losers. The standard ways to ensure against this threat are: 1) to create mechanisms of judicial review—either new, separate constitutional courts or already existing supreme courts—and to grant them the powers to review and invalidate laws and regulations found unconstitutional, confirm the constitutionality of election results, impeach high government officials, etc.; 2) to insulate judges from potential pressure by appointing them for life, paying them high salaries, making it difficult to remove them from the bench, etc.; and 3) to entrench all of these protections in the Constitution and to make the process of amending it very difficult. These judicial review tribunals, then, police the boundaries of constitutional politics, while the rulers abide by these constitutional rules and obey unfavorable judicial decisions in order to persuade the current opposition that the laws and courts constrain the rulers now and will constrain the election-winners in the future.

These mainstream theories are correct in that the judicial empowerment is an elite-driven process. The politics of judicial reform or constitution-making in post-Communist countries, democracies and non-democracies alike, clearly show the absence of the involvement of civil society in the processes of reforming courts and/or amending Constitutions. These theories correctly focus on the distribution of power and electoral competition. Drawing on the struggles for power in 17th-century England, North and Weingast note that the process of empowering courts is “intimately related to the struggle for control over governmental power.”⁷ As we will see, this observation holds true for 21st-century Ukraine: the question of who controls the courts is a very political and politicized one. And elections in both consolidated democracies and incomplete autocracies reflect the distribution of power among rival political forces and endow the election-winners with much-needed legitimacy, however short-lived this legitimacy might be. The power consists of resources, and law and courts deliver these resources to the rival elites. Thus, the mainstream theories of judicial empowerment rightly focus on the long-term benefits provided by an independent judiciary to the powerholders and the opposition. If you fear losing elections and ensuing uncertainty, you want to reduce this uncertainty, and the independent courts help you reduce it by protecting your rights in the future. Some critics may scorn this instrumental view of law and courts, but post-Communist rulers are accustomed to governing and reforming their societies through law: they simply follow the steps of their pre-Communist and Communist predecessors.

However, as Maria Popova forcefully argues in her study of pre-Orange Ukraine, the mainstream theories of judicial empowerment ignore the benefits that subservient courts provide to rulers in uncertain environments.⁸ Without knowing the value of these benefits, it is difficult to persuade the rulers and the opposition that a) the independent judiciary would be more attractive to them than the dependent one; and b) the expected benefits of creating independent courts in the future are higher than the existing benefits of keeping pliant courts now. Knowing these benefits is important due to the high stakes involved in winning elections in nascent democracies and unconsolidated autocracies. Many scholars agree that in such political regimes, upon winning elections the rulers govern without many constraints until they are outvoted, overthrown, impeached, exiled or murdered.⁹ Indeed, many accounts of post-Communist politics show that the rulers, regardless of their democratic pedigree, pursued immediate gains and abused formally democratic institutions to solidify their ruling status.¹⁰ For example, it took one weekend in the fall of 1989 to create the constitutional court in Hungary. There, constitution-makers had “a vague conception of the functions of a constitutional court” and devoted “very little effort” to place “the court in the context of a balanced arrangement of powers.”¹¹ And nondemocratic rulers in Russia’s regions who feared no electoral loss found it beneficial to create accessible constitutional courts in the 1990s.¹² Therefore, there is no reason to assume that the powerful think long-term or that those who abuse democratic institutions would not abuse judicial independence—a phrase that is mentioned in most post-Communist constitutions.

The high stakes of political competition may outweigh the benefits of leaving the courts alone and may force rival elites to use all available resources (including courts) to win elections, to remain in power, and to undermine opponents.¹³ Facing electoral uncertainty, the rulers and the opposition try to pressure or to buy judicial loyalty, to dole out important judicial positions to their cronies, to influence judicial decision-making, and to enforce favorable court decisions and defy unfavorable ones—all in order to remain rich, powerful, and alive now. Facing strong opposition in the legislature or in the executive branch, the rivals turn to courts to accomplish their objectives. To election-winners in uncertain political environments, the tasks of both consolidating and concentrating their power appear to be a higher priority than delegating real power to the judiciary. This priority may outweigh prior commitments, former friendships and written rules. A high degree of uncertainty forces rivals to focus on winning at all costs in the immediate future, because losing a battle now might mean losing the whole war.

Moreover, if the new rulers perceive the judiciary as a hurdle in their efforts to consolidate their power, they may try to overcome this hurdle by punishing judges or co-opting them. The ability to punish defectors or someone outside his or her own coterie signals to others that the punisher wields sufficient power over outsiders and maintains its own powerful status. This ability is highly prized, as rivals face an everyday need to prove to others that they still have enough resources and legitimacy to overpower one another. Higher stakes and more intense political competition may force rival groups to focus on this short-term daily need to make their power visible at the expense of the strategic long-term goals. In addition to punishment and coercion, the powerful may also buy judicial loyalty. Buying it may be time-consuming and subtle. For example, Mykola Savenko, a former Justice of the Ukrainian Constitutional Court, admitted that sometimes judges are awarded honorable titles; sometimes judges receive better housing from the authorities.¹⁴ Indeed, no sage politician, whatever his or her commitments might be, would refuse to dominate

the process of designing and re-designing courts, tinkering with their jurisdiction, staffing them with loyal judges, and expecting favorable judgments in return. And this is how the political opposition may perceive judicial reform: they empower the courts and appoint loyal judges, and they expect us to tolerate these judges when we come to power; but we also want to appoint judges who are loyal to us. And so, a new round of “judicial reform” may take place, as occurred in 19th and early-20th century Chile, where the judiciary became an object of public disdain after several decades of competitive politics, alternating parties in power, and several rounds of judicial purges.¹⁵ Now, in the early 21st century, the West is always prepared to fund rule-of-law reforms.¹⁶ Mainstream judicial empowerment theories tend to focus on domestic politics and overlook international influence (moral or financial) on those who fight for office through power politics. True, domestic power struggles determine winners and losers in fragmented polities. But continued Western support of rulers who use unconstitutional means to remain in power helps entrench the impunity of the winners of these struggles.

To be sure, there may be miscalculations: the rulers and the opposition may overestimate the loyalty of judges, judges may choose to please the opposition when they sense the declining popularity of the incumbent majority, and so on. But the powerful public and private actors know that they design and re-design courts, narrow or expand their jurisdiction, control judicial appointments, and direct material resources necessary to carry out judicial decisions.¹⁷

Both the rulers and the opposition know that judges can deliver important tangible benefits. For example, electoral revolutions, peaceful street protests against electoral fraud that have led to the overthrow of incumbent presidents—in Serbia (2000), Georgia (2002), Ukraine (2004), and Kyrgyzstan (2005)—all saw high courts canceling fraudulent election results.¹⁸ Courts may disallow popular politicians from running for important positions or reinstate political parties in an electoral campaign, and, as a result, influence the outcome of elections, as has repeatedly happened in Bulgaria.¹⁹ Or they can impeach popular presidents, like constitutional courts did in Russia in 1993 and in Lithuania in 2004.²⁰ Apart from high-level politics, courts can be useful in overseeing bankruptcy cases against the companies controlled by the opponents; reviewing privatization schemes; handling criminal cases against important individuals, their families and their cronies; and hearing disputes over the control of media outlets. Winners of these cases tend to applaud judicial independence, while losers accuse courts of submitting to the pressure of the winning party. As politics becomes more polarized, the accusations of judicial dependency increase in number, and the media is happy to publish scandalous accounts of judicial biases and errors.

