Political Competition as an Obstacle to Judicial Independence in Electoral Democracies

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Independent courts are desirable by virtue of their indispensability to the rule of law. They are more likely to provide equal responsibility and protection under the law and thus increase justice, strengthen democracy, and promote prosperity. But independent courts also significantly constrain the other branches of government. Executives and legislatures often have to back down from pursuing their preferred policies as a result of adverse decisions delivered by independent courts. Why do incumbents ever agree to this external constraint on their power? Why would incumbents refrain from interfering in judicial decision-making in order to demand favorable decisions? The question is especially vexing, given that courts lack both the power of the purse and the power of the sword to resist pressure or to implement their decisions.

The puzzle of why independent courts have existed in North America and Western Europe for several centuries has spawned a large literature. Most of it, either directly or indirectly, links judicial independence to the electoral market (Landes & Posner, 1975; McCubbins and Schwartz, 1984; North and Weingast, 1989; Gely and Spiller 1990; 1992; Ramseyer 1994; Weingast, 1997; Ferejohn, 1999; Stephenson, 2003). The basic argument is that politicians offer independent courts when political competition is intense and incumbents cannot expect to win elections indefinitely. The argument presupposes that elections are likely to be the method for turnover in power for the foreseeable future.

Consolidated democracies satisfy the prerequisite by definition. A democracy cannot be considered consolidated unless elections are accepted by all political actors as the legitimate method for determining who would be in power. However, many of the electoral democracies found in Latin America, Africa, Asia, and the post-Communist region may not meet the prerequisite. Elections may take place regularly, but the possibility of democratic breakdown often lurks in the form of a military coup or the ascension of an anti-systemic figure to the highest elected office (Schmitter, 1994). In addition, in many electoral democracies incumbents do expect (correctly or incorrectly) to win elections indefinitely through more or less subtle manipulation, harassment of the opposition, vote-buying, or electoral fraud. If political competition is intense in such contexts, should we still expect it to produce independent courts? Or is it possible that it has a different effect on incumbents' decision on whether to keep the courts independent or pressure them into delivering favorable rulings?

This article argues that in electoral democracies political competition has the exact opposite effect on judicial independence than it purportedly has in consolidated democracies: it *hinders* rather than *promotes* the maintenance of independent courts. The article proposes a rational-actor (as opposed to cultural or institutional) theory of judicial independence in electoral democracies. The theory of *strategic pressure* posits that, in electoral democracies, political competition: 1) increases the benefits to incumbents of dependent courts; 2) increases the number of court cases whose outcomes matter to

incumbents; and 3) fails to increase the costs of exerting pressure on the courts. As a result, weak incumbents (i.e. those who face stronger competition and a higher probability of losing the next election) are more likely to try to extract favorable judicial decisions in a greater number of cases, which leads to the politicization of justice and the subordination of the courts to the executive. I test the predictions of the strategic pressure theory on the judicial output of two electoral democracies—Russia and Ukraine. Empirical analysis of court decisions in disputes about the registration of candidates in parliamentary elections shows that the more competitive regime (Ukraine) exhibits a lower level of judicial independence. This finding is in line with the prediction of the *strategic pressure* theory.

Political Competition and Its Effects on Judicial Independence in Consolidated Democracies

Since political competition is the main explanatory factor considered here, it is necessary to define this potentially loose term. Political competition can encompass two interrelated phenomena: 1) the ideological diversity of the main political actors; and 2) electoral uncertainty. Political competition is low when all viable political actors are basically part of a single governing coalition. In this scenario, even when there is turnover in power, elections are associated with a lower level of uncertainty, because despite some fluctuation in the number of votes different parties get, the governing coalition remains virtually the same. Such a stable broad coalition governed the Netherlands for most of the 20th century and Italy between the 1940s and the 1990s. Political competition can also be low in the presence of significant ideological diversity and even confrontation if there is a dominant political force that consistently wins elections. Then electoral uncertainty is rather low. Mexico and Japan during most of the 20th century represent such examples. On the other hand, the level of political competition is high when there is significant ideological polarization among political actors and, on top of that, election outcomes are uncertain and usually lead to a clear turnover in power.

In consolidated democracies, political competition fosters judicial independence, because it simultaneously increases the benefits to incumbents from independent courts and the costs that incumbents have to incur should they choose to subordinate the courts. The very act of pressuring the judiciary is often costly, even for incumbent politicians. Gely and Spiller (1990, 1992) argue that the greater the disagreement over issues among different veto players, the greater the likelihood that judicial output would not systematically reflect any politicians' preferences. The underlying logic is that when different veto players disagree over the preferred outcome of a given case, the costs of punishing the judiciary for not delivering favorable decisions are higher. This way the courts' discretionary power of interpretation is larger. Whittington (2003) also points out that there are costs associated with mobilizing a coalition and politicians have to expend informational or other resources in order to actually implement the attack on judicial independence. By weakening the incumbents, political competition increases the costs of dependent courts.

The main benefits from independent courts are greater policy stability and a lower probability of legal harassment. Greater policy stability results because independent

courts are likely to ensure that legally enacted policies continue to be implemented even after the politicians who put them in place leave office. Thus incumbents who face a realistic chance of losing office have an incentive to offer independent courts in order to attract support for their policies from interest groups (Landes and Posner, 1975). Another incentive for them to tie their hands through independent courts is that by yielding some policy control while they are in office, they maximize the policy control that they would have after they leave office (Ramseyer, 1994). Yet another motivator for incumbents to establish limited government institutions, such as an independent judiciary, is that they can borrow money at lower interest rates, because the existence of independent courts increases lenders' faith that there is an actor out there who can force incumbents to service their debts (North and Weingast, 1989).

Finally, an independent judiciary provides an institutional mechanism for political competitors to commit to exercising restraint (Stephenson, 2003). In other words, Politicians in competitive regimes may fear finding themselves on the receiving end of politicized justice once they are in opposition. If this fear is strong enough, it causes weak incumbents to refrain from leaning on the courts (Magalhaes, 1999, Yamanishi, 2004). If, on the other hand, incumbents do not fear finding themselves in opposition (for e.g. the LDP in Japan), they would not feel the need to offer independent courts (Ramseyer, 1994; Ramseyer and Rasmusen 1997, 2000, 2001; Stephenson, 2003).

Political Competition and Its Effects on Judicial Independence in Electoral Democracies: A Theory of Strategic Pressure

So why would these theoretical mechanisms not hold in electoral democracies as well? Would incumbents in such regimes not prefer their policies to stick around longer than them? Would incumbents rather not worry about legal harassment after they leave office? Both of those benefits may indeed be very attractive for incumbents in electoral democracies. But what about the benefits of dependent courts? None of the theories discussed above explicitly consider the benefits that incumbents can reap from lowering the independence of the judiciary. These benefits should be quite obvious— having a subservient court means you do not lose individual cases and that is a benefit for all incumbents. Failing to discuss these benefits is tantamount to assuming that they are a constant rather than a variable. Such an assumption seems unwarranted. The benefits of dependent courts should vary in response to different causal factors, just as the benefits and costs of independent courts vary.

The theory of strategic pressure that I propose in this section starts from this simple observation. I argue that dependent courts are much more useful to incumbents in electoral democracies than they are to incumbents in consolidated *democracies*. One reason for this is that electoral democracies often represent a transitional stage that features hectic institution-building, redistribution of resources, oftentimes, the establishment of new norms and informal practices, and occasionally even the promulgation of a new constitution. This period thus provides a "window of opportunity" for incumbents to entrench themselves in power. A dependent judiciary can be extremely helpful to the incumbents' project of tightening their grip on power.

