Judges and Their Allies: Rethinking Judicial Autonomy through the Prism of Off-Bench Resistance

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Judges and Their Allies

RETHINKING JUDICIAL AUTONOMY THROUGH THE PRISM OF OFF-BENCH RESISTANCE

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ABSTRACT

The social construction of judicial power is a complicated process, especially in hybrid political regimes. We argue that off-bench resistance against blatant interference supported by vibrant social networks is an important manifestation of judicial autonomy. By drawing on evidence from field research, media coverage, and the existing scholarly literature, we clarify the logic of off-bench judicial resistance against external interference, outline a taxonomy of five strategies of resistance in hybrid regimes, and explain the political implications of off-bench judicial behavior.

> To resist is to experience autonomy. (Gordon 1993, 142)

In 1977, nobody openly protested the dismissal of highly respected Chief Justice Yakoob Ali Khan for refusing to take an oath in front of Pakistan's General Zia-Ul-Haq. But 30 years later, a similar move by General Musharraf, who tried to dismiss Chief Justice Iftikhar Chaudhry, was publicly, collectively, and successfully resisted by judges and their allies at home and abroad. In 2005, Uganda's judges grumbled among one another in the wake of the storming of the courthouse in Kampala by the paramilitary Black Mambas group. But 2 years later, Uganda's judges responded to an identical form of interference by going on strike with lawyers. In 2012 alone, judges in Benin, Colombia, Egypt, Ghana, Greece, Malawi, Morocco, Pakistan, Spain, Sri Lanka, Tunisia, and Yemen went

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on strike demanding greater judicial autonomy. How and why do judges go off-bench when their autonomy is threatened?

Most scholars agree that the global judicialization of politics (Tate and Vallinder 1995) requires judges to assert new roles, ranging from peacemakers to state builders to election monitors, and that extralegal factors routinely influence how judges assert or fail to assert these newly explicit political roles (Kapiszewski, Silverstein, and Kagan 2013). However, one of the most puzzling yet underresearched judicial behaviors is the role of judges as protectors of their own autonomy. We argue that a deeper understanding of judicial autonomy requires, first, acknowledgment of judges as social and political actors and, second, serious analysis of what judges do outside the courthouse. Judges' informal relationships with other social actors shape the nature and boundaries of judicial autonomy: we call this the social construction of judicial power. Thus, judicial autonomy is dependent on and a function of the alliances to which judges belong and the varying quality of those relationships.

Off-bench judicial behavior has important political implications: it shapes the ability of judges to protect their autonomy and, more generally, their ability to exercise political power. Yet in a world where judicial independence is formally and narrowly defined, it can potentially threaten the institutional legitimacy of courts. To be sure, political regimes matter and formal constitutional rules matter, but for too long now scholars have ignored the way in which judges themselves shape political interactions and political spaces through off-bench behavior. Efforts to go off-bench are at least as important in safeguarding judicial autonomy as what judges do inside the courtrooms. Going off-bench and mobilizing allies, judges lobby and negotiate with friends and foes, complain to the public, leak decisions to the media, organize and go on strike, or even seek refuge abroad. Through collectively mobilizing under dynamic leadership, by making and maintaining alliances with select political elites, lawyers, the business community, media, and foreign donors and international NGOs, judges may successfully protect their autonomy and maintain their power. Theorizing the social construction of judicial power offers a new perspective on the use of informal networks in hybrid regimes, not as a form of predation or kleptocratic accumulation but instead as an informal strategy of survival by judges seeking to protect their autonomy and to maintain their influence.

To explain how and why judicial off-bench resistance against blatant interference depends on the social networks of judges, we begin by critically assessing two existing judge-centered explanations of judicial autonomy. We show that existing research either focuses on the behavior of judges on the bench or concentrates on off-bench behavior in noncrisis situations. Next, by drawing on evidence from field research, media coverage, and the existing scholarly literature, we clarify the logic of off-bench judicial resistance against external interference through outlining a taxonomy of five strategies of resistance in hybrid regimes—regimes combining democratic and authoritarian elements (Diamond 2002; Levitsky and Way 2010). These strategies are risky, as they involve both appeasing and antagonizing multiple audiences—both allies and enemies of autonomous

judges. We find that the key to success may lie in the strength and breadth of judges' social networks when deploying off-bench strategies. We conclude by outlining future promising areas of research on the relationship-based approach to judicial autonomy and the social construction of judicial power.

I. OFF-BENCH BEHAVIOR AND JUDICIAL AUTONOMY

Off-bench resistance against blatant interference in hybrid regimes is a puzzle (Helmke and Rosenbluth 2009) because existing research emphasizes the cautiousness of judges as the key factor in enhancing judicial autonomy. We define judicial autonomy as judges' freedom from unwelcome and improper interference and from any personal or professional harm arising from issuing judgments. Judiciaries in hybrid regimes are generally thought to be too weak or too prudent or too friendly to be veto players in the political process (Tate 1993; Dezalay and Garth 2002; Tsebelis 2002; Hirschl 2004). One set of existing explanations focuses on what judges do or not do on, rather than off, the bench. It focuses on the judicial review of legislation and argues that judges protect their autonomy either by hiding behind constitutional protections (Ferejohn 1999) or by issuing landmark decisions (Shamir 1990) or by strategically delaying judgments in the hope that attacks against judicial autonomy become too costly (Whittington 2003). Judicial autonomy, then, grows or weakens out of the texts of judicial decisions and out of the acceptance, rejection, or ignorance of these decisions by key political actors. Therefore, judges first have to please the authorities by issuing favorable judgments and then expand their autonomy.