In short, rival elites, who are uncertain about their future, face a choice: to play by the rules or to break them. If they feel that they will face no punishment for breaking the rules because they will be able to capture the courts and law-enforcement agencies, they are

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likely to break them in order to reap the benefits that the pliant courts deliver. Therefore, politicians and economic magnates can get away with this clearly criminally punishable behavior due to the entrenchment of impunity, which subservient courts only strengthen.

Impunity may be entrenched on three levels. First, it may be entrenched formally through a proportional electoral system and the immunity of high government officials from criminal prosecution.²¹ For example, a proportional electoral system guarantees that party leaders always hold a seat in Parliament, which makes them protected from criminal prosecution. This does not mean that every country with proportional electoral system is likely to have dependent courts. But it does create incentives for the party leaders, who are not required to disclose party funding sources and to open party lists, to engage improper behavior, like buying votes and legislators and building party machines by illegal means. Some argue that even if parliamentary immunity were to be abolished in Ukraine, the culture of elite protection from prosecution will remain.²²

Second, impunity may be entrenched informally through the mutually assured blackmail and business networks of the powerful.²³ Both of these mechanisms do not disappear just because a polity has competitive elections and alternating governments. These networks are not interested in combating judicial dependence and insulating courts because everyone faces the risk of being punished for interfering with judicial decision-making.²⁴ Thus, it may be rational, interest-based behavior: I will accuse my opponents of meddling with justice, but I will not punish them for it because I myself may be the next target of the “protect the judges” campaign. It is far less risky to blackmail one’s enemy and than to negotiate with them to reach one’s goals, because one can break one’s agreement without the risk of being punished. Indeed, pact-making and pact-breaking between former arch-rivals is very common in post-Orange Ukraine.

Finally, the impunity for meddling with justice may be entrenched morally through the emerging social understanding that the rich are above the law and the poor are outside the law.²⁵ This means that society may tolerate corruption, pressure and other criminally punishable interference with the decision-making of increasingly disrespected judges. After all, this is a far less serious crime than the murder of journalist Georgiy Gongadze in 2000 or the poisoning of Viktor Yushchenko in 2004—crimes that caused major social upheavals yet went unpunished for years.

Well-entrenched impunity lowers the cost of attacking and/or interfering with the judiciary. This cost is high in regimes with competitive elections and fragmented politics, according to the mainstream theories of judicial empowerment. These claim that the dispersal of power reduces the possibility of attacks on the judiciary and shields courts from outside pressure because these attacks can be successful only when a large coalition of governing actors undertakes them. To be sure, these theories do not specify how large such coalition should be, what a successful attack would entail, and what the costs of an unsuccessful attack on the courts are—all of these are empirical questions. More often, these theories treat the absence of such attacks (or their failure) as evidence of successful institutionalization of judicial independence: as long as the courts are functioning without scandals and interruptions, they provide “insurance” for the threatened rulers. Indeed, for countries with traditions of judicial purges, this may be an achievement in itself. However, the mere existence of the government organization does not usually mean that this organization is successful. It is equally possible that the judiciary functions precisely because it does not interfere with the wishes of the powerful too much

and because it helps the powers-that-be to govern.²⁶ And some argue that there is no point in searching for attacks on the judiciaries because the latter cannot be real veto players: judges are appointed by the rulers, judges share ideological views of the ruling elites, and the constitutional rules may be biased towards the powerful.²⁷

As we shall see in case of Ukraine, certain political actors were able to attack courts and individual judges successfully without making coalitions with rivals because they faced no punishment for their improper meddling with judicial decision-making. In sum, the core argument of this essay is that competitive and fragmented politics coupled with impunity of the powerful means that multiple powerholders, who are virtually unrestrained in their race for wealth and power, tolerate judicial independence up to the point—as long as courts deliver important benefits and do not interfere with the preferences of the powerful.

Why Ukraine?

Exploring Ukraine's judicial politics is useful for the following two reasons. The first reason is practical. Many believe that Ukraine, the largest country in Europe, shows the democratic way ahead for most post-Soviet states.²⁸ Prior to the 2004 Orange Revolution, Ukrainian leaders, like the leaders of other post-Soviet states, largely played power politics without any significant constraints imposed on them by the courts and tended to lean on the judiciary in order to consolidate their own power.²⁹ But in the wake of this electoral revolution, Ukraine remains the only “free” (as defined by Freedom House) country in post-Soviet space with open and fair elections, an independent media, an active civil society, and growing attractiveness for foreign investors.³⁰ The country's Orange Revolution prevented Prime Minister Viktor Yanukovich from winning the presidency through electoral fraud.³¹ This revolution saw the Supreme Court holding a full-blown televised trial, exposing vote-rigging by the incumbents and ordering a new runoff election, which opposition leader Viktor Yushchenko won with 52 percent of the vote.³² Since then, the results of two parliamentary elections have been contested in courts, which may indicate that, in the near future, results of all national elections would have to be confirmed by Ukrainian courts.

Moreover, in the wake of the Orange Revolution, both the Supreme Court and the Constitutional Court elected their own chief justices, which clearly belonged to the Orange camp.³³ At the same time, Ukraine completed the establishment of a separate network of 35 administrative courts, which handle the disputes between the individuals and the state and are supposed to enhance governmental accountability.³⁴ Moreover, new Ukrainian leaders announced judicial reform as one of their key objectives, and the Western governments did not hesitate to provide advice and funding for the major actors in the legal reform processes.³⁵ As Table 1 shows, representatives of the Western governments, Western-based NGOs (such as the American Bar Association), and international organizations (Council of Europe, and European Union) meet with the Justice Ministers and judges of the Supreme Court and Constitutional Court at least twice a month. Therefore, in the early years of the Orange Revolution the expectation was clear: courts are there to serve the needs of the people and to constrain the powerful.

Yet, by mid-2009, judges were failing in fulfilling this expectation, and courts are viewed as dependent, corrupt and powerless.³⁶ In 2009, fewer Ukrainians (4 percent) reported trust in courts today than five years ago (21 percent), as Table 2 shows. Therefore,

TABLE 1. Meetings with representatives of Western governments and international organizations

	2005	2006	2007	2008
Minister of Justice	9	11	18	34
Supreme Court	20	29	26	n.d.
Constitutional Court	n.d.	15	16	10

Source: Websites of the Ministry of Justice of Ukraine, the Supreme Court of Ukraine, and the Ukrainian Constitutional Court

TABLE 2. Do you approve of the performance of the judiciary?