Another reason why incumbents in electoral democracies can reap greater benefits from pressuring the courts is the underinstitutionalization of the party system,

which often plagues these regimes. By underinstitutionalized party system, I mean that most parties lack well-developed grass roots organizations, stable financing, and a party label that transcends the name recognition of the leader. In such context, just a few court decisions can do a lot to damage a party's electoral chances. For example, one court through one single trial during a crucial moment can destroy even major oligarchic structures and thus severely undercut a party's campaign. By contrast, it would be much harder (more costly and more time-consuming) for the courts to systematically persecute the hundreds of individuals and companies who contribute to established parties in consolidated democracies. Similarly, closing down a party newspaper will have much greater impact on that party's popular approval rating if the newspaper is the only channel for communicating with its supporters. The same court decision will have a much smaller effect, if any, on established parties that have a dense network of grass roots organizations through which to energize their base. Finally, many parties in electoral democracies are little more than vehicles for their leaders to participate in parliamentary elections. Thus, a court decision to remove the party leader from the ballot would in effect destroy the whole party. For example, none of the parties headed by major Russian and Ukrainian political players survived their leaders political demise. Our Home is Russia (NDR) disappeared when former Prime Minister Viktor Chernomyrdin was sidelined, Russia's Choice (VR) had to regroup into a different party after former Prime Minister Yegor Gaidar was no longer a major player. In Ukraine, the Social-Democratic Party of Ukraine (united) [SDPU(o)] disappeared altogether after the fall from grace in 2004 of its leader, Kuchma Presidential Administration head, Viktor Medvedchuk.

The second step in the theoretical account that I propose is to explain how political competition would affect the chances that incumbents would offer independent courts. I offer three hypotheses. First, I hypothesize that *intense political competition dramatically increases the benefits that incumbents can derive from pressuring the courts and as a result creates a strong incentive for incumbents to attack the judiciary*. When incumbents are weak they can use subservient courts as campaign instruments to maximize their reelection odds by securing favorable rulings in politically salient issue areas, such as campaign finance, electoral registration, redistricting, or polling station organization. Moreover, weak incumbents can boost their chances of retaining power by using dependent courts as a weapon against their main competitors. For example, a subservient judiciary can severely undermine the opposition by prosecuting its financial backers for tax evasion or fraud, siding with municipal authorities to deny meeting permits for opposition rallies, or prosecuting opposition activists on trumped up hooliganism or vandalism charges.

In addition, political competition manifested in a significant ideological distance between the incumbents and the opposition, should boost the incumbents' desire to hold on to power. After all, if future cooperation between the incumbents and the opposition is not in the realm of possibility, then incumbents should be less willing to cede power. This dynamic also creates an incentive for incumbents to pressure the courts as a way of increasing the probability of remaining in power.

Second, *political competition hinders judicial independence in electoral democracies because it produces a "politicization of justice" effect*[1]. Courts become increasingly embroiled in politics, but their output is dependent on the preferences of incumbent politicians. This trend occurs because during a period of intense political competition, a larger set of cases decided by the courts affect the probability that the incumbents will retain power and as a consequence a larger set of cases become politicized.

Political competition thus creates a strategic incentive for weak incumbents not only to try really hard to win each case they are involved in, but also to attempt to prevent the opposition from winning cases that it has a stake in. By using the courts as attack dogs, incumbents can hope to weaken their competitors or signal strength and thus hurt the opposition's ability to recruit supporters. In other words, weak incumbents will choose to interfere in cases that would seem trivial to strong incumbents. For example, weak incumbents may meddle in business disputes involving companies that support the opposition and pressure the judges to deliver rulings that hurt the opposition's financiers. Or disputes associated with municipal elections may suddenly become a high stakes affair for a weak incumbent who is afraid of ceding any ground to the opposition.

The greater the number of cases that become politicized, the greater number of judges become subject to pressure. And the more judges are affected, the greater the collective action problem that they face if they wish to resist. In other words, despite the weakness of the incumbents, the "strategic defection" mechanism, identified by Helmke (2002), should not work at the district court level[2]. Rather, a "strategic pressure" mechanism results in a higher probability that judges will yield to pressure and deliver rulings biased in favor of the incumbents, thus lowering the level of independent judicial output.

Finally, *political competition does not seem to increase the costs associated with pressuring the courts.* The political resources incumbents need to expend in order to implement an attack on judicial independence seem unrelated to electoral uncertainty. If an attack is construed as passing legislation aimed at curtailing the insulation of the judiciary from the other branches, then weak incumbents would indeed have a harder time implementing or credibly threatening the judiciary with such an attack. However, incumbents can effectively influence judicial output (especially at the district court, rather than the Supreme Court level) through informal and *ad hoc* measures, such as budget cuts, insufficient appropriations, withholding of benefits that judges are entitled to by law, and simply failing to comply with individual rulings (Solomon & Foglesong, 2000). The police and the tax authorities, which are usually controlled by the executive, can also be used to harass individual judges. These are some examples of legal informal

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[1] The term is meant to be the antonym of the "judicialization of politics" concept. The judicialization of politics literature which examines (and largely criticizes) the trend towards the insertion of the courts in the thick and thin of political life focuses exclusively on consolidated democracies. That literature raises concern about judges becoming too powerful and usurping responsibilities that should belong to elected politicians. In other words, the issue in consolidated democracies is too much judicial independence, rather than too little (Stone Sweet, 2000; Guarnieri & Pederzoli, 2002; Hirschl, 2004).

[2] Helmke proposes a "strategic defection" theory of judicial behavior, which posits that when incumbents are weak and on their way out of office, judges have a strategic incentive to resist pressure, and thus produce more independent judicial output. Judges basically fear retribution from the next government and therefore disassociate themselves from the incumbents by ruling against them.

mechanisms through which the executive can coerce the judiciary into delivering favorable rulings. Threats and violence can also work quite effectively. None of these mechanisms requires building broad consensus among the political elites, so intense political competition is not likely to make them more costly.

Whose Courts are Worse? How a Focused Comparison of Russia and Ukraine Can Help Us Test Judicial Independence Theories

To test the strategic pressure theory against traditional political competition theories of judicial independence, I compare court performance in Ukraine and Russia. I select these two countries for comparison, because they are remarkably similar, yet vary significantly on the main variable of interest, namely political competition. The two now-independent-states share a common history since the 9th century and were united in one state until 1991. They also share a virtually identical post-Soviet institution-building and economic trajectory. Russia and Ukraine each passed constitutions in the early 1990s that purportedly established a semi-presidential form of government, which soon enough ballooned into super-presidentialism (Holmes, 1993-1994; Fish, 1997; Easter, 1997; Huskey, 1999; McFaul, 2001; Ishiyama & Kennedy, 2001; D'Anieri, 2003). In addition, Russia and Ukraine's paths from a command to a market economy went through virtually the same stages: price liberalization in the early 1990s, hyperinflation in the mid-1990s, double-digit contraction of the economy, the development of crony capitalism, and finally return to growth in the late 1990s and a booming economy in the 2000s. Each country had a group of powerful oligarchs who amassed personal fortunes, built powerful financial-industrial groups largely through asset-stripping and monopoly government contracts, formed parties and built media empires, and finally held key government positions, which gave them enormous influence over the policy-making process.

However, as Ukrainian politics became increasingly competitive during the 1990s and beyond, Russian politics became less competitive. Well before the massive Putin reelection victory in March 2004 and the Orange Revolution that followed the November 2004 Ukrainian presidential election, Russia and Ukraine had been on a divergent path. This contrast holds whether we define political competition as electoral uncertainty or as the ideological distance between the major political actors. In Russia, the incumbent president has never lost a presidential bid. By contrast, both post-Soviet Ukrainian presidents lost an election. In 1994, Leonid Kravchuk failed to win a second term and in 2004, Leonid Kuchma was unsuccessful in securing the election of his chosen successor, Viktor Yanukovich. In addition, while in Russia only the 1996 was close and unpredictable, in Ukraine each presidential election has been very hotly contested. Finally, Ukraine's main political competitors have vastly divergent visions about the future of their country. The "Orangist" factions want to see Ukraine integrated in NATO and the European institutions, with all the political and economic reforms that this process entails. The Party of Regions, headed by 2004 election loser Viktor Yanukovich, advocates closer ties with Russia. By contrast, any observer of Russian politics would be hard-pressed to identify any significant ideological differences between United Russia and the few remaining parties that purported compete with it. Even the Communists and the supposedly ultra-nationalist, misnamed Liberal Democrats seem to share the goal of

maintaining a stable Russia through moderate nationalism, state intervention in the economy, and assertive foreign policy.