Numerous analyses of hybrid regimes have demonstrated that powerful executives have sufficient resources to restrict judicial autonomy without regard to judicial decision making. Hybrid regimes seek to co-opt judges, place strategic pressure on courts, selectively use law and courts, or blatantly interfere in the judiciary (see, e.g., Ginsburg and Moustafa 2008; Pérez-Liñán and Castagnola 2009; Levitsky and Way 2010; Popova 2012). Blatant interference in the judicial process (see, e.g., Helmke 2010; Garoupa and Maldonado 2011; VonDoepp and Ellett 2011; Horan and Meinhold 2012) can range from forcing judges to take oaths repeatedly in front of the executive (Pakistan 1977) to intimidating judges (Albania 1995, Paraguay 2001, Kyrgyzstan 2005, Romania 2012), to ridiculing judges and specific judgments (Uganda 1999–2011, Malawi 2004–11, Georgia 2004, and Poland 2005–7), to dismissing or impeaching judges on the spot (Ecuador 2004, Malawi 2001, Peru 2001, Serbia 2003, Ukraine 2007, and Sri Lanka 2013), to openly defying unfavorable court rulings (Russia 1993, Belarus 1996, and Uganda 2004, 2005, 2007), to storming the courthouses (Kyrgyzstan 2005, Uganda 2006, and Ukraine 2008), to abolishing the courts on the spot (Ukraine 2008) or perhaps even killing a chief justice's favorite cat (Russia 1993). Yet judges react differently to this interference: some choose to swallow it, while others choose to resist by going off-bench. We need a more accurate explanation for why and how these off-bench resistance choices are made.

Another set of explanations also emphasizes judicial cautiousness, yet it focuses on off-bench behavior in friendly settings. We know a lot about proactive judges pleasing their audiences (Baum 2006; Garoupa and Ginsburg 2009), strategically reaching out to those audiences through public communications (Widner 2001; Vanberg 2005; Staton 2010), building reputations (Council 74) and pursuing "change through measured action" (Crowe 2007, 74), and enjoying the hospitable setting of an "organic, intellectual community" of legal professionals (Woods 2008, 23) or a "global community of courts" (Slaughter 2003). For example, Tanzania's Chief Justice Francis Nyalali reached out to international aid donors, who offered both financial support and professional development assistance, as a part of his efforts to strengthen judicial autonomy (Widner 2001). In Argentina, international organizations protected judicial autonomy by providing training and funding the domestic allies of judges (Chavez 2008, 73). Between 1995 and 2010, members of the Mexican Supreme Court expanded judicial autonomy by building "connections (synergies) with new agents—the Executive, Legislature, mass media, legal complex, civil society, and interest groups" (Castillejos-Aragon 2013, 145). In the 1970s and 1980s, Italy's judges gained more power by forming judicial unions of all ideological stripes, "by forging connections with political parties and winning the support of public opinion" and by forming "a sort of alliance between activist judges and prosecutors and progressive media" (Guarneri 2013, 166, 177).

Hybrid regimes are unpredictable and frequently hostile environments. Judges demonstrating autonomy are assaulted with a barrage of aggressive rhetoric from powerful executives such as, "Those who want to preach judicial independence can go to Mars to do it" (Pavlović 2004, 9; quoting Serbia's Prime Minister Zoran Đinđić) or "the major work for the Judges is to settle chicken and goat theft cases but not determining the country's destiny" (*Daily Monitor*, June 30, 2004; quoting Uganda's President Yoweri Museweni). Threatened judges are often forced to react to this blatant form of interference, to frame interference as a crisis, and to manage the crisis by both attracting allies on the spot and channeling their energy against the perpetrators. Thus, resisting judges must simultaneously please certain audiences and mobilize them yet displease other audiences and disarm them.

One existing theory that goes furthest in exploring the "mobilizing allies" part of off-bench resistance is the "legal complex" approach to judicial politics, according to which a collective of private and government lawyers, prosecutors, and civil servants and legal academics and judges "mobilize on a particular issue" (Halliday, Karpik, and Feeley 2007, 6–7). Through writing legal commentary, litigating, judgment writing, and bill drafting, the legal complex advances the cause of political liberalism (Halliday, Karpik, and Feeley 2012). As Halliday (2013, 338) captures, "Repeatedly, it is the alliance of an organized bar and bold judiciary that energizes and enables the defense of basic legal freedoms; and, repeatedly, it is the division or conflict between the bench and bar that inhibits the emergence of political liberalism or permits a slide back from liberal to

illiberal politics." We draw on this approach and show that off-bench resistance through mobilization of legal professionals does not always protect judges against blatant interference. Indeed, as we argue below, legal professionals, for example, chief justices or government lawyers, may themselves be perpetrators of interference. Moreover, off-bench resistance against interference is often carried out by individual judges and involves much more than law-centered activities and a much broader range of nonlegal actors. We show that resisting judges often act neither with "a sense of mission or duty to protect citizens" (Hilbink 2012, 615) nor in defense of political liberalism (Halliday et al. 2007), albeit they frame their off-bench resistance against interference in terms of protecting liberty and the rule of law. This allows us both to account for a broader range of the "interference-resistance" relationships and to show the importance of judges' broad social networks in cases in which they choose to stand firm against blatant interference.

The choices and implementation of off-bench strategies in making and breaking alliances may reflect, and have important consequences for, judicial autonomy and judicial power in general. As Ewick and Silbey (2003, 1336) argue, "resistance represents a consciousness of both constraint and autonomy, power and possibility." For example, Hilbink (2012, 615) has shown that judges in Chile and Spain who resisted executive interference acted "as imaginative and creative agents, that is, as political entrepreneurs who work to alter structures and attitudes within and around the judiciary." Whether to acquiesce or resist is a tough choice for many sitting judges (Wang 2010, 129–31), especially for those who are near the end of their renewable terms. Ties of loyalty may discourage judges from resisting (Sanchez Urribarri 2012).

Similar to blatant interference, resistance may take the form of inaction (refusal to change the judgment according to the wishes of the powerful) or action (from secret negotiations to labor strikes). Off-bench resistance is a reactive and defensive move through which judges try to attract the attention of their allies, assign the blame to the perpetrators, and mobilize allies to defend against what judges frame as unacceptable attacks. Judicial resistance is risky because (1) the support of judicial allies may be weaker and less durable than the political forces behind blatant interference, (2) judges are concurrently speaking (often in complicated legal jargon) to multiple audiences, and (3) judges are manufacturing the crisis while simultaneously trying to manage it. Yet, actually resisting blatant interference in a hybrid regime may empower a judge who is strongly expected to be loyal to the regime (Nodia 2005, 42–43; Magaloni 2008, 188; Sanchez Urribarri 2010).