	Feb. 2005	May 2006	Feb. 2007	Feb. 2008	March 2009
Fully	21.3	8.4	5.9	6.7	2.9
Sometimes	31.7	35.8	33.4	37.8	25.8
No	29.3	39.7	45.4	43.0	62.7
Hard to say	17.7	16.1	15.3	12.5	8.6

Source: Razumkov Center, http://www.uceps.org/eng/poll.php?poll_id=169.

one cannot claim that Ukrainian judiciary was always that way regardless of the nature political regime. Neither one can claim that public officials knew nothing about judicial independence—they receive plenty of well-funded advice from abroad that judicial independence is a good thing. Learning from Ukraine’s experience of judicial disempowerment may help other countries—which will have competitive elections—to avoid the traps of judicial dependence.

The second reason for exploring Ukraine’s judicial crisis is theoretical. Mainstream theories of judicial empowerment predict that independent and accessible courts are likely to be established in countries, like Ukraine, where political party systems are fragmented and elections are highly competitive. Indeed, judging by Ukrainian national and local elections, which are more difficult to steal and which could serve as reliable indicators of the strength of political actors, ruling parties and incumbent presidents regularly lose power. Former President Yushchenko’s popularity declined significantly since 2005, according to every public opinion poll conducted in the country, and by mid-2009 had reached a low of 3.5 percent. Yushchenko’s party came in third in the two parliamentary elections held in spring 2006, and in fall 2007 fell behind Yanukovich’s Party of Regions and the Tymoshenko’s Bloc.³⁷ The highly contested local elections in Kyiv in March 2006 and May 2008, and in Ternopil in March 2009, confirmed that a vibrant electoral market also exists at the local level. In this context, incumbents face the real possibility of being outvoted and fear losing elections.

Since the Orange Revolution, Ukraine’s fierce political competition has been dominating both parliamentary politics and politics within the executive branch. Regional,

ethnic, and linguistic divisions within the country ensure that the key rivals view the dispersal of political power as a long-term pattern rather than a short-lived occurrence.³⁸ Both the opposition and the ruling parties successfully blocked the functioning of Parliament whenever they wanted. Both prime ministers (Yanukovych and Tymoshenko) successfully defied orders of the President, prompting the latter to dissolve Parliament twice: Yushchenko succeeded on the third attempt in spring 2007, yet he failed to dissolve the Verkhovna Rada in the fall of 2008.³⁹ When necessary, on several occasions, former rivals (regardless of their ideological differences) signed coalition agreements to stay in power just to break these agreements as soon as they no longer secured the governing status.⁴⁰ In short, today's Ukraine is a country of "feckless pluralism" with a vibrant electoral market, strong political opposition and persistent battles among the parliament, the cabinet, and the president.⁴¹ However one measures all of these three variables, their scores are definitely higher than five years ago and are there to stay, which makes Ukraine a perfect case study to determine whether growing political competition leads to more judicial independence.

As we will see, these predictions seem to be incorrect in the case of Ukraine. The presence of a strong political opposition in Ukraine only exacerbated the political pressure on the judiciary, as rival political forces tried their best to use courts for their own short-term political gains.⁴² And these immediate gains appear to outweigh the benefits of being strategic and of empowering the judiciary. When ruling elites thought that the litigation or its threat would advance their interests, they actively used courts, advocated for more judicial power and praised judicial decisions. When they faced unfavorable court judgments, Ukraine's politicians defied them, attacked courts and recalcitrant judges, and tried to limit judicial independence. In short, key political actors in post-Orange Ukraine revealed the taste for both judicial dependence and independence. International experts noted the trend of judicial disempowerment, Ukrainian style (see Tables 3 and 4), yet they have not explained why judicial disempowerment goes hand in hand with increasing political competition in this country.⁴³ The rest of this essay examines how and why the rulers facing electoral uncertainty and strong political opposition chose to meddle with judicial decision-making in Ukraine instead of insulating it.

Unpunished Interference in Judicial Decision-Making in Ukraine

To examine how and why Ukraine's various politicians chose to capture the judiciary instead of shielding it from external pressure, this essay focuses on concrete actions taken by the rulers and the opposition aimed at interfering in the processes of handling of court cases. Among many indicators of judicial (in)dependence, this one helps assess the extent to which judges are actually insulated from outside pressure when they decide cases. According to this indicator, courts, however powerful and independent they may be on paper, are weak if the powers-that-be allow themselves to meddle in the domain of handling court cases. Both insiders (court chairs and vice-chairs) and outsiders (politicians, government officials, businesspeople, lawyers and mass media) can exercise this influence on judges from the moment of the submission of the lawsuit until the enforcement of judicial decisions.

To be sure, researching the instances of this interference is difficult. Judges, who are interested in staying on the bench, may hesitate to report it because this would serve as grounds for both impeachment through constitutional channels and retaliation by the

TABLE 3. World Governance Indicator: rule of law for Ukraine, 1996-2007

	'96	'98	'00	'02	'03	'04	'05	'06	'07	'08
Score	-0.5	-0.92	-1.01	-0.86	-0.9	-0.75	-0.61	-0.79	-0.71	-0.62

(+2.5=best, -2.5=worst)

Source: Daniel Kaufmann, Aart Kraay, Massimo Mastruzzi, *Governance Matters VIII: Governance Indicators for 1996-2008*, 2009. http://info.worldbank.org/governance/wgi/sc_country.asp.

TABLE 4. Judicial framework and independence, Ukraine, 1999-2008

	'99-00	'01	'02	'03	'04	'05	'06	'07	'08	'09
Score	4.5	4.5	4.75	4.5	4.75	4.25	4.25	4.5	4.75	5

(1= best, 7= worst)

Source: Freedom House, <http://www.freedomhouse.org/uploads/nit/2009/Ukraine-final.pdf>.

powerholder (and court chairs)—perpetrators of this interference. Moreover, politicians and government officials may be unwilling to confess that they ordered judges to decide in their favor, businesspeople and lawyers are unlikely to admit that they bribed judges to secure favorable judgments, and judges are not likely to reveal that they had been pressured or bought—all such instances are criminally punishable in Ukraine.⁴⁴ In many cases, it is the widespread perception that this interference exists that weakens judicial power. Indeed, the media is more likely to report about the allegations of judicial corruption or pressure on courts than about good judicial performance. But they also let judges of all rungs (from the Supreme Court to the city-level courts) who feel pressured to complain against this improper pressure in public in order to attract the attention of both domestic and international allies.⁴⁵ However, because courts are widely distrusted, a domestic audience may not believe revelations coming from judges, and, instead, such media stories may help entrench the public perception that judges are pliant and corrupt.

All of this was true about the judiciary in pre-Orange Ukraine. Much has been written about “telephone justice”—a pattern (inherited from the Soviet rule) of the powerholders phoning judges or chairs of the court and dictating how to handle certain cases that mattered to those at the top.⁴⁶ Leonid Kuchma’s semi-authoritarian regime pressured parts of the judiciary, while the private parties easily bribed the underpaid judges.⁴⁷ However, many experts and judges believe that political fragmentation in post-Orange Ukraine only worsened the situation: it strengthened political pressure on courts and deepened judicial corruption.⁴⁸ Ukrainian powerholders took this practice to a whole new level by sacking judges on the spot in retaliation for unfavorable judgments, and by storming the courthouses personally or sending security personnel to judicial chambers to ensure that judges would carry out their orders. Less radical government officials and businesspeople employ an array of means in their attempts to influence the judicial decisions,

ranging from letters, telephone calls or personal visits to judges or court chairmen to open criticism of specific judicial decisions that diverge from their view of the correct outcome.

