

## Patrimonialism through Reform: Public Participation in Police Reform, Institutional Capture, and Bureaucratic Independence in Ukraine

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Ukraine’s ambitious police reform program, launched in 2014 after the Revolution of Dignity, has had a mixed record of success and disappointment. The case of Ukraine’s police reform merits attention because it has involved civil society and members of the international community to an unprecedented degree in the selection, training, and oversight of new law-enforcement institutions. Most previous research on recent police reform in Ukraine has focused on the attempts to reform the Patrol Police, the endurance of institutional legacies alongside new reforms in Ukrainian policing as “bricolage,” or negotiations between the state and society over the content of reform and the state’s use of violence.<sup>1</sup> Other literature has examined the role of domestic civil society and international actors, namely, the EU, the US, and Canada, in promoting reform of law-enforcement and anti-corruption agencies in Ukraine.<sup>2</sup> Authors vary in their assessment of the efficacy of post-Euromaidan reforms, but most agree that the enduring issues that hinder law-enforcement reform in Ukraine are institutional legacies of corruption, low wages, inter-agency competition, cooperation with organized crime, an ambiguous legal framework, a lack of political will to address corruption, and political interference in law enforcement.<sup>3</sup> Despite the consensus around the underlying issues of Ukraine’s law

enforcement, observers have paid minimal attention to a critical factor that is at the root of the problem: political competition and the struggle for control over law enforcement by rival political interests through control over staffing and personnel policy. Put plainly, how are institutions captured through patrimonialism during the reform process, and how might this be prevented??

This article argues that a major but underexplored challenge to reform in Ukraine is the politicization of law enforcement through competition over staffing decisions by various political factions. I will provide evidence for the argument that Ukrainian political factions have attempted—and largely succeeded—in corrupting the post-Euromaidan, law-enforcement personnel reform process in Ukraine either in order to protect or expand their control and influence over law-enforcement institutions through patrimonial processes of monopolizing and manipulating hiring, promotions, and oversight institutions. In Ukraine, this struggle of competing political factions to maintain power through control of the coercive apparatus by means of patrimonial staffing and appointment is the continuation of a long tradition of power politics, and political elites exercise their control over law enforcement to protect allies and harass their political enemies.<sup>4</sup> Patrimonialism, a practice whereby jobs are distributed as personal political spoils, makes law enforcement accountable to political patrons rather than the public.<sup>5</sup> Patrimonial control over the staffing of law-enforcement agencies is both an anchor of authoritarianism in many post-Soviet countries, as well as a major impediment to democratic development and the rule of law in independent Ukraine.<sup>6</sup>

As this article will demonstrate, the impulse of Ukrainian political actors to exert patrimonial control over law-enforcement institutions through control over staffing policy has

evolved to co-opt seemingly transparent and fair reform processes that were meant to address the very issues of politicization. Thus, anti-corruption reforms and processes that are designed to break the control of political elites over law enforcement were effectively hijacked to maintain and, in some cases, deepen political control over these very institutions. Patrimonial capture of key institutions, such as courts, electoral commissions, law enforcement, and increasingly civil society, is disturbingly widespread in Ukraine.<sup>7</sup> This article examines several cases where institutional capture of Ukraine’s law-enforcement institutions was prevented, detected, and reversed through bureaucratic insulation and civil society oversight.

This article features five case studies from three different law-enforcement institutions, which demonstrate the efforts of various Ukrainian political actors to secure patrimonial control over the law-enforcement reform process by examining the “re-attestation,” or lustration, of police in 2015–2016, the hiring of thousands of new police officers, and the creation of oversight institutions, such as the Civil Oversight Council (*Rada Hromads’koho Kontroliu*, RHK) at both of the following agencies: the National Anti-Corruption Bureau of Ukraine (*Natsional’ne antykoruptsiine biuro Ukraïny*, NABU) and the State Bureau of Investigations (*Derzhavne biuro rozsliduvan’*, DBR).