II. REPERTOIRES OF OFF-BENCH RESISTANCE

While political scientists have amply demonstrated how rulers in hybrid regimes practice power politics and undermine the opposition (see, e.g., Levitsky and Way 2010), we know much less about resistance against these practices. Judicial off-bench resistance in these regimes demonstrates that defending judicial autonomy takes much more than

writing judgments and pleasing judicial audiences (Baum 2006; Garoupa and Ginsburg 2009; Staton 2010). On the basis of evidence from our field research in postcommunist and sub-Saharan African countries and from scholarly analysis and media coverage of judicial politics in hybrid regimes, we treat off-bench resistance as a sequence of five strategies: secret negotiations with the attacker, secret mobilization of judicial allies, public relations campaigns, collective protests, and open mobilization of judicial allies. We focus on senior judges and top courts because they are more likely to be targeted and be concerned about judicial autonomy, and they have more to lose from impeachment or dismissal than the rank-and-file judges. The scope and scale of the interference and ensuing public scrutiny increases further up the judicial hierarchy, as does the potential for national mobilization and publicity. Judges on the lower rungs of the judicial hierarchy rarely have the resources, networks, or influence to mobilize allies at a significant level. Or if they do, the level of interest and political intensity is dissipated among lower courts. As we demonstrate below, some judges use all five strategies, while others do not, reflecting a broad range of judicial autonomy. Somewhat paradoxically it is in situations wherein the attacks are most extreme or threatening that judges may be willing and able to go the furthest in terms of resistance.

A. Engage in Secret Negotiations with Attacker

As a first line of defense, top judges act like diplomats. They release internal memos, make phone calls to important people, and hold informal meetings with government officials and opposition leaders. Although the content of these secret interactions is difficult to research, the results can be ascertained by abrupt reversals of unfavorable judicial decisions or announcement of the judicial decisions by government officers ahead of the actual court session. Of course, these meetings and phone conversations may be sites of continuing interference, and the powerful may insist on telling judges how to decide certain cases (Shekighenda 2007; Ledeneva 2008; Trochev 2010). Chief justices in particular play an important role in these negotiations and may inconsistently side with either the rulers or the judges.

Communication between powerful elites and judges over specific cases and judicial reform proposals has been amply documented in Argentina and Brazil (Larkins 1998; Brinks 2005), Bulgaria (Schönfelder 2005), Egypt (Ismail 2007), Georgia (ABA 2008, 45–48), Kenya and Tanzania (Ojienda 2007), Kyrgyzstan (International Crisis Group 2008), Latvia (*Baltic Times*, December 12, 2007), Russia (Ledeneva 2008), Turkey (Vavuz 2010), and Ukraine (Wilson 2006). For example, Russia's Constitutional Court survived its near abolition in 1993 and, later, the attempt to transform the court into a purely advisory body in 2001, only thanks to the "shuttle diplomacy" of its justices who incessantly lobbied powerful presidents and their aides (Trochev 2008b). Top judges in east African courts regularly quietly approach political elites off the bench in crisis situations or perhaps to preemptively "smooth the way forward" for difficult judgments (Ellett 2013). For example, a few months before the 2006 Ugandan presidential

election, observers noted Principal Judge Ogoola of the High Court shuttling to and from the prison (where the key opposition leader had been detained) to the state house, while the defense minister and the director of public prosecutions reportedly visited Ogoola in his chambers (Gloppen, Kasimbazi, and Kibandama 2006, 80). These secret negotiations took place because the High Court had earlier released a detainee—the leading opposition presidential candidate Besigye—on bail whom the government had accused of rape and treason and rearrested again by storming the courthouse.

This strategy both maintains the appearance of judicial insulation and hides the degree and severity of interference on the part of the regime. Secrecy also maintains the appearance of coherent networks of power and indivisibility of the governing majority. It minimizes the damage both to the rulers, if the voters perceive interference as illegitimate, and to the judges who try to limit harm to their public reputation. However, revelations about secret negotiations between judges and their foes may harm the ability of judges to resist off-bench. For example, such revelations about Malawi's senior judges, who had secretly bargained with the government over judicial salaries between 1999 and 2001, weakened public perceptions of the judiciary, who were later forced to strike over promised salary hikes in 2005 and 2012 (*Daily Times*, March 18, 2012). As a judge of the High Court of Malawi stated in the recent judicial salary dispute case, "Negotiations involve compromises. . . . Questions will always arise as to what the judiciary gave or took in order to get any suggested improvements to their Terms and Conditions of Service approved."[1]

B. Make Secret Alliances at Home and Abroad

When judges fail to be heard by attackers, they can retreat and accept the interference, or they can turn to potential allies. Making alliances in secret encompasses a broad range of off-bench resistance strategies: from complaining to mobilizing. Through deployment of these strategies, recalcitrant judges apply their diplomatic and team-building skills to lean on personal networks of family, friends, lawyers, intellectuals, magnates, foreign diplomats, and international financial institutions. Individual judges may complain to their friends, with the hope that their inner circle will protect them. Here, threatened judges do not need to use legal terminology in order to convey the sense of the crisis because they rely on friendship ties. For example, judges of the Supreme Court of Kyrgyzstan were able to end the 2-month occupation of their courthouse in 2005 only by enlisting the support of members of their extended families, who evicted the occupiers, while the police did nothing following the inaction of the government, which had been dissatisfied with the Supreme Court rulings (Trochev 2013). This secret diplomacy may protect judges when there is strong public distrust toward the judiciary and when the legal community is unwilling to openly side with an unpopular judicial branch. For example, the only reliable allies Ukrainian judges have outside the courthouses seem to

1. Author interview, Blantyre, Malawi, July 2013.

be physicians, who promptly issue sick notes for recalcitrant judges, who hide in hospitals, away from the wrath of the powerful. In Ukraine, which had four bar associations and a highly competitive political environment in the last decade, strategic judges have tried to take sick leave for the duration of election campaigns (Popova 2012), while those judges who are attacked on the spot are whisked away in ambulances (Trochev 2010). Still, friends and relatives of judges may discourage threatened judges from resisting, either because the former may be more risk averse or because the attacker may have also threatened those same members of the judges' inner circle (Deng and O'Brien 2013).