This should not be surprising—greater jurisdiction of courts to handle politically important disputes should result in greater pressure on courts from key political forces who want to win their cases in courts. The severity of political fragmentation forced political and business actors to interfere with judicial decision-making. This is because it is difficult for politicians to accomplish things through regular political processes—the opposition is too strong. They face virtually no risk of being punished for this clearly illegal behavior as they appoint and dismiss judges and chief law enforcement officers. In fact, fearing no punishment, they publicly discuss that they are entitled to fire recalcitrant judges, to blockade courthouses, to phone judges or to offer bribes to them. Let us illustrate each of these activities.

Sacking Judges on the Spot

Politicians of all stripes engage in this extreme pattern of retaliating against judges who issue unfavorable judgments. The powerholders do not feel required to follow due process, and wait until the appellate court upholds or overturns the judicial decision that upset them. Instead, they rail against a judge by sacking him or her without following proper judicial disciplinary procedures, showing their rivals that they wield sufficient power to overcome any hurdle in their race for wealth and power.

Just like many other post-authoritarian nations, the Ukrainian Constitution enshrines standard guarantees of judicial independence, including judicial immunity and irremovability from office.⁴⁹ To balance judicial independence and judicial accountability, Chapter 6 of the Law of Ukraine on the Status of Judges specifies the procedures for disciplining judges.⁵⁰ As in many countries with career judiciaries, it is the judicial chiefs (court chairs and vice-chairs) who supervise judicial performance and maintain judicial discipline. In Ukraine, they complain to the High Qualification Commission of Judges, which conducts inquiries into alleged judicial misconduct and imposes disciplinary sanctions. Judges who are sanctioned have the right to appeal to the High Council of Justice (HCJ), a twenty-member body in charge of screening judicial nominees and disciplining judges. According to Article 15 of the Law on the Status of Judges, the president has the power to dismiss judges whom he appointed for an initial five-year term, and the parliament has the power to dismiss judges whom it appointed for life.⁵¹ But both the president and the parliament can exercise this power only upon the recommendation of the Supreme Court Chair and HCJ, which conducts its own investigation of judicial misconduct. The HCJ most often acts upon the complaints from politicians and businesspeople—that is, actors from outside of the judiciary. Prior to the Orange Revolution, the HCJ recommended firing over 60 judges for the violation of an oath of a judge, including corruption.⁵² What constitutes a violation of an oath is unclear, and dismissed judges cannot contest their dismissals in courts, something that most judges believe weakens the system of protecting judges from politically motivated punishment.⁵³

However, political fragmentation in today's Ukraine has exacerbated the trend of politically motivated punishment of judges, a trend that already existed in pre-Orange Ukraine.⁵⁴ On the one hand, Ukraine's rulers quickly abandoned the idea of cleansing the judicial corps of corrupt, incompetent and pliable judges, something that was done in the Czech

Republic in the early 1990s and in Georgia after the Rose Revolution of 2003. Ukraine’s politicians were pragmatic when deciding not to proceed with cleansing.⁵⁵ Severe political fragmentation meant that no single political force could implement the wholesale purge of the judiciary, even though many international actors insisted on cleansing the judicial branch. Moreover, by the fall of 2006, the judicial branch presented itself as “the most Orange”—the newly elected Chief Justice of the Constitutional Court Ivan Dombrovskiy was believed to be close to President Yushchenko, and the newly elected Chief Justice of the Supreme Court Vasyl Onopenko was close to Prime Minister Yuliya Tymoshenko.⁵⁶ The expectation was that together, top judges would be able to repair the defects in the judicial branch without purging it.

On the other hand, political fragmentation forces political rivals to retaliate against individual judges to show their force to the judicial corps and to political opponents. The actions of the powerholders provide plenty of evidence for such signaling of politically motivated retaliation, because leaders ignore the constitutional procedures of firing a judge. They choose to ignore the Constitution in order to show their actual power to their opponents and to demonstrate that they can achieve their short-term goals in a fragmented political system. Judges acutely feel this willingness of the powerful to disregard constitutional channels (see Table 5).

Consider the case of judge Volodymyr Monych, who served in the court in the town of Mukachiv in western Ukraine. On January 22, 2007, he issued an injunction against the Speaker of the Parliament, who signed the Law on the Cabinet of Ministers, after the parliament had overridden the veto of President Yushchenko.⁵⁷ In a bitter struggle with the parliament, Yushchenko vetoed the law because it transferred significant powers to the cabinet from the president. Judge Monych also banned publication of the law. Formally,

TABLE 5. Which factors threaten judicial independence during disciplinary proceedings?

	2007	2008
Activity of the High Council of Justice is politicized	43%	38
Members of political parties interfere in the activity of qualification commissions of judges and HCJ	42	38
Businesspeople interfere in the activity of qualification commissions of judges and HCJ	12	19
Decisions dismissing judges by the Parliament are very often grounded in political motives	49	43

Source: Surveys of 1,024 judges (conducted in 2007) and of 1,072 judges (conducted in 2008) in eight oblasts of Ukraine. Monitoring of Judicial Independence in Ukraine. Year 2008, pp. 61-68.

Monych acted upon the lawsuit of Member of Parliament (MP) Ihor Kril, from Yushchenko’s party. But it was obvious to everyone that the decision to ban the publication came from the Presidential Secretariat (PS) (the former head of the PS Viktor Baloha is a close friend of Ihor Kril and a cousin of Vasyl Petyovka, Mukachiv’s mayor) and that Monych

lacked jurisdiction in the case (only the Constitutional Court had the jurisdiction in such cases). Furious MPs immediately complained to the HCJ to fire Monych, and the HCJ promptly concluded that the judge broke his oath and that this was sufficient grounds for his removal by the parliament. The HCJ reached this conclusion without inviting Monych to present his case and without listening to his side of the story.⁵⁸ Monych asked the HCJ to postpone the inquiry until his release from the hospital—hospitalization has become a common practice for government officials to avoid attending inquiries. The parliamentary justice committee, nevertheless, proposed to have the Parliament dismiss Monych from the bench on February 8, 2007. The Supreme Court judges openly complained to Speaker Olexandr Moroz about this hasty action and the violation of the procedure for removing judges. The Speaker agreed, and postponed the parliamentary vote on removing judge Monych until the latter could show up and present his explanations. However, on April 5, 2007, the Parliament fired Monych, who was still in the hospital.⁵⁹ Monych's dismissal came at a time of severe political fragmentation—just when President Yushchenko had dissolved parliament, only to see it defy this dissolution and continue functioning. Instead of leaving the judges alone, rival politicians tried to beat their opponents at all costs.