Determining a universal metrics of successful law-enforcement reforms is complicated in Ukraine because public trust of all law enforcement is low and anti-corruption agencies have had very modest results in effectively prosecuting corruption.<sup>8</sup> Nevertheless, in this article I argue that by the measure of political independence to conduct investigations, the establishment of a rigorous, transparent, and independent personnel process, the creation of independent civilian

oversight, and the avoidance of major corruption scandals, the Patrol Police and NABU are empirically better institutions than both their predecessors (in the case of the Patrol Police) and other law-enforcement agencies, such as the rest of the National Police or the State Bureau of Investigations. I argue that the relative success in reforming these institutions was due to their bureaucratic insulation from political interference, while the failure of police attestation, hiring in other areas of the National Police (outside of the Patrol Police), and the issues in launching and operating the DBR were due to the inability to design and enforce independent personnel processes that can resist patrimonialism and political capture.

I also show that, while foreign assistance and civil society participation are both important components of reform, the critical factor in the few areas of successful law-enforcement reform in Ukraine has been institutional designs that protect bureaucracies by insulating their personnel policies from political interference in their personnel policy through the establishment of firm and transparent selection criteria that are overseen by independent external observers. This article offers several examples of bureaucratic insulation, that is, efforts undertaken by neutral forces (often international actors) to ensure that the newly created law-enforcement institutions are independent of political actors in terms of funding, staffing, and operational decision making.<sup>9</sup> The first section of this article considers the historical context of law-enforcement reform in Ukraine, and looks at the role of political competition over law enforcement, civil society, and international actors in Ukraine's reform process. The second section provides an examination of five cases of law-enforcement reform in Ukraine, including the establishment of

the Patrol Police, attestation of the NPU, new hiring in the NPU, and the launch of NABU and the DBR.

#### LAW-ENFORCEMENT REFORM IN UKRAINE

Despite decades of overtures and platitudes from Ukrainian political leaders about the need to reform Ukraine’s police and law-enforcement systems in order to address issues of corruption, brutality, and police incompetence, police reform has remained an elusive and piecemeal medley of grudging symbolic concessions and stillborn pilot programs before 2014. Police reform became a political possibility—indeed, a priority—only in 2014–2015 because of the combination of public pressure, international pressure, and state-building needs. First, the police and other security forces, such as Ukraine’s Security Service (*Sluzhba bezpeky Ukraïny*, SBU) engaged in large-scale repression that resulted in the death of over a hundred protesters and thousands of injuries. Erica Marat calls this “transformative violence,” a watershed event that leads a government to announce police reform under tremendous public pressure.<sup>10</sup> Second, following the collapse of the Yanukovich regime, police were not only delegitimized, but many officers simply abandoned their posts and fled, fearing retribution from protesters after the revolution. Rosario Puglisi writes that there was a veritable “security vacuum” on the streets of Ukraine’s major cities.<sup>11</sup> Yulia Shukan writes that, “[i]ndeed, the law-enforcing agencies, mainly the police force, suffered defections and lacked loyalty towards the new regime. Citizens replaced them in Kyiv in the aftermath of Maidan so [as] to prevent crime and enforce order.”<sup>12</sup> Filling the security vacuum was just one of the functions performed by a new and more muscular Ukrainian civil society that contributed substantially to drafting, advocating for, and overseeing the

implementation of reforms in numerous spheres, as well as playing a role in aiding the war effort, which has been well documented.<sup>13</sup> Finally, given the ties between the Yanukovich regime and Russia's thorough penetration of Ukraine's national security institutions, reform and lustration of security personnel provided more than cathartic justice for the wrongs committed by police officers under Yanukovich and previous administrations. The reform was thus a necessary national security measure for strengthening the state and maintaining Ukrainian independence.<sup>14</sup> Matthew Light argues that a similar convergence of the need to rehabilitate the state's image and simultaneously to restore its coercive capacity caused Georgia to prioritize police reform in 2004–2005, after decades of decay under the Shevardnadze administration.<sup>15</sup> The same factors that forced a reluctant Ukrainian political elite to prioritize law-enforcement and state-building reform were also of concern to international actors, such as the EU, the US, and Canada, who were interested in bolstering the Ukrainian state's capacity to deter further Russian aggression and to prevent a possible security and refugee crisis in Europe. Below, we look at the effects of political competition, civil society, and international actors on the law-enforcement reform process in Ukraine.