The traditional political competition theories of judicial independence predict that the Ukrainian courts would be relatively more independent than their Russian counterparts, because Ukraine's intense political competition would make incumbents less likely to apply pressure on the courts to deliver favorable rulings. The strategic pressure theory, by contrast, predicts that Ukrainian courts would be less independent, because intense political competition would create a strategic incentive for incumbents to lean on the courts harder and more often.

Judicial independence in electoral registration disputes

To test the predictions of the judicial independence theories, I compare how independent Russian and Ukrainian courts were in deciding electoral registration disputes during the early 2000s. Such cases are potentially very salient to incumbents—deciding who can contest elections and who cannot can have profound impact on the incumbents' probability of remaining in power. Clearly, the surest way to ensure one's victory on election day is to exclude all major competitors from the race altogether. Threatening an opponent into dropping out can be messy. But if a court took down the competitors' registration for alleged violations of electoral law, then the remaining viable candidate could claim an easy *and* clean victory.

As a result of this strategic calculation, the Russian and the Ukrainian courts played an important role in shaping the final roster of candidates who contested parliamentary seats throughout the 1990s and 2000s. During the 2002 and 2003 parliamentary elections, at least 134 candidates in Ukraine and 118 candidates in Russia went to court to either defend their registration or challenge an opponent's registration. Moreover, most of these candidates were not also-rans, but viable contenders for seats. In fact, 18% of the single-mandate-district (SMD) winners in both Russia and Ukraine were involved in electoral registration court cases[3].

The data sets

To answer the question of whether the Ukrainian and Russian courts applied election law provisions impartially in electoral registration disputes, I started with data sets that included all candidates who vied for a seat in one of the 225 single-mandate districts (SMDs)—3084 people in Ukraine and 3018 in Russia. Information on all candidates, rather than only those who participated in court proceedings, is essential to the process of evaluating court bias. In order to understand whether electoral registration lawsuits were politicized, we need to know who were those not involved in court cases in the first place.

In both Russia and Ukraine, the Central Election Commission (CEC) provides information on the political affiliation, previous election experience, age, gender and occupation of each candidate. The CEC also lists the final vote tally in each SMD. In

[3] Calculations by the author on the basis of information from Ukraine's Central Election Commission and multiple Russian sources (newspaper coverage, interviews with candidates, court websites, regional election commission websites, etc).

Ukraine, the CEC compiled a set of court decisions delivered by district courts during the campaign (Tsentral'na Viborcha Komisiya, 2002). Unfortunately, the CEC electoral registration dispute collection does not provide court decisions from 10 of Ukraine's 25 regions, which all together contain 90 of the 225 SMDs. Fortunately, the incomplete information should not skew the results of the analysis in any significant way, because the excluded districts come from all parts of the country—the industrial, pro-presidential East, the nationalist West, and the rural, Communist and Socialist-leaning South. After this exclusion, my data set includes information on all 1953 candidates who set out to run in 135 SMDs and participated in 134 electoral registration disputes[4].

In Russia, the CEC does not provide systematic information on electoral registration disputes. What it does provide is a media coverage section, which is an extensive compilation of articles from the national and regional media that deal with campaign issues. The section provides information on quite a few court cases, but its collection could be biased as it may cover only the cases involving more famous candidates. To avoid this potential pitfall, I contacted the election commissions in each of the 89 subjects of the Russian Federation and asked for information on electoral disputes adjudicated in their region during the 2003 campaign. I also contacted all regions' highest courts and searched the decisions database of the Supreme Court of the Russian Federation. Finally, I scoured reports by election monitoring NGOs *Assotsiatsiya "Golos"*. These information-gathering techniques yielded information on 118 cases decided in 141 of the country's 225 SMDs, where a total of 1974 candidates ran for a seat. As in the Ukrainian data set, the excluded regions represent the entire political spectrum— from reformist regions, through moderate and Red Belt communist regions, to authoritarian ethnic republics[5].

Finally, I collected information on the viability of each of the candidates who were initially registered in the SMDs, whose electoral dynamics I analyze. During the roughly two months between registration and election day, both the regional and national press covered the SMD races and identified the main contenders for most seats. Many local newspapers ran series of articles on their region's SMDs and pointed out who were viable ("*prokhodnye*") candidates in each okrug. In addition, think tanks and pollsters conducted weekly public opinion polls in many districts and sifted the candidates who had a shot at a victory from the also-rans. Using a diverse set of sources, I identified 283 candidates in Russia (14% of the sample) and 255 candidates in Ukraine (13% of the sample) as viable contenders with a realistic chance of winning their district seat.

Table 4.1 lists the main cumulative figures that describe the two samples. The data are highly comparable as each country's sample includes roughly the same number of SMDs and the same number of candidates. Moreover, the rates at which candidates go to court are roughly the same. This similarity suggests that Russian and Ukrainian

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[4] 15 of Ukraine's 25 provinces are included in the sample. These regions are: Krym AR, Vinnytsia, Volyn, Chernihiv, Zakarpattia, Zaporizhzhia, Kyiv, Kirovohrad, Lviv, Mykolaiv, Odessa, Poltava, Ternopil', Kharkiv, Cherkasy, Kyiv, and Sevastopol.

[5] 45 of the 89 subjects of the Russian Federation are included in the sample. These regions are: Buryatiya, Karelia, Komi, Marii-El, Tatarstan, Chuvashiya, Krasnoyarsk, Astrakhan, Bryansk, Volgograd, Novosibirsk, Chelyabinsk, Primorskii Krai, Stavropol, Khabarovsk, Amur, Arkhangelsk, Ivanovo, Irkutsk, Kamchatka, Kurgan, Kursk, Moskovskaya oblast, Nizhnii Novgorod, Novgorod, Omsk, Orenburg, Perm, Pskov, Rostov, Ryazan, Samara, Saratov, Sverdlovsk, Smolensk, Tver, Tomsk, Tula, Tyumen, Ulyanovsk, Yaroslavl, Moscow, St. Petersburg, Nenetsk, and Khanty-Mansy.

candidates have roughly the same proclivity towards using the courts to resolve electoral disputes, rather than extra-judicial methods and venues. It also suggests that the courts in both countries are roughly equally used as an important arena for the implementation of "electoral technologies". The general win-rate is also similar and around 50% in both countries. The one major difference is that there were more competitive districts in Ukraine than in Russia, which is additional evidence that political competition, exemplified by electoral uncertainty, is higher in Ukraine than in Russia.

Table 4.1: Descriptive statistics of the electoral registration data sets

	Russia	Ukraine
Number of candidates who:		
• Ran in all 225 SMDs	3018	3084
• Ran in the SMDs in the sample	1974	1953
• Participated in a registration dispute	118	134
• Participated in a registration dispute and then won the SMD seat	26	24
• Were viable from the start of the campaign	282	255
Information about the SMDs:		
• SMDs in the sample	141	135
• Number of competitive districts	52	72
• Average number of candidates per SMD	14	14
Information about the court cases:		
• Total number of cases in the sample	118	134
• Number of losses	66	61
• Number of victories	52	73
• Win-rate at trial for all candidates	44%	54%

The legislative framework for electoral registration disputes

Russian and Ukrainian courts heard three types of electoral registration cases during parliamentary campaigns. The first type involved candidates who submitted documents declaring their intention to run in a single-mandate district, but had been denied registration by a District Election Commission (DEC). Many of these individuals filed court appeals asking the court to direct the DEC to register them. The second type of dispute involved candidates whose existing registration had been revoked by a DEC. Some of these individuals went to court seeking to overturn the DEC decision and get back on the ballot. And the final category of litigants were candidates, ordinary citizens, and election commission officials who appealed to the court to take down a candidate's

valid registration for alleged election law violations[6]. Both Ukrainian and Russian electoral law stipulate that any DEC decision or action can be reviewed by a district court. Both laws also provide litigants with the option of challenging any perceived failure to act on the part of DEC in court (Law On the Election of People's Deputies of Ukraine, Art. 29; Law On the Election of Deputies of the State Duma of the Federal Assembly of the Russian Federation, Art. 94 and Art. 95). For example, if a candidate files a complaint with the DEC that one of his opponents has been violating election law provisions, but the DEC simply ignores the complaint or decides that it is unfounded the unsuccessful complainant can take his or her case to court.