Increasingly, threatened top judges quietly ask international legal and nonlegal actors for protection against blatant interference. International donors, most of whom include "rule of law" as a condition of development funds, may help constrain interference by the attackers who depend on international aid (Carothers 2006; Sannerholm 2007). Judges, who choose to resist yet who lack any support and protection at home, may have no choice but to go into hiding abroad to stay alive. Witness how top judges were forced to flee their homeland in order to survive in the "age of judicial power": an appeals court judge María Eugenia Villaseñor fled her native Guatemala in 1995; in Haiti, investigating judge Marcel Jean fled to the United States in 2003; the chief justice of Albania, Zef Brozi, fled to the United States in 1995; the judge president of Zimbabwe, Michael Majuru, fled to South Africa in 2004; and the judge president of Ethiopia's Oromia region, Teshale Aberra, fled to the United Kingdom in 2004. These may be extreme examples of pressure by rulers in regimes tilted toward authoritarianism, but they point to the benefits of cultivating secret alliances between judges and international actors. However, seeking allies internationally is not a consistently effective strategy; it is dependent on the particular moment in history and the particular setting. International allies may offer moral support to threatened judges, yet, for regional or international security considerations, donors typically stop short of cutting funds to the executives who interfere in the judiciary. As the case of Uganda demonstrates, high levels of foreign aid have swollen government coffers and provided resources to sustain the regimes' patronage base (Mwenda and Tangri 2005), which in turn enables further interference in the judiciary (Ellett 2013). Under crisis conditions, judges fleeing the country through activating their extended networks are exercising a form of autonomy. They are surviving and may in fact later return to strengthen the judiciary.

C. Go Public

When secret and informal negotiations and alliance-making fail, judges may decide to go public. Availability of the Internet greatly enhances the speed, visibility, and affordability of this judicial resistance strategy. For example, some Russian courts publish on their websites requests from government officials about specific trials (*Rossiiskaia gazeta*, May 21, 2013), while judges in Guatemala compile and publish reports about threats against justice sector workers (Martínez Barahona 2010, 22). Going public may involve

exposing interference and complaining about it to the media. Although judges prefer to stay inside the courthouse, they choose to go public in the hope of raising awareness and building alliances. Senior judges may turn into public relations managers, assuming that they have good connections with the media. As Uganda's chief justice recently told the Kenyan judiciary, a close working relationship between the media and Uganda's judiciary has greatly strengthened its courts (*Daily Nation*, August 18, 2011). Kenya's current chief justice, Willy Mutunga, has taken this advice to heart and did not hesitate to go public when he was threatened with violence in an anonymous letter sent by supporters of presidential candidate Uhuru Kenyatta (BBC, February 20, 2013) and later when he was accused by Kenyatta's opponents of taking bribes in handling the postelection dispute (*Star*, April 29, 2013). This strategy effectively immunized the chief justice from any harm (Shah 2013) because it tarred presidential candidates and sent a message that any interference would be exposed and resisted.

Going public may also be a preventive or preemptive strategy. Judges may leak drafts of antigovernment judgments to the media both to gauge rulers' reactions and as a preemptive strike to demonstrate to potential allies that judges are free to rule against the regime and to garner support before the rulers can attack the judiciary. For example, in 1952–53, the West German Federal Constitutional Court judges repeatedly leaked to the media that they would strike down Germany's participation in the European Defense Community Treaty, a cornerstone of Konrad Adenauer's foreign policy platform. By generating a media outcry, these leaks helped judges resist government pressure and thwarted government attempts to pack the court and manipulate the nascent tribunal (Vanberg 2005, 67–77). In 1995, the Korean Constitutional Court leaked a draft judgment in a case involving the criminal prosecution of two former Korean presidents. This leak arguably strengthened the ability of the prosecution to pursue criminal charges and the willingness of former presidents to submit to the "trial of the century" (Saxer 2002, 168–72). These leaks are high-risk strategies and may jeopardize the legitimacy of the court—not just the attacker. Moreover, the leaks may occur beyond the control of the presiding judge. In a case related to the crossing-the-floor constitutional provision in Malawi in 2006, the government appealed the High Court decision before the ruling had even been issued. Expressing extreme irritation, the presiding judge publicly noted, "The impression created is that the President has a predetermined position and, that he has no confidence in the opinion of this Court until he hears from the Supreme Court" (Ellett 2013, 157).

Judge-led public relations campaigns may not always succeed because judges tend to speak in legal jargon that is alien to ordinary citizens (Woodman 2011). This is compounded by the fact that politicians tend to have better public relations campaign managers than judges (Wilson 2005). Indeed, the public complaints of Ukrainian judges do not seem to improve public respect or generate public outcry. Only 4% of Ukrainians approved of the performance of the judiciary between 2008 and 2013 (Razumkov Centre 2013). In the wake of the sustained political-legal crisis in Uganda surrounding

the 2006 presidential elections, the chief justice emerged as a rather weak figure who had tried to protect the judiciary, with statements such as, "[the judiciary] as an arm of the state, is enabled to carry out its duties only if the other arms provide it with the necessary assistance as constitutionally mandated" (*Daily Monitor*, February 14, 2007). Such weak pronouncements endeared him to neither the public nor members of his own judiciary.

Political elites and bureaucrats (judges in many countries are part of government bureaucracies) may not tolerate whistle-blowers and may punish judges who publicize improper executive interference instead of protecting them. For example, the first (and last) chief justice of Eritrea was fired and placed under house arrest (as a result of which Eritrea's High Court became defunct) in 2001, after publicly speaking out against executive interference (Beyene 2001). Or witness the fate of a judge of the Supreme Court of Indonesia who was removed from the bench by his colleagues for his public revelations of judicial corruption in 1996 (Bourchier 1999). Meanwhile, the mass media may be more interested in publishing accounts of scandalous judicial behavior (leaked by lawyers and government officials) inside and outside the courtroom, rather than providing judges with the opportunity to defend themselves against accusations (Nyamnjoh 2005; Elghossain 2008; Ellett 2012). As Johnson and Radu (2013, 35) report, many Romanian judges complain "that the other branches of government used media sources to discredit the judicial body and put pressure on judges to decide cases with a particular outcome." Despite these constraints, judges who are under pressure still go public in the hope that their public relations campaigns will better shield them from government interference than constitutionally mandated provisions on institutional insulation. In short, the broader and richer the informal social networks, the higher the likelihood of gaining public support, which, in turn, can be leveraged against those who are interfering.