The saga with the dismissal of three judges of the Ukrainian Constitutional Court (UCC) further demonstrates the negative impact of political fragmentation of judicial power.⁶⁰ When then-President Yushchenko dissolved the parliament on April 2, 2007, a group of MPs immediately challenged Yushchenko's actions in the UCC.⁶¹ The Constitutional Court accepted their lawsuit in a matter of few days, and both Yushchenko and Prime Minister Yanukovych repeatedly promised to comply with the UCC decision, whatever it might be. Both also admitted that no UCC decision could resolve the political crisis. But as soon as the Court began preparations for the public hearing of this case, judges signaled that the Court might declare Yushchenko's actions unconstitutional. Rumors spread that the president might recall six UCC judges appointed under presidential quota in order to paralyze the Court. Five UCC judges openly complained about the pressure and refused to take part in the public hearing of the case, which began in a courthouse surrounded by several thousands of Yushchenko's supporters and opponents.⁶² The Ukrainian Security Service accused Suzanna Stanik, judge-reporter in the case, of corruption, though it never launched a criminal case against her. Facing serious risk of having his decree overturned, Yushchenko issued a new decree dissolving the Parliament on April 26.⁶³ But the UCC did not close the case on the constitutionality of his previous decree. Yushchenko responded by dismissing three UCC justices on the grounds that they had violated the oath of a judge. All three judges had been appointed under presidential quota by Yushchenko's predecessor, Leonid Kuchma. On April 30, Yushchenko fired Valeriy Pshenichnyi, who was an acting Chief Justice. The next day, Yushchenko fired Justice Stanik, and on May 10, Yushchenko dismissed Justice Volodymyr Ivashchenko.⁶⁴ All three justices objected to their dismissal, continued attending the UCC hearings, and successfully petitioned local courts to cancel presidential decrees on their dismissal. Yushchenko even had to send in his bodyguards to prevent these justices from entering the UCC building, but to no avail. The MPs from the Yanukovych's Party of Regions protected justices, allowing them to enter the courthouse.⁶⁵ President Yushchenko then issued another decree dismissing these three judges, and eventually succeeded in removing them from the bench—even though Justice Stanik won the case against her dismissal in the Supreme Court in March 2008.⁶⁶ Her victory, however, prompted Yushchenko to issue yet another decree dismissing her from the bench, this time

on the grounds of violating the procedure of taking an oath of a judge.⁶⁷ Stanik contested this decree in the Kyiv City Administrative Court and won in February 2009. She admitted that she did not intend to return to the UCC and fought as a matter of principle in order to protect the rule of law. Yushchenko's counsel dismissed Stanik's victory as an illegal usurpation of the judicial review power by the Kyiv court.⁶⁸ It was clear to everyone that Yushchenko violated the Constitution in the process of dismissing these UCC judges, yet no one was sure how many more times President Yushchenko was capable of dismissing judge Stanik—he faced no punishment for doing so.⁶⁹ And the parliament made its own move by dismissing UCC judge Petro Stetsyuk, who was believed to be close to the presidential side, but judge Stetsyuk ignored this and remained on the bench.⁷⁰ Throughout 2007, the Presidential Secretariat repeatedly questioned whether Ukraine needed the constitutional court at all and proposed to dismiss all justices in order to create a completely new bench—all because the UCC did not curry favor with the president.⁷¹ Only in the summer of 2008 did the three Yushchenko appointees to the UCC take an oath, and the full bench elected a new Chief Justice of the Constitutional Court Andriy Stryzhak, who was rumored to be close to Yushchenko's former chief of staff Viktor Baloha.⁷²

Only these personnel changes made the UCC fully functional, which means that a single actor, President Yushchenko, was able to paralyze the Constitutional Court in the context of polarized politics. Moreover, his attack on the Constitutional Court worked. In 2009, Yushchenko did not lose a single case in the Constitutional Court, even though he has routinely lost cases in other Ukrainian courts.

In fact, President Yushchenko was not always successful when it came to disabling courts that issued unfavorable judgments. When he dissolved the Parliament in October 2008 and scheduled snap elections of the Verkhovna Rada to be held on December 7, 2008, the Rada members from the Bloc Yulia Tymoshenko asked the Kyiv City Administrative Court to issue an injunction against Yushchenko's action.⁷³ Judge Volodymyr Keleberda, who Yushchenko appointed to the bench in February 2007, suspended the decree dissolving Parliament and prohibited the Central Election Commission from taking any measures in preparation for elections. The president immediately appealed this injunction in the Kyiv Appellate Administrative Court, arguing that Judge Keleberda acted outside his jurisdiction because such cases were reviewable only by the Constitutional Court itself. However, the members of Parliament who belonged to the Bloc Yulia Tymoshenko physically occupied the court chambers of appellate and cassation judges, disrupting their work in order to prevent the reversal of suspension. Yushchenko dismissed judge Keleberda by repealing his appointment decree and without providing any reason. He then ordered the Procurator General to launch criminal case against judge Keleberda. Moreover, President Yushchenko abolished the Kyiv City Administrative Court and set up two new courts instead.⁷⁴ He later explained that he acted according to the plan prepared by the Justice Ministry earlier in the year. However, the Chairman of the Kyiv City Administrative Court protested this abolition in the Kyiv District Administrative Court, and secured the injunction against Yushchenko's move. Moreover, the Pecherskii District Court suspended the criminal case against judge Keleberda. President Yushchenko retaliated by dismissing Inna Otrosh, the Chairwoman of the Pecherskii Court, but the next day, the Council of Judges of Ukraine reinstated her in her previous job and demanded that Yushchenko repeal his decree abolishing the Kyiv City Administrative Court.⁷⁵ Finally, President Yushchenko revoked his own decree dissolving the Parliament. Meanwhile,

Tymoshenko's legal team dropped its lawsuit against Yushchenko's move to dissolve the Rada. Following this truce and after several days of the blockade of the courthouse by Tymoshenko's party that had no interest of speedy litigation, the Kyiv Appellate Administrative Court upheld the appeal of Yushchenko's lawyers and ruled that judge Keleberda acted unconstitutionally.⁷⁶ But several weeks later, this court reversed its decision by ruling that the issue was mute and dropping any reference to the unconstitutional actions of Keleberda.⁷⁷ As a result, no snap parliamentary elections were held, no court was abolished, and Judge Keleberda remained on the bench—all thanks to the backing of Tymoshenko's lawyers, who reaped the benefits of dependent courts. As in the case of Judge Monych, discussed above, the public perceived Judge Keleberda as a pawn in the battles between the President and the Rada.⁷⁸

In summation, political fragmentation in post-Orange Ukraine failed to strengthen judicial independence, as power politics continued to trump institutional design the way it did under Kuchma.⁷⁹ Judges in local courts and in top courts face as much risk (if not more) of being removed from the bench when they enrage powerholders, as they did before the Orange Revolution. If under President Kuchma the center of political power was clear and judges knew who to be afraid of, judges now face multiple political forces (the HJC, the president, and legislators) that can launch removal proceedings and invent unconstitutional ways of dismissing judges. The high probability of coalitions among any group of political forces, well-entrenched impunity, and deepening public disdain of courts only increases the risk of illegal dismissals of judges. This risk, however, does not mean that judges who upset the power holders are actually fired. For example, most of 47 judges blacklisted by Viktor Yushchenko in November 2007 remained on the bench. They were not removed because their found protection in the camps of Yushchenko's rivals.⁸⁰

Telephoning Judges, Storming Courthouses

Less radical yet more widespread interference in judicial decision-making has to do with the practice of phoning judges with orders and requests. In today's Ukraine, public officials no longer conceal the fact that they tell judges how to decide cases because they hold no fear of being prosecuted for such meddling with justice. They are not afraid because they know they will not be punished, even if law-enforcement agencies collect evidence of their illegal behavior. The following examples illustrate impunity of public officials.