The content of the election laws is important for my analysis in so far as neither law overtly favors pro-government litigants or hurts opposition-affiliated litigants. Imagine, for example, that one law gives pro-government candidates carte blanche to use administrative resources, while the other law provides stiff penalties for such practice. In such a scenario, any difference that we observe between the two countries in the win-rates of different types of litigants is likely to stem as much from the bias built into the law as from any bias at the court. Consequently, we would not be able to derive a measure of judicial independence from a comparison of the win-rates of different types of litigants.

Fortunately, both the Russian and the Ukrainian laws pass muster. According to the OSCE, the Ukrainian law "provides an adequate framework for the conduct of democratic elections" (OSCE/ODIHR, 2002, p. 6). The OSCE's assessment of the Russian law is virtually the same—"[the] legal framework is generally consistent with OSCE commitments and other international standards relating to democratic elections" (OSCE/ODIHR, 2004, p. 4).

More specifically, both laws ensure that both pro-government and opposition parties get DEC representation (OSCE/ODIHR, 2002, p. 6; OSCE/ODIHR, 2004, p. 4). This guarantee suggests that DECs in both countries should behave similarly during the registration process. For example, we have no reason to believe that Russian DECs were more likely than Ukrainian DECs (or vice versa) to deregister opposition candidates on shaky grounds, which would in turn result in oppositionists in one country going to court with consistently stronger cases, than oppositionists in the other country. Both laws also contain formal measures designed to minimize the use of administrative resources, such as: a requirement that candidates enjoy equal access to any facilities of regional governments, an explicit ban on government officials engaging in campaign activities, and penalties for bribing voters. Both laws also stipulate that candidates who lie about their income can be denied registration or deregistered. Finally, both laws provide clear, open, and transparent appeal procedures through which contestants can take cases to court (OSCE/ODIHR, 2002, p. 6; OSCE/ODIHR, 2004, p. 4).

What can a litigant's political affiliation tell us about judicial independence?

I hypothesize that when judicial independence from politicians is low, the political affiliation of litigants is a significant predictor of success in court. In the case of

[6] In all case types, the litigants relied on Art. 29, par. 2 of the Law On the Election of People's Deputies of Ukraine, and Art. 18 par. 11 of the Law On the Election of Deputies of the State Duma of the Federal Assembly of the Russian Federation.

electoral registration disputes, if judicial independence from politicians is low, pro-government candidates will win more often than anybody else, *ceteris paribus*, and opposition candidates will win less often than anybody else, again *ceteris paribus*. The size of the difference between the chances of victory of pro-government and opposition candidates is thus a direct measure of the level of judicial independence from politicians—the larger the difference, the lower the level of judicial independence.

When examining the relationship between candidates' political affiliation and their chances of success in court, we need to control for other factors that may affect judicial decision-making. I will argue that, in addition to the political affiliation of the litigant, electoral registration trial outcomes depend on: case merit, a candidate's viability, and the competitiveness of the district[7].

Case merit. Ideally, the rule of law doctrine envisions a legal system in which case merit, determined impartially and faithfully by the judiciary on the basis of the laws on the books, should be the one and only predictor of victory in a court. The stronger the case, the higher the probability of success for the plaintiff who brings the case to court. Plaintiffs who file frivolous or weak cases, on the other hand, should lose more often than other litigants. It is, therefore, essential to know whether the political affiliation of the candidates is highly correlated with case merit or not. If candidates of one political stripe have systematically stronger cases, then we should, in fact, expect an impartial and independent court to side with them more often than with other candidates.

Candidate viability. Viable candidates are both more likely to participate in a court case and more likely to eventually win in court. By viable candidates, I mean those who were widely believed to be among the top contenders for a given SMD seat at the outset of the campaign, before any registration disputes could arise. Candidates who have a realistic chance of winning the seat from the outset of the campaign should definitely be more likely than the average candidate to fight a decision by the DEC to cancel their registration. In addition, viable candidates probably also become the target of court challenges by their opponents more often than candidates who stand no chance of gathering a significant percentage of the vote. For starters, it seems like a waste of time and resources to try to take down the registration of someone who does not threaten your chances of winning the seat. Moreover, even if the challenge of a powerful

[7] In addition, the degree of legal expertise that a candidate has at his or her disposal might also affect the likelihood of going to court and winning, not just for front-runners, but for all candidates regardless of their rating going into the campaign. For one, a candidate with a legal background or strong representation is likely to be quicker to detect any election law violations committed by his or her competitors. Naturally, such a candidate should also be more likely to bring a lawsuit to court, as well as appeal a DEC decision to deregister him or her. And, it almost goes without saying, legal expertise should increase a candidate's chances of winning in court, all other factors being equal. I collected data on the personal legal expertise of the candidates (whether the candidate herself was a jurist), but the variable was not significant in any of the models and had the opposite sign. The decision to omit it from the analysis, however, stems from the fact that I could not find data on the strength of candidates' legal representation, which should be the more relevant operationalization. Even if I could track down such information, I expect it to be highly correlated both with a candidate's administrative resources (i.e. political affiliation with the incumbent regime) and with his or her viability. Since these variables are included in the model, the only omitted variable bias that this analysis may suffer from might be a slight overestimation of the influence of viability and administrative resources on the court. The overestimation, however, should affect both states to a similar extent, so it should not affect conclusions about the relative level of judicial independence in Russia and Ukraine.

opponent's registration fails in court, the plaintiff can probably claim that the defendant escaped punishment either due to a technicality or thanks to corrupting or pressuring the judge into delivering an unfair ruling. Given the low esteem in which the public holds both judges and politicians, many voters would probably be inclined to believe the alleged misdeeds even if the charges do not stick. Therefore, lawsuits and counter-lawsuits could be an effective "black PR" strategy for viable candidates. In other words, viable candidates should be more likely to become involved in electoral registration lawsuits.

Electable candidates probably also have a higher probability of winning in court than also-rans. The first reason why this advantage may exist is that even the most impartial judges would probably be reluctant to deregister a candidate who appears headed for an election victory, because such an act seems counter-majoritarian and somewhat undemocratic. Of course, it is crucial to find out whether only pro-presidential candidates enjoyed this advantage or whether it extended to opposition nominees. Another reason why viable candidates might have a better batting average in court is that they probably, on average, devote more resources to the legal fight. Since their stakes in the ultimate outcome are higher, it seems reasonable to assume that they would try harder to influence the race (Priest & Klein, 1984).

District Competitiveness. Finally, I hypothesize that the probability of being involved in a court case in the first place is affected not only by the candidate's characteristics, but also by environmental factors. Specifically, it seems that competitive districts should yield more court cases than districts where the campaign is but a chronicle of an election victory foretold. Both meritorious and frivolous lawsuits should be more numerous in competitive districts. "True" cases should abound because candidates are more likely to push the limits of acceptable campaigning when they are facing stiff competition. For example, all leaders in the polls with access to administrative resources would mobilize them if their opponents were breathing down their necks. Frivolous lawsuits would also occur more frequently, since, as I previously mentioned, they can be an effective campaign strategy.

Measuring the independent variables

Case merit. It is all but impossible to capture case merit in an observable variable. If we could, judges and courts would be superfluous. It is also extremely hard to capture judges' true perceptions of case merit, not least because judges themselves may find it impossible to distinguish between faithful interpretation of case merit according to the legal text and their personal prejudices on the subject or preconceptions about the litigants.