D. Engage in Collective Protest

Once the decision to go public is made, and if the rulers did not crush the judges, the latter must show their commitment to collective action. The cost of resisting collectively is lower when judicial bosses themselves convene meetings of judges, speak out against interference, organize judges' protests and strikes, and appeal to international donors and transnational judicial networks. As we see in Egypt, Pakistan, Poland, Romania, and Serbia, judges' associations are instrumental in collective mobilization—the occupation of public space or public discourse—be it in staging street protests or holding strikes.

The case of Uganda nicely illustrates the dynamic of judicial off-bench mobilization. In 2007, when once again members of presidential candidate Kizza Besigye's opposition members were released on bail, the same paramilitary group stormed the court. This time, with the chief justice out of the country, the deputy chief justice first held a crisis meeting and tried (unsuccessfully) to secretly negotiate a peaceful solution (International Bar Association 2007). But this was not far enough for the main corps of judges. The next day, senior judges, without waiting for the chief justice, held a crisis meeting at the High

Court.[2] They released a statement angrily demanding an apology from the executive and assurances that such "atrocious and unprecedented incidents" would not occur again. Ultimately, the senior judges would go on to suspend all judicial business for all courts (International Bar Association 2007). As retired Supreme Court Justice George Kanyeihamba boldly noted, the Museveni "government has not developed a culture of killing vocal judges so judges should use this opportunity to resist anything that smells like dictatorship and abuse of human rights" (*Daily Monitor*, March 16, 2007).

Collective resistance may be more effective than individual resistance for the following reasons. First, it demonstrates the willingness of judges to protect their peers. As one judge spoke out against government pressure and rigged elections at the meeting of the Cairo's Judges' Club in September 2005, "Our unity [as judges] is Egypt's safety valve" (Younes 2009, 156). Second, collective resistance brings greater visibility to judges' protests and strikes, which cannot be ignored by government-controlled media, as we have repeatedly seen in Egypt, Congo, and Ghana and also in countries as diverse as Italy (*BBC News*, January 31, 2010) and Romania (*Financial Times*, September 28, 2009), Bangladesh (*New Nation*, July 28, 2009) and Colombia (Vieira 2008). Third, judicial solidarity magnifies the heroic stance of judges, particularly when the authorities are unpopular, as the world has seen in the 2-year-long street protests against the dismissal of Pakistan's chief justice, who was agile in building and maintaining his own support network (*Washington Post*, March 17, 2009; Ghias 2010). Fourth, collective protests by judges frame the public debate around core values of public governance, such as justice, separation of powers, government accountability, and the rule of law, as is evident in the public statements of judges' associations in Slovakia, the Maldives, and Sudan (Judges of Sudan's Provincial and District Courts 1983; Judges for Open Judiciary 2009; *Asian Tribune*, March 17, 2010). Finally, collective off-bench resistance demonstrates to potential allies that judicial recalcitrance is not the isolated behavior of maverick judges but a serious defense of judicial autonomy. This is how one Romanian judge explained the motivation for going on strike: "In Romania there is only a theoretical separation of power. The legislature tries to dominate the other branches and the executive tries to control the judiciary because he has the financial resource to do this. The judicial system has no power so it is like a small puppy that tried to make others happy to get a bone. The perspective of the politicians is different from the judges' perspective. This is why the judges went on strike and tried to bring on the public agenda that judges exist who have rights and responsibilities" (Johnson and Radu 2013, 37).

To be sure, the ruling regime may ignore or overcome collective judicial resistance, just as it did in Slovakia, the Maldives, and Sudan. To some judges, pursuing collective

2. International Bar Association representatives reported that at this crisis meeting those in attendance considered collective resignation, boycotting all government cases including those against the accused, and calling for mass mourning and prayer for the judiciary (International Bar Association 2007).

action, not to mention collective occupation of public space, is not an option. For example, the head of the Union of Judges of Kazakhstan, Vladimir Borisov, publicly admitted, judicial "corporate solidarity, it seems to me, is overrated. As one my colleague told me, 'No outside forces are needed, judges will gobble one another slowly and completely'" (Prilepskaia 2010). While Ukrainian judges periodically threaten to cease work when the government fails to provide funding to cover utility bills and postage, then–Ukrainian Supreme Court chief justice Vasyl Onopenko openly admitted, "Ukrainian judges could not organize street rallies" to protect each other against political interference (*Dzerkalo tyzhnya*, June 23, 2007). Similarly, Wang (2010, 130) reports that Taiwanese judges felt that they could neither join lobbyists and street demonstrations nor talk to the media because they needed to maintain social perceptions of their impartiality. Still, judicial solidarity can be deployed as a serious shield of resistance for judges, a shield rendered even more potent when combined with mobilization of other allies.

E. Publicly Mobilize Allies at Home and Abroad

Collective off-bench resistance may have a higher chance of success if judges are able to attract other important groups in support. To achieve that, judges must act as public coalition builders through forging alliances. Some argue that lawyers, who tend to fight for liberalism, represent one such actor (see, e.g., Gould 2006; Halliday et al. 2007). However, in hybrid regimes lawyers are not uniformly or reliably helpful in defense and support of the judiciary. They may support the rulers and have no incentive to switch sides. As a former executive of the Malawi Law Society characterized the tough choice African lawyers face, "You had to pick sides between the two political parties; if you picked the wrong side then you were in danger of losing big government contracts."[3] Indeed, the African legal profession is often fragmented and rarely acts in coordination. As former Botswana Law Society president and current leader of the opposition Botswana National Front, Duma Boko, noted, "The legal profession is characterized by various interest groups who at times are pursuing conflicting agenda" (*Mmegi*, November 7, 2008). The Uganda Law Society, which has been an active and vocal supporter of judicial autonomy, joined the judges' strike in solidarity in 2007. Potentially, lawyers are equally as vulnerable to blatant interference as judges are. For example, the Fourth Congress of Russia's Attorneys that took place in 2009 openly stated that "year after year, contrary to the law, attorneys are asked to testify as witnesses in criminal cases against their clients; attorneys' offices are searched; attorneys are not permitted to meet detained clients; and attorneys are not provided with the documents necessary for the provision of legal assistance" (Trochev 2008a, 5). The same is also true for civil society and business people, who are the usual suspects in demand-centered explanations of

3. Author interview, senior Malawian lawyer, former executive of the Malawi Law Society, Blantyre, Malawi, July 2009.

judicial autonomy. For example, allies may turn into enemies of autonomous courts, as evidenced by Ukraine's Viktor Yushchenko, who sent his bodyguards to protect Supreme Court judges to enable them to cancel rigged election results during the Orange Revolution, yet Yushchenko had blatantly interfered with the judiciary during his presidency (Trochev 2010). Or allies may be corrupt and damage the reputation of judges, as occurred in postwar Italy (Della Porta 2001) or in Venezuela in the 1980s (Sanchez Urribarri 2011, 863).