- In September 2005, Oleksandr Turchynov, the former head of the Security Service of Ukraine (SBU) in the first Tymoshenko's Cabinet, accused Petro Poroshenko, then the head of the Presidential National Security and Defense Council, of pressuring judges to make certain rulings in commercial disputes. However, no criminal charges were brought against him. In 2009, Poroshenko became a Minister of Foreign Affairs, while Turchynov held a post of the First Deputy Prime Minister.⁸¹

- In October 2008, when President Yushchenko tried to dissolve Parliament—as described in the previous section of this article—and Tymoshenko successfully contested the dissolution in the administrative courts, the Minister of Internal Affairs Yuri Lutsenko publicly announced that there had been phonecalls between Presidential Secretariat, Judge of the High Administrative Court Mykhailo Tsurkan, and Judge of the Kyiv City Administrative Court Yaroslava Dobryanskaya. He informed President Yushchenko that these

phone calls could serve as grounds for criminal investigation against Yushenko's aides, Ruslan Kirilyuk and Ihor Pukshin. However, no charges were brought against them.⁸²

- In May 2009, Deputy Minister of Justice Evheny Korniychuk (Bloc Yulia Tymoshenko), a son-in-law of the chairman of the Supreme Court, wrote to the Procurator General that three MPs from the Party of Regions—Ivan Mirnyy, Oleksandr Volkov and Aleksei Zhuravko—stormed the chambers of the chief justice of the Kyiv Appellate Economic Court, disrupted the hearing in the case of abolishing the infamous natural gas trading company UkrGazEnergo, and tried to steal court files. Even though the police were involved, no criminal case has been initiated.⁸³

- The governor of Poltavaska Oblast, Valeriy Asadchev (a supporter of Yushchenko) admitted that during his first five months in office in 2006 he phoned judges twice but did it “solely to request to speed up the handling of the dispute over raising rates for hydro in his oblast.”⁸⁴

Judges also no longer hide the fact that they receive orders from the important figures on how to decide the outcomes of cases. Judges from local courts in Eastern Ukraine complain that officials from the Presidential Secretariat phone them;⁸⁵ judges from courts in Kyiv complain that MPs and Kyiv City Council members phone them;⁸⁶ judges of economic courts complain that officials from the Cabinet of Ministers phone them;⁸⁷ judges of the High Administrative Court have complained that then-Acting Prime Minister Yurii Ekhanurov “explained” to them how to decide complaints against illegal dismissals of the Ministers;⁸⁸ justices of the Constitutional Court openly report pressure from key political figures of all ideological stripes;⁸⁹ and Supreme Court Chief Justice Vasyl Onopenko repeatedly complains that he receives phonecalls from legislators and other influential people regarding certain cases.⁹⁰

These complaints are backed by the results of a 2007 survey of 1,024 judges and of a 2008 survey of 1,072 judges, both conducted in eight oblasts of Ukraine. Seventy-one percent of those surveyed in 2007 said that they knew about the incidences of attempts to influence courts during the trial, as compared to 77 percent surveyed in 2008.⁹¹ Who perpetrates this improper influence on judges? To be sure, most judges blame outsiders, while some blame only ideological opponents of the political masters of certain judges (see Table 6). Members of the Ukrainian Parliament lead the pack of public officials who engage in this improper behavior—four out of ten surveyed judges mentioned this group. Given that the Ukrainian Parliament has rarely given permission to prosecute its members, legislators enjoy immunity from criminal prosecution and feel unrestrained in their attempts to pressure judges. Political parties, whose bosses are guaranteed the seat in Parliament and covered by immunity, are also often mentioned by judges as perpetrators of pressure.

What form does this improper influence take? As Table 7 shows, it often involves threats to judicial careers, bribery and “friendly advice.”

Bribing Judges

While we can certainly argue that growing political competition resulted in more “telephone justice,” we cannot argue that growing political competition caused more judicial corruption—corruption in courts in post-Soviet countries with less competitive political

regimes is also on the rise. What we can argue is that heightened political fragmentation did not prevent judicial corruption from spreading.⁹² Why? Most politicians and government officials in today's Ukraine have strong business interests. And, as I argued in the previous section, there are strong incentives to engage in corrupt behavior in all sectors

TABLE 6. Who attempts to influence courts improperly when they handle cases?

	2007	2008
Procurators	33%	31
Counsel	23	30
Litigants	48	55
Local government officials	27	27
Court chairs	11	9
Judges from appellate courts	13	10
Journalists	28	41
Political parties	29	34
Non-governmental organizations	14	20
Picketing and street protestors	35	41
Members of Parliament of Ukraine	39	40
Members of the city councils	15	13
Presidential Secretariat	9	17
Government officials	13	12
Members of the High Council of Justice	11	10

Source: Surveys of 1,024 judges (conducted in 2007) and of 1,072 judges (conducted in 2008) in eight oblasts of Ukraine. Monitoring of Judicial Independence in Ukraine. Year 2008, p. 56.

TABLE 7. What forms of influence on judges are used?

	2007	2008
Threats to launch disciplinary proceedings against a judge	54%	60
Threats to block the career	49	47
Bribery	28	26
Friendly advice	28	25
Physical threats to a judge and her/his family	17	10
Financial sponsorship of the court	14	14

Source: Surveys of 1,024 judges (conducted in 2007) and of 1,072 judges (conducted in 2008) in eight oblasts of Ukraine. Monitoring of Judicial Independence in Ukraine. Year 2008, p.58. Top six answers are shown.

of the political system—the risk of being detected and punished for corruption is minimal in Ukraine, and the judicial branch is not an exception. As long as judges cater to the needs of the powerful, they are allowed to accept bribes and extort favors.⁹³

According to Ihor Zvarich, the former chairman of the Lviv Appellate Administrative Court, who was monitored by the security services for eight months and caught red-handed

with \$US 1.3 million in cash: “To be an honest judge in Ukraine is a big risk for career and health, much bigger risk than to be a judge the bribe-taker . . . Yes, Ukrainian courts are corrupt, everybody knows this. But they are located somewhere on the bottom in the hierarchy of corruption schemes.”⁹⁴ Indeed, on the day of Zvarich’s arrest in March 2009, Ukraine’s Security Service and the Procurator General proudly announced that some twenty subordinates of Zvarich and a chairman of the Ivano-Frankivsk Oblast Court were charged with corruption. Yet, when journalists went to these courts, they learned that nobody was suspended or dismissed from their jobs despite these corruption charges.⁹⁵

While judicial salaries have been steadily increasing since the Orange Revolution, the funding of the rest of the judicial system remains inadequate, and the prices of judicial decisions have also gone up. Judges in the local courts receive bribes directly, while in higher courts they do this through intermediaries, judicial assistants or lawyers.⁹⁶ It is not uncommon in private litigation for both sides to offer a bribe to the judge and then to ask a judge to decide the case according to “conscience.” Indeed, in December 2008, during a live broadcast of a highly popular TV show “Freedom on ‘Inter’,” a former MP and Kuchma’s lieutenant Aleksandr Volkov confessed that a judge gave him a 70 percent discount for handling an absolutely clear case in his favor.⁹⁷ Of course, a judge has to inform another side of the appropriate amount in such cases. To be sure, when the court chair asks a judge to decide a case in a certain way, the former is unlikely to share the proceeds from the bribe with the latter.