Case merit is basically unobservable in individual cases, but it is important to know whether as a variable it might be correlated with our main variable of interest, candidate political affiliation, in order to avoid potential omitted variable bias. In other words, if we happen to find out that pro-government litigants win more often than other litigants, we want to know whether that is because they have stronger cases on average, or whether it is because judicial independence from incumbents is low and judges have to deliver favorable rulings.

We can assume that both in the Russia and in Ukraine pro-governmental candidates did not have stronger cases than other litigants. If anything, as the main beneficiaries of the practice of using administrative resources (which is an electoral law violation in both countries), pro-government candidates should have weaker cases both as litigants and as defendants. Finally, given electoral technologies that allowed the incumbents to stack the DECs with loyal representatives, we can also assume that most DECs would be reluctant to deregister a pro-government candidate. When they did, they were probably responding to particularly egregious electoral law violations. This dynamic should also lead to pro-government candidates having weaker cases than everybody else.

Domestic and foreign election monitors in both countries cited ample evidence to support these assumptions. The administrative resources and mechanisms employed in both campaigns to boost pro-presidential candidates and hurt oppositionists were very similar. Both the Committee of Voters of Ukraine (CVU), the country's largest NGO devoted to monitoring campaigning, and the OSCE/ODIHR observers reported high levels of administrative resource use (Committee of Voters of Ukraine, 2002; OSCE/ODIHR, 2002, p. 12). In Kharkiv oblast, for example, CVU representatives noted that the oblast administration bused people to attend a public "Youth Forum for a United Ukraine", distributed leaflets and encouraged everyone to support the For United Ukraine (Za Edu) bloc. In Chernihiv, professors and students from local universities were required to take part in a state-organized rally for Za Edu. And in Kyiv, local businesses who refused to purchase Ednist (Mayor Omelchenko's party) election materials received warnings from city officials to expect rent increases and frequent tax and fire inspections after the election (Committee of Voters of Ukraine, 2002). OSCE observers reported that in Lviv, the head of the local branch of Za Edu distributed free coal and used state vehicles during working hours. In Kharkiv, citizens received free electrical appliances along with notes soliciting votes for Za Edu (OSCE/ODIHR, 2002, p. 13).

In Russia, the main beneficiary of administrative resources was United Russia. OSCE observers noted that regional governments often supplied all the equipment and most services to the local United Russia campaign headquarters. Opposition candidates, on the other hand, often did not receive permits from the regional authorities to hold

rallies and could not find public organizations willing to provide them space to hold meetings. The OSCE also received numerous complaints about police detaining oppositionists' campaign workers and impounding opposition campaign materials (OSCE/ODIHR, 2004, p. 5).

Some will argue that the OSCE was biased against the incumbents in both elections and as a result painted a skewed picture of the situation. Maybe these were no-holds-barred campaigns, in which all competitors used every dirty campaign trick in the book. If the opposition lagged behind the presidential supporters in administrative resources, it compensated in illegal campaign financing by friendly oligarchs and maybe even the USA. This theory was the leitmotif of pro-presidential election technologists and CIS and Russian observers in Ukraine. The official publication of the Russian government, Rossiiskaya Gazeta, hinted that the 5mln USD earmarked by the USAID for programs aimed at ensuring the transparency of the elections, was in fact spent on behalf of Nasha Ukraina's campaign, which of course would be a violation of election law (Bogdanov, 2002). Even if this were an accurate description of both parliamentary campaigns, no one has attempted to argue that oppositionists were the main perpetrators of campaign rules violations, so we can safely dismiss the possibility that the pro-presidential candidates who went to court had stronger cases, all else being equal.

District Competitiveness. It seems reasonable to assume that the difference between the number of votes that the winner receives and the number of votes that go to the runner-up captures the competitiveness of the campaign. Given this operationalization of the concept, both countries display a wide variation in district competitiveness. In Russia, the closest majoritarian race took place in SMD #163 in Sverdlovsk Oblast, where incumbent Duma deputy Georgii Leont'ev beat provincial oligarch Aleksandr Ryavkin by only 5 votes! By contrast, in Saratov's SMD#156, the deputy leader of United Russia's Duma fraction, Vyacheslav Volodin, overtook his KPRF opponent, Ol'ga Alimova, by more than 250,000 votes, winning 82% of the vote to her 9%. In the closest Ukrainian race in Odessa's SMD #135, pro-presidential candidate Ihor Reznik defeated independent Serhii Bovbalan by 0.25% or 260 votes. At the other end of the spectrum, in Ternopil's district #168, Nasha Ukraina's nominee Mihailo Polyanchich beat his closest competitor, independent Oleg Povadyuk, by 69% or 92,290 votes.

Instead of using the continuous variable, however, I created a DistComp dummy variable, where I assigned 1s to all SMDs where the difference between the winner and the runner-up was under 10%. After applying this coding scheme, I ended up with 72 competitive districts in the Ukrainian sample (53% of the total) and 52 competitive districts in the Russian sample (37% of the total). This result is in line with all the other pieces of evidence that the Ukrainian election was more competitive than the Russian election. The rationale for using a dummy variable, which required me to choose a cut off point, which is inherently somewhat arbitrary, is that beyond a certain threshold an increasing difference between the two top vote getters stops reflecting competitiveness. Whether the winner beats his closest rival by 25 or 45 percentage points does not really seem to matter much—in both cases the race seems rather uncompetitive.

An important caveat of measuring district competitiveness through election results is that if a major competitor is deregistered by the courts and cannot participate in the election, an extremely competitive district may appear uncompetitive if we only look

at the election outcome. To avoid this problem, I classified the five Ukrainian and seven Russian SMDs, where a viable candidate was deregistered, as competitive, regardless of the size of the difference between the winner and the runner-up[8].

Candidate Viability. Capturing candidate viability in a variable is even more challenging and definitely more labor intensive than gauging district competitiveness. To estimate candidate viability prior to the election, rather than after it, I scoured the regional and national press for assessments by people familiar with the politics of each SMD. While some publications surely exaggerate the chances of success of the candidates they support, if the exaggeration is of staggering proportions, then the candidate probably has significant resources. In a way such exaggerations indicate that the candidate is in this race for real and acts *as if* he or she were a viable contender for the seat, which for the purposes of this analysis is as important as actual viability.

A final source of viability assessments are public opinion polls conducted by regional research institutes and NGOs during the campaign. For example, the Institute for Regional Issues (*Institut Regional'nykh Problem*) in Odessa conducted weekly polls on a sizable sample of 2064 respondents and calculated the approval rating of all candidates in the Odessa oblast SMDs. The Institute's reports identify the viable candidates in each SMD (Institut Regional'nykh Problem, 2002). For the Russian sample, I used the assessments contained in the Russian Regional Report[9] and reports by Group 7/89[10].

Political Affiliation. I created two dummy variables to capture a candidate's political affiliation— a pro-government variable, which assigned 1s to all candidates who had the incumbent regime's backing and an opposition variable, which assigned 1s to all candidates who openly challenged the incumbent regime.

In 2003, the Kremlin openly supported one party, United Russia, so all its candidates in the SMDs were unambiguously pro-presidential. United Russia ran 100 candidates in the 141 SMDs in the sample. In most of the districts where United Russia did not put forward a candidate, the federal center nevertheless threw its weight behind one of the candidates. I classified 55 candidates as unofficially supported by the Kremlin. I was conservative in identifying such candidates because of a tendency by the regional press to exaggerate certain candidates' ties to the center. Since Putin's stamp of approval carried enormous political value due to his popularity, independent candidates and nominees of parties other than United Russia had a strong incentive to portray themselves as being close to the president. I expected that the regional press that often publishes pre-paid articles and passes them off as reporting or editorializing would reflect this bias. Therefore, to classify independent candidates as Kremlin protégés, I used only objective criteria such as an official endorsement by the *United Russia* leadership or by

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[8] In Ukraine, these SMDs were #6, 71, 99, 147 and 148; In Russia— #9, 47, 96, 97, 120, 159 and 179. There were, of course, SMDs where non-viable candidates were deregistered. However, since these candidates were not expected to be affect the overall result of the race, I assume that their deregistration also had no effect on the district's competitiveness.