Mobilizing transnational networks of judges and lawyers may also help judges condemn interference (Risse, Ropp, and Sikkink 1999; Slaughter 2003; Meierhenrich 2008). In addition to providing hospitable sites for learning about common legal issues, international meetings of judges are spaces where threatened judges may freely vent their frustration and potentially seek protection. Transnational networks produce various rules of judicial conduct and the opportunity for informal communication and networking, all of which protect judges from improper interference (International Commission of Jurists 2007; Mayne 2007; Terhechte 2009). Judges then rely on these common rules to defend themselves against pressure, and they may exchange their experiences of resistance against interference (see, e.g., Sherif and Brown 2002; Safjan 2009). Meanwhile their peers from abroad draw on these rules to visit threatened judges and investigate and condemn attacks on the judiciary, as seen in the reports and statements of various international organizations.[4] For example, in a recent investigation by the Southern Africa Development Community (SADC) Lawyers' Association into the erosion of the rule of law in Lesotho, one female judge opined that the chief justice was failing to protect her despite her complaints. "[I] informed the Chief Justice about my anxieties with respect to my personal security after the police had searched my residence, I also requested the Chief Justice to give me assurances about my personal security. I have had no response from the Chief Justice" (SADC Lawyers Association 2007, 29).

However, transnational judicial networks may come and go or be toothless or tardy in providing protection to threatened judges. For example, in the mid-1990s, after Kenya's judges had voiced their desire for independence from the executive at several international judicial conferences, Kenya's leaders banned judges from attending meetings with colleagues in other countries (Mutua 2001, 115). Repeated protests by the Council of Europe (2007a, 2007b, 2010) did nothing to protect judicial autonomy in Ukraine against attacks by presidents and prime ministers in the context of highly competitive politics (Trochev 2009, 2010). It is easy for political elites to resist overt transnational interference under the auspices of protecting their sovereignty. Moreover, rulers may

4. The organizations include the American Bar Association, the UN Special Rapporteur on the Independence of Judges and Lawyers, the International Bar Association, the International Commission of Jurists, the Venice Commission, the East Africa Law Society, Southern Africa Development Community Lawyers Association, Human Rights Watch, Commonwealth Judges and Magistrates Association, and Amnesty International.

become sensitized to off-bench judicial behavior and try cutting judges' ties with the international community, blackmailing judges, transferring them to remote locations, packing courts with their cronies (Ecuador in 2004), paralyzing courts by delaying judicial appointments (Russia 1993–95, Serbia 2006–7, and Ukraine 2005–6), and cutting court budgets or jurisdiction (Hungary's 2011 constitutional reform). Note that all of these measures may be framed as "good" judicial reform: purging the judiciary of corrupt or undisciplined judges, streamlining judicial procedure, taking time for the proper scrutiny of judicial candidates, or even creating new courts.

III. THE SOCIAL CONSTRUCTION OF OFF-BENCH RESISTANCE

As we have illustrated, strategies of off-bench resistance present high personal and institutional risk. That risk is partially mitigated by a strong and broad social network of allies. The five off-bench resistance strategies, outlined above, vary along several dimensions: secret versus public, individual versus collective, local versus international, and short term versus long term. It appears that highly autonomous judges are able to use all five approaches as a roughly sequenced set of escalating resistance strategies. In contrast, less autonomous judges appear to either swallow blatant interference or resist in secret. They appear unable to engage in public collective protests because they cannot rely on the support of allies outside the courthouse. Thus, the public and collective nature of off-bench resistance is made possible by strong social networks. Just as political elites may succeed through mobilizing informal networks, so too do judges. In short, judges may quickly be forced to become coalition builders and crisis managers—explicit political actors—in order to protect their autonomy against blatant assaults. The efficacy of judges as political actors hinges on their ability to activate the very same kinds of resources that contribute to the political efficacy of social movements: networking with a broad range of allies and leadership.

Some judges may mobilize their informal networks through traditional client-patron mechanisms (extended kinship structures, religion, ethnicity), while others may turn to 21st-century transnational elite networks: journalists, high-level bureaucrats, sympathetic law societies, international organizations, and foreign donors. The internationalization of the judiciary has in recent years reversed decades of an "inward-looking judicial culture" (Malleson 1999, 2). In turn, the type, diversity, reliability, and strength of allies affects the choice of resistance strategies. While these contemporary forms of international networking are predominantly associated with liberal democracies, they also occur with increasing frequency among judges from hybrid regimes. Internationalized judges (judges who earned, not bought, advanced legal degrees from abroad, know English, or regularly attend international legal conferences) are operating within the "global community of courts" (Slaughter 2003), and they tend toward an even more critical stance vis-à-vis hybrid regimes. Voeten's (2008) study of the European Court of Human Rights provides indirect evidence of this tendency. He found that judges from former Socialist countries were more likely to find violations of human rights

against their own government and against other former Socialist governments. Evidence of internationalization as a form of socialization from our field research is more direct. First, exposure to a cosmopolitan legal complex brings a new dynamism and energy both on and off the bench. Second, legal or other careers abroad offer a range of reassuring fallback positions should the domestic political situation become career or even life threatening. In Uganda, Malawi, and Tanzania, judges who had spent a period of time in regional or international tribunals and who then returned to the bench were more outspoken and proactive and were more likely to support, or perhaps even initiate, off-bench strategies of resistance.[5] One English-speaking judge of the Russian Constitutional Court, who had said that Russian judges rubber-stamped decisions of security services and were "instruments in the service of the executive authorities" (*El Pais*, August 31, 2009) and who was subsequently disciplined for violating judicial ethics (*Wall Street Journal*, December 3, 2009), begins his work by checking the website of the International Commission of Jurists.[6] While Hamann and Ruiz Fabri (2008, 501) argue that judges from "unruly" societies in which "judiciaries appear 'weak' and/or isolated" gain legitimacy by participating in these networks, we argue that this participation has become crucial for the very survival of these judges.