Estimating the extent of actual judicial corruption is as difficult as the extent of the “telephone justice.” The official crime statistics show dismal numbers of bribes to judges and of illegal interference with judicial proceedings; the number of successful prosecution of both crimes is even smaller. In early 2009, President Yushchenko complained that despite the fact that “only a lazy person does not talk about corruption in the judicial system,” not a single judge was convicted in 2008, and only sixteen criminal cases against judges went to court that year.⁹⁸ For example, judge Mykola Korniyets of the Boryspol City District Court, who was on Yushchenko’s black list of 47 judges, has not been seen at work since October 2007. He vanished after he was charged with intentionally issuing four illegal decisions in the land transfer cases, which left 559 farmers without their land plots in the highly prized Kyiv suburbs. Korniyets disappeared promptly after his decision had been overturned on appeal, and the Procurator General’s office had found evidence of corrupt motives and influence of the Rada members behind these rulings. Yet, only a year-and-a-half later, in March 2009, did the Supreme Court Chairman Vasyl Onopenko ask Parliament to allow the arrest of Korniyets, who remained at large, on these corruption-related charges.⁹⁹

Public opinion surveys consistently point out the pervasiveness of pressure on courts and corruption in courts on par with other public institutions. According to the nationwide poll of professional lawyers and citizens conducted in November 2005 by the Institute of Sociology of the Academy of Sciences, 82 percent of polled lawyers and 77 percent of polled laypeople believed that the pressure on courts existed.¹⁰⁰ But among those surveyed who actually attended court hearings, this figure drops to 19 percent. According to this survey, MPs, organized crime, government officials, counsel and litigants figured highly in terms of who pressured judges. Bribery as the main means of interference with judicial decision-making was mentioned by 64 percent of polled lawyers, 79 percent of citizens, and 74 percent of those who attended court hearings. Political pressure on judges were mentioned by 52 percent of lawyers, 44 percent of citizens and 32 percent of those who went to court. According to another survey

of 207 journalists conducted in January 2007, 69 percent of respondents mentioned judicial corruption as the main barrier to improving relations between the mass media and judges.¹⁰¹ Subsequent public opinion surveys of lawyers and ordinary Ukrainians revealed even larger proportions of those who believed that courts at all rungs were deeply corrupt.¹⁰²

To sum it up, contrary to the predictions of mainstream theories on judicial empowerment, growing political competition in Ukraine appears to heighten improper influence on judges and does not help reduce judicial corruption. Powerful actors do not seem interested in insulating the judiciary either from the rulers or from the private sector. When political rivals know that they cannot get things done through regular political processes, they turn to courts to overcome the resistance of their rivals. Since the powerful know that they control both the appointment and removal of judges and that interference with judicial decision-making goes unpunished, they face no incentives to avoid threatening and bribing judges. Much of the talk about judicial corruption is directed at judges controlled by rival political groups. And mutual accusations from all political camps help strengthen public perception that all judges are bought, biased, or dependent.

Conclusion

This essay does not argue that political fragmentation is bad for judicial empowerment. It argues that political fragmentation and electoral competition alone do not assist in making courts more independent. Under certain conditions, more political fragmentation and highly contested elections goes hand-in-hand with more judicial dependence. What are these conditions? Severe political contestation and ensuing uncertainty may force rival political groups to secure their electoral victories at all costs. It may force them to use courts not as self-binding mechanisms or pre-commitment devices, but to achieve their short-term power-maximization goals—building party machines, strengthening clientelistic base, or securing funding for election campaigns. In this context, leaving the courts alone and insulating them from politics would be considered a sign of weakness. The high stakes of the political game offer few incentives to rival groups to delegate power to judges, but offer many more incentives in attracting judges to their side. Through their judicial decisions, judges provide a cover of legality and legitimacy for the questionable actions of political rivals, endow them with political resources, and secure tangible financial benefits.

In Ukraine, the risk of being punished for threatening, pressuring and bribing judges is very low due to the well-entrenched impunity of the rich and the powerful. These groups demonstrate this impunity by no longer concealing that they makes moves against recalcitrant judges, blockade courthouses, phone judges about specific cases, and bribe them. The risk for judges of being penalized for engaging in illegal judicial decisions is also low, especially when considered in contrast to the benefits such behavior brings. Since all political blocs and all government institutions engage in this behavior, it makes no sense for them to seriously fight against corruption and against improper influence on the courts. Moreover, political fragmentation makes key actors incapable of getting things done without forming coalitions with their arch-rivals. Short-term coalition-making and coalition-breaking has become a permanent feature of political life in post-Orange Ukraine. This is why, for example, no one has been prosecuted for illegal interference in judicial trials in the wake of the Orange Revolution, even though law-enforcement agencies have collected sufficient evidence of many instances of such interference. Meanwhile, ordinary

Ukrainians, most of who value their rights and believe in abstract judicial independence, seem to accept this reality and do not wish to punish corrupt judges and politicians.

The judges themselves have been unable to convince Ukrainians that they are there to serve the needs of a broader society. This only confirms to the public that all politicians are the same, and that judges are there to help politicians rather than to hold them accountable. In this context, both the practice and public perception of heightened political fragmentation and severe electoral competition in today's Ukraine work against judicial independence. Building independent courts there is impossible without raising the probability of being caught and punished for pressuring judges and for selling judicial decisions. More research is needed to explore why and how the powers-that-be—who are afraid of losing elections, ruling status and wealth—obey some rules while disregarding others.

NOTES

1. Ukraine's judicial system employs some 7,500 judges and consists of the Constitutional Court, 693 courts of general jurisdiction in charge of civil and criminal cases headed by the Supreme Court, 38 economic courts in charge of commercial disputes headed by the High Economic Court, and 34 administrative courts in charge of disputes between citizens (corporations) and government authorities headed by the High Administrative Court.

2. See, e.g., Y. Zakharov, I. Rapp, V. Yavorsky, eds., *Human Rights in Ukraine – 2007. Report by Human Rights Organisations* (Kharkiv: Prava Ludyny, 2008), pp. 32-54, at <http://library.khpg.org/files/docs/1240732247.pdf> (accessed on November 30, 2009).