[9] A bi-weekly publication jointly produced by the Center for Security Studies at the Swiss Federal Institute of Technology (ETH) Zurich, http://www.isn.ethz.ch (8 May 2006) and the Transnational Crime and Corruption Center (TraCCC) at American University, Washington, DC, http://www.American.edu/traccc (8 May 2006).

[10] *Gruppa 7/89 Assotsiatsiya Regional'nykh Sotsiologicheskikh Tsentrov*, is an organization of 17 regional polling agencies, who conduct public opinion research, http://www.789.ru/portal/index.php (8 May 2006).

the governor, if the latter was a member of United Russia. For example, Vyacheslav Shport in Khabarovsk and, the Nizhnii Novgorod governor's wife, Gulii Khodyreva, fit the bill (Tselobanova, 2003; Sokolov, 2003). Finally, some candidates, such as former Minister of Justice, incumbent Duma deputy and head of the Duma's Committee on Law-making, Pavel Krasheninnikov ran both in an SMD and on United Russia's federal list (Grankin.ru, 2004). Thus, even though in the Magnitogorsk SMD he was officially an SPS nominee, I classified him as a candidate supported by the federal center.

I also classified as pro-presidential some "technical candidates" for United Russia (UR) and any existing "clones" of UR nominees' main rivals in each district. The main goal of "technical candidates" in entering the race was either to campaign in favor of the United Russia nominee and pull out of the race in favor of the principal a few days before election day or to take away votes from a viable competitor. Such candidates were, for example, Igor' Artemenkov in Moscow's SMD #200, who withdrew from the race in favor of eventual winner, Vladimir Vasil'ev, and Anatolii Shiryaev in Volgograd's SMD #72, whose task was take away votes from the Communist, Aleksandr Kulikov, in order to bolster the chances of victory for *United Russia* nominee, Aleksandr Ageev (Artemenkov, 2004; Kuts, 2006). Corroboration that a candidate named "Sergei Vladimirovich *Kprf*" (Ryazan SMD #149) had a single-minded mission to undermine the KPRF nominee in the district seems unnecessary. "Clones", or candidates who share the same family name as a viable candidate, also register with the sole purpose of confusing voters and thus lowering the viable candidates' final tally.

Deciding who the opposition was in Russia in 2003 also required making some analytical choices. Ostensibly and rhetorically United Russia faced opposition from all sides. From the left—in KPRF and Rodina; from the democratic right—in SPS and Yabloko; and from the far right—in LDPR. In reality, however, Rodina and the LDPR were hardly a veritable opposition to the incumbents[11]. The voting record of the LDPR in the 3rd Duma shows that their leader's inflammatory pronouncements were empty bravado and the party was more useful than harmful to the Putin administration, because it provided an outlet for disgruntled voters, yet behaved loyally and predictably in parliament (Levada, 2004, p. 49). Rodina also postured as opposition, but the extensive media coverage that it received led many observers to believe that the Kremlin saw Rodina as a useful and acceptable version of the KPRF. There were indeed reports that the Kremlin (and more specifically, deputy head of the Presidential Administration, Vladislav Surkov) created Rodina, which was to play the role of a "technical party" for United Russia[12].

The Kremlin's attitude towards Yabloko and SPS was ambivalent. On the one hand, many believe that the main trigger of Khodorkovski's arrest and prosecution was his decision to fund Yabloko and the SPS, which suggests that the Kremlin perceived the democratic parties as dangerous competitors, which could undermine its goal to garner a constitutional majority for United Russia (Mereu, 2003). In addition, Rodina's anti-SPS

[11] McFaul and Petrov (2004) actually argue that LDPR and Rodina were basically part of an informal pro-Kremlin coalition with United Russia.

[12] There are probably dozens of articles alleging that the Kremlin created Rodina. For a succinct formulation of the idea see an interview with Ol'ga Sagareva, Dmitrii Rogozin's press secretary who later wrote a tell-all book about Rodina and an article on the popular *Comporomat.ru* website (Sagareva, 2004; Ishchenko, 2004).

tirades also might have been indirect digs by the Kremlin. But, on the other hand, Putin appeared with SPS leader Chubais a few days before the election, which could be interpreted as a token gesture of support by the Kremlin. Khodorkovski himself actually ventured a radically different take on the presidential administration's relationship with the right opposition. He argued that for the first time since 1991, the Kremlin simply refrained from actively supporting the SPS and Yabloko and both floundered in the polls as a result of their inherent unpopularity with the electorate (Khodorkovskii, 2004).

Following the different interpretations, I constructed four political affiliation dummy variables— two to capture opposition status vis-à-vis the regime and two to reflect pro-presidential bloc affiliation. The first opposition variable, *KremOpp1*, codes only KPRF nominees and independents openly aligned with the Communists. The second one, *KremOpp2*, also includes SPS and Yabloko nominees, as well as the independents these parties campaigned for. The first pro-presidential variable, *KremBacked1*, codes only United Russia nominees and independents overtly supported by the Kremlin. The second variable, *KremBacked2*, includes also LDPR and Rodina nominees, as well as protégés of these two parties.

Classifying Ukrainian candidates according to where they stood along the main pro-presidential/anti-presidential cleavage also required in-depth investigation of local politics and the background of smaller parties. The first complication arose from the fact that a lot of candidates registered as independents, but in effect belonged firmly to one of the two camps. An initial cut at the problem was to look at the party affiliation that each candidate was required to report in his or her registration application. It seems evident that a self-nominated candidate who is a member of SDPU(o) or one of the constituent members of the Za Edu bloc (Kinakh's Trudova Ukraina or Yanukovich's Partiya Regioniv, for example) would not be a "true" independent.

Another obvious step in the proper identification of the political leanings of each candidate was to code all "clones" as political opponents of the viable candidate in their district, whatever his or her political affiliation. Since clones register only to take away votes from viable contenders, they cannot possibly be independent players. The final easy step was to code the major party and bloc representatives along the pro-government/opposition cleavage. The pro-presidential forces included Za Edu and all its constituent parties, SDPU(o), Zhinki za Maibutne, Democratic Party-Democratic Union, and the Green Party. The opposition camp consisted of Yushchenko's Nasha Ukraina, Simonenko's Communist Party of Ukraine, Moroz's Socialist Party of Ukraine and the Yuliya Timoshenko Bloc.

The incumbents' desire to split every portion of the opposition vote was also fairly transparent. To this end, several party "clones" sprung up shortly before the campaign started. Narodnyi Rukh Ukrainy Bloc (which included the National Rukh of Ukraine For Unity) aimed to steal nationalist votes from Nasha Ukraina, which contained the "real" Rukh, but it was not particularly successful at the national level. It garnered only 0.16% of the vote or around 40,000 votes. Komanda Ozimoho Pokolinnya (KOP) had the task of attracting young liberal voters who would otherwise probably support Nasha Ukraina. This ploy worked better as KOP got over half a million votes (2.02%). The Communist Party of Ukraine (renewed) was also somewhat successful in splitting the communist vote and received 1.39% of the vote. The 362,712 votes that went to KPU(o) constituted 7% of the communist vote. Finally, the Natalia Vitrenko Bloc was

designed to mop up the votes of people frustrated by the loss of the Soviet social safety net, but for some reason reluctant to support the Communists. The bloc's leader was also a rather effective attack dog, who constantly spewed conspiracy theories about Yushchenko's ties with the US and even the Nazis. Vitrenko's cozy relationship with the incumbents was evident from her wide media exposure. Given her extremist anti-market rhetoric, one would think that the oligarchs close to the president would dislike her as much as they feared Communist leader Simonenko. Yet Vitrenko was all over national TV, while Simonenko was almost completely shut out (Wilson, 2002).