Effective leadership may be a critical factor to the success of off-bench resistance. Yet, as we have demonstrated, chief justices do not always facilitate success. As Leakey (2012) notes, chief justices' success in defending judicial autonomy varies tremendously. For example, the South African chief justice has a history of smoothing disputes among the executive, the legislature, and the judiciary, while in Kenya the previous chief justice "cast the judiciary as unwilling to engage or change" (269). While many chief justices and court presidents are cronies of the rulers and are willing to swallow blatant interference (Solomon 2006), other senior judges may choose to resist. For example, the heads of judges' associations and judicial councils, deputy chief justices, or principal judges may lead off-bench resistance if the chief justices are unwilling or unable to lead. To be sure, rulers may exploit these divisions and blame judges for being politicized and biased. However, the presence of judicial associations as a form of social network, if they have strong organizational capacity and enjoy high levels of trust by rank-and-file judges, may increase the possibility of collective judicial resistance against blatant attacks (Hammergren 2007, 116–21; Beers 2012; Hilbink 2012; Ingram 2012).

IV. EXPLAINING JUDICIAL POLITICS THROUGH OFF-BENCH BEHAVIOR

The puzzling resistance by judges against blatant interference lies in a different understanding of judicial autonomy that is based on the informal relationships judges have

5. Author interviews, Kampala, Uganda, 2007; Dar es Salaam, Tanzania, 2007; Blantyre, Malawi, 2007, 2009, and 2013.

6. Author interview, Moscow, June 20, 2001.

with one another and with external actors. Without understanding the nature of these social networks, we will learn very little about judicial autonomy or the construction and exercise of judicial power. Analyzing judicial autonomy through the prism of off-bench resistance allows us to treat the former as a continuum and as a function of informal relationships and the social networks of judges. This improves our understanding of judicial politics in five important ways. First, we argue that theories of judicial politics that portray judges as constrained by the policy preferences of political branches need to reconfigure notions of judicial autonomy to capture this relationship-based off-bench behavior. While we already know that making sense of the "relationship between judges and their audiences can enhance our understanding of judicial behavior" (Baum 2006, 158), inserting the off-bench behavior of judges into the definition of judicial autonomy highlights the importance of the shape and strength of social networks of judges in the choices justices make on the bench. This dimension of judicial behavior is political because it shapes the ability of judges to exert influence on other social actors. It is evident that judges regularly go off-bench in hybrid political regimes. In hybrid regimes the judiciary is progressively more politicized, politics are increasingly judicialized, and key political questions are regularly framed as legal questions or disputes. To protect their autonomy and potentially expand their power, judges must deploy informal political resources. This, in turn, disrupts the neat vertical or horizontal separation of powers that serves as the conceptual foundation for political scientists studying law and courts.

Second, this interference-resistance relationship signals to allies—who rarely read government orders and judicial decisions—the actual degree of judicial autonomy. The emphasis on secrecy and formal insulation of the judiciary may not assist in protecting judicial autonomy in hybrid regimes but may instead merely serve to highlight the removed nature of the judges and the institution from the everyday lives of the people. Counterintuitively, by adhering to conventional norms of judicial behavior through staying insulated inside the courthouses, judges may not be able to protect their autonomy from the assaults. The now well-known examples from Pakistan's recent political history illustrate how resisting judges may succeed in reconfiguring the boundaries of judicial autonomy. In 1977, the dismissal of highly respected Chief Justice Yakoob Ali Khan for refusing to take an oath in front of General Zia-Ul-Haq did not trigger open resistance. This dismissal along with the court-packing and constitutional maneuvering transformed the Supreme Court into a very useful tool for Zia-Ul-Haq's regime (Tate 1993; Shah 2008). But 30 years later, a similar move by General Musharraf was fiercely and successfully resisted. Pakistan's Chief Justice Iftikhar M. Chaudhry, who had been initially perceived as General Musharraf's crony (Berkman 2010), regained his post in 2009 after his dismissal by Musharraf in 2007, by reconfiguring both the formal insulation of the judiciary and the professional norms against speaking outside the courtroom, by displeasing Musharraf's network, and by negotiating, mobilizing, and engaging in reciprocal relationships with important domestic and international actors (Ghias 2010). Following those successful strategies of resistance, in 2013, Chief Justice

Chaudhry ordered the arrest of the prime minister on corruption charges and "has also called senior generals to account for human rights abuses and election-rigging efforts stretching back two decades" (*New York Times*, January 15, 2013). Indeed, Chaudhry's maneuvers could be seen as the only viable barrier between judicial dependence and some semblance of judicial autonomy in Pakistan's volatile political setting.

Third, any analysis of judicial allies should involve discussion of the wider legal profession. As Gould argues (2006, 938), law has become a field of power in its own right: "an intense contestation within and through which the legal profession and its select allies are waging campaigns for a redefinition of the contours of the state and the substance of politics." The "legal complex" approach (Halliday et al. 2007) goes furthest in explaining the informal interactions among the regime, law professionals (judges and the bar), and civil society. At their best, lawyers are regarded as the "custodians of the rule of law and other civilized values" (Ghai 1987, 743). Yet, as Epp (2012, 92) argues, the effectiveness of lawyers depends on their "independence from governmental control, the capacity to act collectively, and alliances with liberal allies. In the contemporary world, the legal complex's structural connection to its key ally, the human rights sector, is especially significant." Further, as Abel (1995, 10) notes, "Lawyers are often a central target of authoritarian regimes. Professional associations have a spotty record of resisting threats to the rule of law: bar associations did not stand up to McCarthyism in the United States, the German occupation in France, or fascism in Italy or Brazil; but professional bodies in Ghana and Malaysia have threatened to strike in support of the judiciary, and the organized profession supported legal aid in many countries." Moreover, lawyers in Asia and Latin America are consistently engaged in politics—more frequently in support of strong leaders rather than liberal democracy. Dezalay and Garth (2010, 262) explain that "in any country, lawyers serving and profiting from power may periodically lose credibility for their political alliances or their profiteering, which then opens up new space for lawyers to reinvest in legal idealism and the reform of the state—also drawing on the groups with whom they have historically or newly connected." This temporal variation in the strength of supportive relationships between lawyers and judges, which we discussed in the previous section, may contribute to the nonlinear trajectory of judicial empowerment.