3. "Interview: Yushchenko on Elections and Courts," *Deutsche Welle*, October 23, 2008 at <http://www.dw-world.de/dw/article/0,2144,3733051,00.html> (accessed November 30, 2009); "President Took Part in the Ceremony of Oath-Taking by the Newly Appointed Judges," <http://president.gov.ua>, February 18, 2009, at <http://www.president.gov.ua/news/12955.html> (accessed November 30, 2009); "President Took Part in the Meeting of the National Commission on Strengthening Democracy," <http://president.gov.ua>, December 10, 2008, at <http://www.president.gov.ua/news/12310.html> (accessed November 30, 2009).

4. "Yulia Tymoshenko: Sooner or Later an Honest Court Will Assess the Fraudulent 2010 Elections," Official website of Yulia Tymoshenko, February 20, 2010, <http://www.tymoshenko.ua/en/article/uv4w2uwz> (accessed April 10, 2010); and "Statement by Yulia Tymoshenko Regarding Decision by Ukraine's Constitutional Court," For-ua.com, April 9, 2010, <http://en.for-ua.com/analytics/2010/04/09/115322.html> (accessed April 10, 2010).

5. See materials of the 8th extraordinary Congress of Judges of Ukraine, *Statutes and Decisions: The Laws of the USSR and Its Successor States* 44, no. 1 (January-February 2009). According to the surveys of some 1,000 judges from eight oblasts of Ukraine conducted in 2007 and 2008, more than a half (57 percent in 2007 and 51 percent in 2008) of those surveyed reported that the level of judicial independence was "unsatisfactory" during 2007 and 2008, respectively, yet slightly less than 40 percent of surveyed felt the same way about the level of judicial independence that existed between 1996 and 2004. *Monitoring of Judicial Independence in Ukraine. Year 2008* (Kyiv: Center of Judicial Studies, 2008), 20, pp. 53-54, at <http://www.judges.org.ua/article/Mon2008.pdf>

6. Mark J. Ramseyer, "The Puzzling (In)dependence of Courts: A Comparative Approach," *Journal of Legal Studies* 23, no. 2 (June 1994): 721-47; Pedro C. Magalhães, "The Politics of Judicial Reform in Eastern Europe," *Comparative Politics* 32, no. 1 (October 1999): 43-62; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003); Rebecca Bill Chavez, *Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Palo Alto, CA: Stanford University Press, 2004); and Jodi Finkel, *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s* (Notre Dame, IN: University of Notre Dame Press, 2008).

7. Douglass C. North and Barry R. Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England," in Lee J. Alston, Thrainn

Eggertsson and Douglass C. North, eds., *Empirical Studies in Institutional Change* (Cambridge: Cambridge University Press, 1996), pp. 134-65, quote at 162.

8. Maria Popova, "Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine," *Comparative Political Studies* 43, no. 10, forthcoming in October, 2010.

9. See, e.g., Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs* 76, no. 6 (November/December 1997): 22-43; and Guillermo O'Donnell, "Delegative Democracy," *Journal of Democracy* 5, no. 1 (1994): 55-69.

10. See, for example, Kataryna Wolczuk, *The Moulding of Ukraine: The Constitutional Politics of State Formation* (Budapest: Central European University Press, 2001).

11. László Sólyom, "The First Year of the Constitutional Court," *Acta Juridica Hungarica* 33, nos. 1-2 (1991), p. 5; and András Sajó, "The Roundtable Talks in Hungary," in Jon Elster, ed., *Roundtable Talks and the Breakdown of Communism* (Chicago: University of Chicago Press, 1996), p. 93.

12. Alexei Trochev, "Less Democracy, More Courts: A Puzzle of Judicial Review in Russia," *Law and Society Review* 38, no. 3 (September 2004): 513-548.

13. Thomas Carothers, The End of the Transition Paradigm, *Journal of Democracy* 13, no.1 (2002): 10-11.

14. Alisa Yurchenko, "Justice Is Ready for Marriage," *Vlast Deneg* 5 (May 2009): 10-16.

15. See Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (New York: Cambridge University Press, 2007), pp. 46-63.

16. By April 2009, the Rule of Law Assistance Directory listed 75 rule-of-law projects in Ukraine funded by the Western taxpayers, at <http://www.idlo.int/ROL/external/ROLHome.asp> (accessed November 30, 2009).

17. See, e.g., Alexei Trochev, *Judging Russia: The Constitutional Court in Russian Politics, 1990-2006* (New York: Cambridge University Press, 2008).

18. Alexei Trochev, "Judicial Behavior in Post-Communist 'Colored' Revolutions," paper presented at the Berkeley-Sawyer Seminar in Judicial Politics (November 7-8, 2008).

19. See, e.g. Venelin I. Ganey, "The Rise of Constitutional Adjudication in Bulgaria," in Wojciech Sadurski, ed., *Constitutional Justice: East and West* (The Hague: Kluwer Law International, 2002), pp. 247-264; and Ralitzia Peeva, "Electing A Czar: The 2001 Elections and Bulgarian Democracy," *East European Constitutional Review* 10, no. 4 (Fall 2001), at <http://www1.law.nyu.edu/eecr/vol10num4/focus/peeva.html> (accessed November 30, 2009).

20. See Kim Lane Scheppele, "Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe," *University of Pennsylvania Law Review* 154 (2006): 1757-1851; and Conclusion of the Constitutional Court of the Republic of Lithuania of 31 March 2004, Case No. 14/04, available in English at <http://www.lrkt.lt/dokumentai/2004/c040331.htm> (accessed November 30, 2009).

21. "Punish Rada Rats," *Kyiv Post*, December 12, 2007, available at <http://www.kyivpost.com/news/opinion/editorial/detail/27989> (accessed November 30, 2009).

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24. Mark Rachkevych, Alina Pastukhova, and Stephen Bandera, "Ukraine's Greatest Crimes, Injustices & Other Tragedies," *Kyiv Post*, December 10, 2008, available at <http://www.kyivpost.com/news/nation/detail/31861> (accessed November 30, 2009).

25. Catherine Wanner, "Money, Morality and New Forms of Exchange in Ukraine," *Ethnos* 71, no. 4 (December 2005): 515-537; and Peter Rodgers, Colin C. Williams, and John Round, "Workplace Crime and the Informal Economy in Ukraine," *International Journal of Social Economics* 35, no. 9 (2008): 666-678.

26. See, e.g., Venelin Ganey, *Preying on the State: The Transformation of Bulgaria after 1989* (Ithaca, NY: Cornell University Press, 2007); Hootan Shambayati and Esen Kirdis, "In Pursuit of 'Contemporary Civilization': Judicial Empowerment in Turkey," *Political Research Quarterly* 62,

no. 4 (2009): 767-780.

27. See, e.g., George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton, NJ: Princeton University Press, 2002), pp. 222-235.

28. See, e.g., "Expert Commentaries on the Orange Revolution," *Ukraine Analyst* 1, no. 6 (30 November 2008): 3-8.

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