Table 4.2 provides comparative descriptive statistics on the political affiliation of the candidates in the Ukrainian and Russian samples. The data show that in both countries the groups of opposition-affiliated and government-affiliated candidates are roughly equal. However, in Russia, the proportion of neutral candidates was much higher than in Ukraine, perhaps as a reflection of the lower level of political competition in Russia.

Table 4.2: Descriptive statistics of candidates' political affiliation

Type of candidate	Russia	Ukraine
Opposition affiliation	KPRF and its protégés only: 158 (8%) KPRF, SPS, and Yabloko: 300 (15%)	500 (26%)
Pro-government affiliation	UR and its protégés only: 159 (8%) UR, LDPR, and Rodina: 314 (16%)	545 (28%)
Neutral affiliation	Higher estimate: 1657 (84%) Lower estimate: 1360 (69%)	908 (46%)
Total	1974 (100%)	1953 (100%)

Sartori selection model of court appeal rate and win rate: multi-stage win-rate analysis of judicial independence

In order to test the proposed hypotheses and determine what candidate and district characteristics can best predict which way the court would go in a dispute over electoral registration, I estimated a Sartori selection model with candidate court experience as the dependent variable. The Sartori estimator is a selection-effects model, which is appropriate to use in cases when the dependent variables in the selection equation and the outcome equation might have correlated error terms. In the case of electoral registration disputes, the decision to pursue a court appeal and the trial outcome are probably both affected by similar unobservable variables, such as case merit. The Sartori estimator assumes that the correlation between the error terms is 1. While such an assumption is probably wrong, the estimator is very robust to that assumption being wrong, whereas the Heckman model (which is a more venerable selection model) is less robust. Moreover, unlike the Heckman, the Sartori estimator allows us to use the same independent variables in both equations. Since the decision to go to court is probably affected by the

exact same factors as the ultimate court decision, and the two decisions are close together in time, the Sartori estimator is more appropriate than a Heckman estimator (Sartori, 2003).

The two binary dependent variables of the selection and the outcome equation (decision to go to court and trial outcome) are coded in one trichotomous variable. If a candidate did not participate in any court proceedings during the campaign, he or she received a 0 for court experience. All candidates who went to court to demand the cancellation of an opponent's registration, to appeal their own deregistration, or to defend their registration from an opponent's challenge but did not win in court received a 1. Finally, all candidates who scored a victory in court received a 2. The independent variables include the main variables of interest, pro-government and opposition affiliation, as well as the control variables: candidate viability and district competitiveness. The two models' coefficients are summarized in Table 4.3[13]:

Table 4.3: Results of Sartori Models for Russia and Ukraine

Candidate and District Characteristics	Coefficient (standard error)	
	Russia	Ukraine
Selection Stage: Decision to go to court		
Viability	.90***	.78***
	(.12)	(.11)
Pro-government affiliation	.24	.08
	(.15)	(.11)
Opposition affiliation	.26*	.15
	(.16)	(.11)
District Competitiveness	.30**	.06
	(.10)	(.09)
Constant	-2.01	-1.75
	(.08)	(.09)
Outcome Stage: Court decision		

[13] I estimated four models for each country with different specifications of the pro-government and opposition variables. The results for the most part were the same. One interesting finding from the Russian models is that LDPR candidates seemed to have a significantly lower probability of winning in court, so including LDPR either in the pro-government or in the opposition-camp led to that camp posting a disadvantage in court. Given reports that LDPR has for years been "leasing" its party label to unabashed criminals seeking to get immunity from prosecution which comes with a parliamentary seat, it should not be too surprising that LDPR nominees often faced insurmountable registration hurdles. In interviews, judges often expressed concern about the "infestation" of parliament by criminal elements, so LDPR's disadvantage probably has little to do with the interests of the center and more to do with judges' personal preferences to keep criminals out of contention. In the model reported in this chapter, the LDPR is neither opposition, nor pro-government.

Viability	1.34***	.96***
	(.16)	(.12)
Pro-government affiliation	.20	.30**
	(.17)	(.14)
Opposition affiliation	.12	.12
	(.19)	(.15)
District Competitiveness	.13	.00
	(.13)	(.11)
Constant	-2.57	-2.17
	(.13)	(.12)
Number of observations	1974	1953
Log likelihood	-455	-538
Wald X^2	116.88	64.56

Note: *p <.1 one-tailed test; ** p <.05 one-tailed test; *** p <.01 one-tailed test

The statistical models confirm the hypothesis that viable candidates participate and win court cases more often than non-viable candidates. This relationship is strong in both countries and we can be very confident that it exists. The tendency of viable candidates both to go to court more often and to win more often could reflect these candidates' higher level of commitment to the race. The result, however, also lends support to much-discussed anecdotal claims that registration disputes were a prominent weapon in the black PR arsenal and therefore viable candidates were both the main perpetrators and the main victims of such cases.

The rest of the results indicate substantial differences between how courts decided registration disputes in Russia and in Ukraine. In Russia, candidates running in competitive districts were significantly more likely to become involved in a court case. The more optimistic interpretation of this result suggests that candidates were trying in earnest to play by the rules, but those who tried to get the upper hand in a very close race, predictably crossed the line into forbidden campaign tactics more often, which resulted in the significantly larger number of disputes in competitive districts. The more cynical interpretation is that the use of "election technologies" was more prevalent in the highly competitive districts where viable candidates dug up dirt on each other and tried to use it to derail competitors' quest for the seat. Finally, the fact that opposition candidates in Russia elected to go to court more often than other candidates supports anecdotal observations that opposition candidates had more registration problems than pro-government candidates.

The Ukrainian data, however, hint at an even worse situation than the cynical Russian scenario. It seems that during the 2002 Rada campaign candidates sued each other regardless of whether the race was competitive or not. There are two ways to account for this outcome: 1) either candidates had complete disregard for election law

provisions and violated them even when a victory seemed secure; or 2) candidates brought cases to court that had very little merit, just because getting your main opponent deregistered could give the seat even to a candidate with very slim chances of winning an honest campaign.

The most important result, however, is that in Russia the political affiliation of the litigant has a smaller effect on a candidate's probability of victory in an electoral registration trial. The coefficients indicate that any advantage that Russian pro-government candidates may enjoy in court is about two thirds the size of the Ukrainian pro-government candidates' advantage. Moreover, the Russian coefficient is not statistically significant, which suggests that we are not certain that such an advantage really exists. In Ukraine, on the other hand, pro-government candidates enjoy a significant advantage when their registration disputes end up in court. This contrast suggests that judicial independence from politicians is lower in Ukraine than in Russia, as Ukrainian judicial output consistently reflects the preferences the incumbent regime.

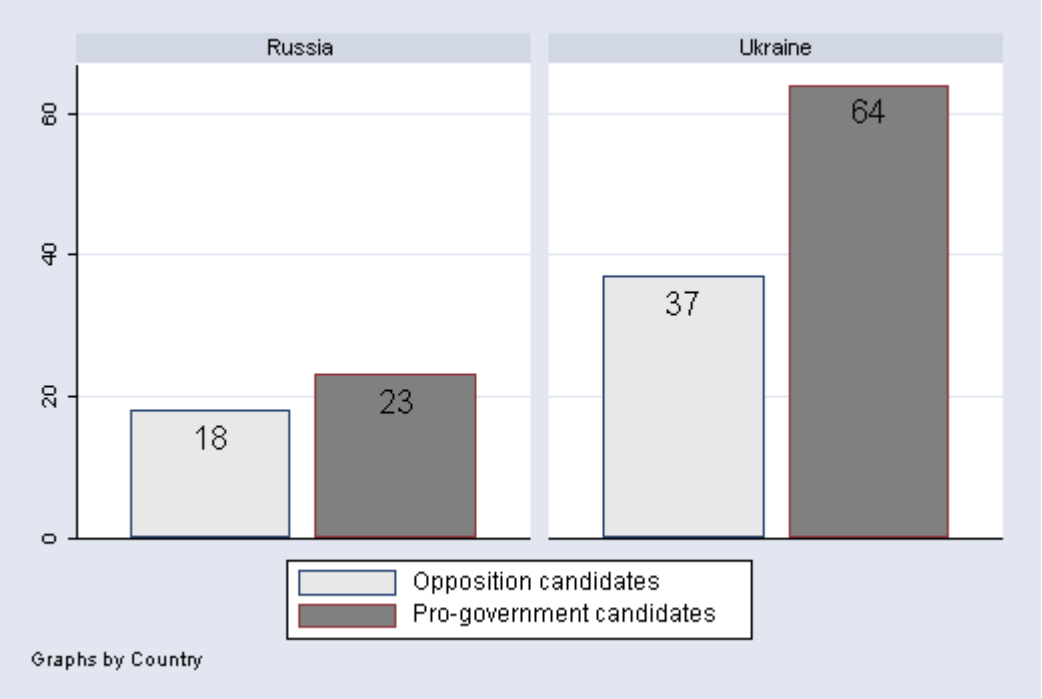
It is important to emphasize that the model indicates that political affiliation matters in Ukraine even after we control for candidate viability. In other words, pro-presidential candidates win not simply because a larger percentage of them have a realistic chance of winning and the courts are reluctant to foil the will of the electorate by deregistering a front-runner. Rather, Ukrainian pro-presidential candidates win more often simply thanks to their affiliation with the establishment.