This brings us to the fourth insight gleaned from analyzing off-bench resistance: the feedback in the interference-resistance relationship may contribute to the dynamic nonlinear nature of judicial empowerment. This thorny relationship contains numerous signals to the perpetrators of interference, indicating what they can do to judges and, in turn, what judges can do to them. Interfering agents then may learn how to neutralize social networks and to secure judicial loyalty more effectively. They learn to justify their interference by appealing to democratic principles, economic or political development, anticorruption norms, and state security. In turn, judges learn when resistance fails and succeeds, which resistance tactics and strategies work or fail to work, which allies are reliable, and which networks are useful or harmful. Recalcitrant judges often learn to

portray themselves as law-abiding defenders of liberty and servants of the nation. This iterative feedback contributes to a nonlinear trajectory of judicial politics and empowerment, a pattern that many scholars of comparative courts have amply documented (see, e.g., Vanberg 2005; Chavez 2008; Trochev 2008b; Sanchez Urribarri 2012; Ellett 2013).

Autonomous judges and their foes may mask their true intentions behind the messiah-like rhetoric; it therefore takes serious empirical research to uncover motivations for both interference and resistance. Some scholars may argue that such understanding of judicial autonomy is antithetical to judicial independence because it politicizes the judiciary and turns judges into political actors who lose impartiality and the ability to decide cases according to law and their convictions. This neat distinction between law and politics, we believe, does not exist. Law is neither completely autonomous from hybrid regimes nor completely autonomous from informal power networks. As Dezalay and Garth (2002, 247) remind us, "The high-minded principles of the law can mask the deals and compromises that are made to ensure social stability and manage diverse interests." Moreover, senior judges are often called on to be political actors by both domestic and international policy makers. For example, sitting judges participate in drafting key pieces of legislation, and they chair special investigatory commissions, not to mention their leadership role in reforming courts and running for political posts. Even in Pakistan, where off-bench judicial resistance has received worldwide attention, "political activists" were appointed to senior judicial posts in 2010 (*Statesmen*, February 20, 2010), while several senior judges were appointed to key ministry slots in 2012 (*Express Tribune*, July 29, 2012). We can hardly ignore the trend that senior judges are increasingly astute national-level politicians who hide their ambitions behind the rhetoric of judicial independence, liberty, and the rule of law.

Finally, viewing judges as political actors and taking their off-bench behavior seriously has fundamental policy implications for rule-of-law reform. Insulating courts and judges from broader society may weaken the defense of judicial autonomy, as social groups that need impartial judicial protection the most will view insulated judges as a part of the nontransparent ruling elite. Insulating courts and judges may prevent them from becoming popular and, consequently, limit potential allies: For who would form an alliance with unpopular judges? Making judges popular does not mean making them populist. If the new reality for judges in hybrid regimes is to balance careful legal reasoning and decision making with an active off-bench presence, then resources and training will need to be aimed at making principled and assertive judging widely accepted. For example, in countries with large numbers of Internet users, training judges to tweet effectively may be as cost effective as schooling them in judicial reasoning. In 2013, Kenya's chief justice had 173,308 followers on Twitter. Improving crisis management and public relations skills, communication and team-building skills, and the English-language skills of key members of the judicial leadership may be more urgent than lecturing them on abstract notions of the rule of law and separation of powers.

V. CONCLUSION

It is common wisdom that extralegal factors, such as political context, the policy preferences of politicians, and the formal safeguards of judicial independence, influence judicial behavior. But judges have individual and collective agency beyond the strategic rendering of judgments from the bench and simply pleasing judicial audiences. We have argued that the two overlooked factors in the existing research on judicial politics—social networks of judges and the practices of off-bench resistance against blatant interference—also influence both the nature and the boundaries of judicial autonomy. We demonstrated how judicial power may be socially constructed by threatened judges who make and break alliances with social actors at home and abroad. Under certain enabling conditions, judges under attack may be able to protect their autonomy by going off-bench, by becoming explicit political actors, and by mobilizing informal political resources. Blatant interference forces judges to make a tough choice: to acquiesce or to resist. While the existing literature on hybrid regimes largely focuses on judicial acquiescence or dependence, we have explored the practices and processes of resistance that judges engage in outside their courthouses. Judges bargain, campaign, lobby, induce and manage crises, and protest outside the courtrooms—all in order to handle blatant interference. This interference-resistance relationship signals to perpetrators of interference what they can do to judges and, in turn, what judges can do to them. This informal feedback mechanism generates a volatile, nonlinear trajectory of judicial politics. We demonstrate how off-bench judicial behavior contributes to this nonlinearity: how judges in hybrid regimes are forced to become politicians to protect their autonomy against interference and, if successful, construct their judicial power.

This focus on the social connections of judges raises important research questions about judges and the world around them. We focused on senior judges in top courts, yet we know little about off-bench behavior of the rank-and-file judges. We argue that judges have agency, yet we know little about how judges themselves define successful resistance. What are the ways in which these same off-bench strategies in short-term crises can be leveraged to enhance judicial autonomy and institutional strength in the medium to long term? Other than short-term professional or personal survival, what exactly motivates judges to engage in risky off-bench resistance against blatant interference? What are the mechanisms of making and keeping judicial alliances: communicating effectively, building trust, and maintaining connections? Which conditions enable or hinder successful off-bench resistance? How do judges select their allies?

The answers to these questions perhaps lie in the goals and the amount of social capital of those judges involved. But these judicial goals and social capital are socially constructed in the process of building or breaking relationships with key powerful networks. We argue that scholars of judicial politics need to retheorize their approach to relationship-based behavior by judges. While at first glance they appear to be antithetical to the traditional norms of judicial independence, off-bench resistance strategies may well represent the only way to protect judicial autonomy against blatant attacks.

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