Effect magnitude as a measure of judicial independence

Finally, we get to the main objective of the analysis, which is to devise a direct measure of judicial independence from politicians in Russia and Ukraine. The Sartori estimator not only suggests that political affiliation is a significant predictor of success in court, but also allows us to predict exactly *how much* more likely a pro-presidential candidate is to win in court in comparison to other candidates. The difference in the predicted probability of court victory represents the extent to which politicians can impose their preferences on the courts. In other words, the greater the difference between the predicted win-rates of pro-government and opposition candidates, the lower the level of judicial independence from incumbent politicians.

I use the Sartori model coefficients to calculate and compare the predicted probabilities of court victory for four groups of litigants, depending on their political affiliation and viability. District competitiveness is held constant at its modal value (0 in Russia; 1 in Ukraine). Figure 4.1 compares the probability of court victory for non-viable opposition-affiliated and government-affiliated candidates in Russia and Ukraine.

Figure 4.1: Predicted Probabilities of Success in Court according to the Political Affiliation of Non-Viable Candidates: Comparison between Russia and Ukraine



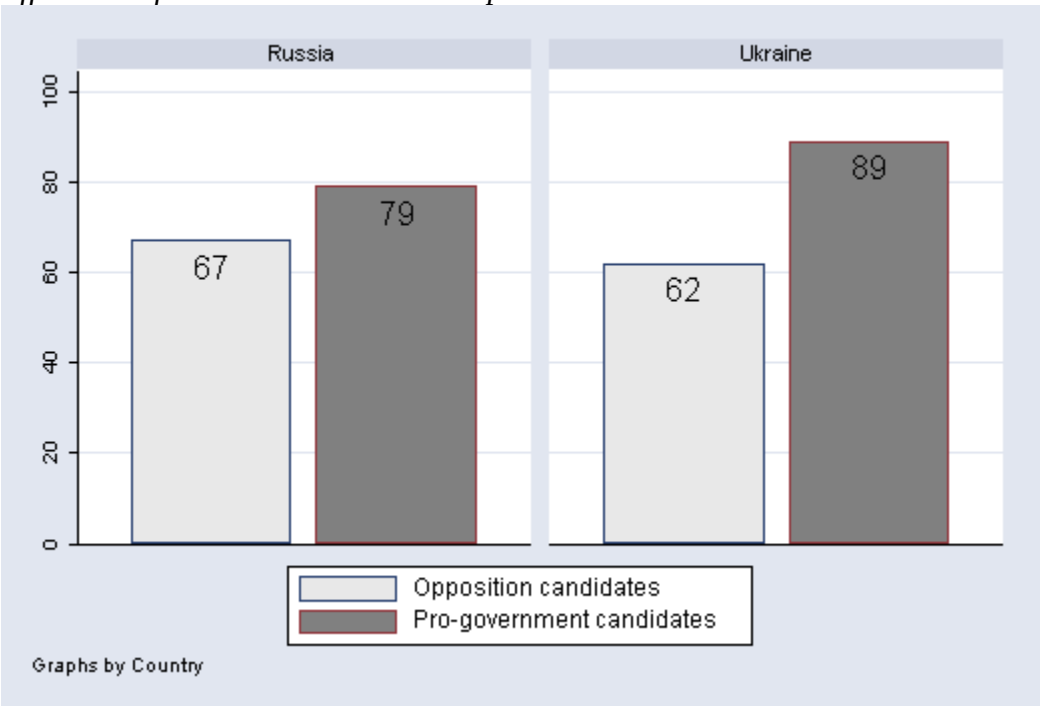
The contrast between Russia and Ukraine is quite stark. In Russia, non-viable candidates have roughly the same probability of winning a registration dispute in court. If pro-government candidates have any advantage at all over opposition-affiliated candidates, it appears to be about 5%. In Ukraine, on the other hand, pro-government candidates enjoy a big advantage over opposition-affiliated candidates— almost 25%! Candidates close to the Kuchma regime were twice as likely to win a court case, as they were to lose, even if they were opportunists who did not have a realistic chance of being elected through a fair process.

I also calculated the 95% confidence intervals for each predicted probability in order to show the amount of uncertainty associated with each estimate. In Russia, the difference between the predicted win-rates of Russian candidates is not statistically significant—pro-government candidates have a 12-40% probability of victory and opposition candidates have an 8-34% probability of victory. By contrast, the results suggest that Ukrainian candidates of different political stripes have statistically different chances of winning a registration lawsuit, because the confidence intervals associated with the two estimates barely overlap. The confidence interval for pro-government candidates is 46-83%, and for opposition candidates it is 23-54%.

The difference between Russia and Ukraine is also significant when we compare the predicted probabilities of success of viable candidates. As Figure 4.2 shows, in Russia pro-government candidates appear to have about a 12 percentage point advantage over opposition-affiliated candidates. The confidence intervals of the two predictions overlap significantly—pro-government candidates have a 46-100% probability of victory and opposition candidates have a 34-96% probability of victory. Ukrainian government protégés' advantage is more than twice as big, at 27 points. In fact, viable candidates who were close to the Kuchma administration had a tight lock on the courts. They were almost assured to win any electoral registration dispute that they were involved in, their predicted probability of winning being at 89%. The confidence intervals also do not

overlap as much as in the Russian model, which points to a statistically significant difference between the two predicted probabilities. Pro-government candidates have a 74-100% probability of victory, while opposition candidates have a 43-89% probability of winning in court.

Figure 4.2: Predicted Probabilities of Success in Court according to the Political Affiliation of Viable Candidates: Comparison between Russia and Ukraine



Conclusion

The statistical analysis of the electoral registration disputes that made it to court during the campaign for the 2002 Rada and the 2003 Duma elections is largely in line with the charges of oppositionists, Western and local observers that these were not fair elections. Unfortunately for the rule of law project in Ukraine, the courts assisted the incumbent Kuchma regime in the fight to hold on to power despite evidence that the majority of the electorate supported the opposition. Instead of serving as the guarantors of the rule of law by applying election law rules impartially and equally to all participants, the courts systematically favored pro-presidential candidates. This slant is even more disconcerting given that pro-presidential candidates seemed to be the main perpetrators of election law violations and dirty campaigning.

The Russian courts fared better in comparison with their Ukrainian counterparts, but they also seem to have failed to act as watchdogs for electoral rights. They did not punish the incumbents for their ample use of administrative resources, as candidates supported by the center appeared to have a slightly higher, rather than a significantly lower, probability of winning an electoral registration dispute.

The empirical finding that Ukraine's courts were more dependent on incumbent politicians than Russian courts during the 2003-2003 parliamentary election cycle supports the "strategic pressure" theory of judicial independence, which predicted that political competition curtails, rather than enhances the courts' decision-making autonomy.