#### POLITICAL COMPETITION OVER LAW ENFORCEMENT

A constant theme in Ukraine's postindependence history has been the struggle for patrimonial control of law-enforcement institutions by rival political elites. Henry Hale argues that patronal networks are bound together by a patron's ability to distribute rewards to clients, mete out punishment to opponents, and detect and prevent potential defectors.<sup>16</sup> These networks endure thanks to what Hale calls "the great power of expectations," whereby clients obey patrons'

directives not only because of their expectations of continued reward and the possibility of punishment, but also because they expect other clients in the network to continue to cooperate.<sup>17</sup> Thus, unilateral defection by clients from patronal networks is futile—and dangerous—and typically occurs only after enough clients' expectations about the ability of the patron to deliver rewards and punishment have changed. This change in client expectations can trigger the collapse of a patronal network and regime, but this usually occurs only when the patron is a lame duck who can no longer guarantee access to goods and protection, or where there is a massive and sudden loss of public and international support caused, for example, by a stolen election (Orange Revolution) or massive police repression (Euromaidan).<sup>18</sup>

Securing and maintaining political control over law enforcement through patrimonialism allow political elites to protect themselves and their allies from force or investigation while deploying these same “administrative resources” against their opponents.<sup>19</sup> The failure to maintain the loyalty of law enforcement resulting in defection has led to the decline of three governments in Ukraine since independence, including Leonid Kravchuk's in 1994, Leonid Kuchma's in 2004, and Viktor Yanukovich's in 2014.<sup>20</sup> Following a wave of miner strikes in eastern Ukraine in 1993, the Ukrainian Parliament (*Verkhovna Rada*) called for early presidential elections, which independent Ukraine's first president, Leonid Kravchuk, lost the following year to his former client, Leonid Kuchma. Lucan Way writes that in January 1994, months before the early election, President Kravchuk was forced to back down from a plan to break up Parliament after he lost the support of Minister of Internal Affairs Andriy Vasylyshyn.<sup>21</sup> Although Kuchma launched a process of constructing strong political control over the Ukrainian state and law

enforcement through patrimonial hiring and building a power vertical loyal to him, it was not enough to prevent the defection of the SBU and other security forces, which ultimately led to the Orange Revolution, which denied his hand-picked successor, Yanukovich, the presidency. Upon Yanukovich's ascent to the presidency in 2010, he began the process of building a patrimonial network, dismissing thousands of law-enforcement officers from the previous regime and engaging in what Taras Kuzio calls the "Russianization" of Ukrainian security policy by offering several high-level ministry portfolios and appointments to his patrons from the Donbas or former Russian citizens before he was ousted during the Euromaidan in 2014.<sup>22</sup>

Following the Revolution of Dignity, competition over control of law enforcement continued under the Poroshenko administration between the Petro Poroshenko Bloc (*Blok Petra Poroshenka*, BPP), which controlled the military and the SBU, and the People's Front (*Narodnyi front*, NF), which controlled the Ministry of Internal Affairs and the police. President Poroshenko was thought to have the loyalty of the SBU and the Prosecutor General's Office (*Heneral'na prokuratura Ukraïny*, HPU), while many battalions in the Ministry of Internal Affairs and certain parts of the National Police were under the patrimonial control of Interior Minister Arsen Avakov. Khatia Dekanoidze, a highly respected, Georgian-born reformer who served as the first head of Ukraine's National Police from 2014 to 2016, was later replaced by Serhii Kniazev, who, many argue, was a client of Avakov's. Kniazev, in turn, resigned in September 2019 and was replaced by Ihor Klymenko, days after Kniazev's ex-wife was detained at the Polish border with an undeclared amount of € 650,000 in cash.<sup>23</sup>

While the recent victory of President Volodymyr Zelens'kyi in 2019 and his Servant of the People Party saw a nearly total change in the cabinet, it is notable that the only minister to retain his position in the new government was Minister of Internal Affairs Arsen Avakov; this, in spite of mass opposition and a letter signed by leading members of Ukraine's civil society, including the Anti-Corruption Action Center, AutoMaidan, Statewatch, and Transparency International, who argued that "Avakov is responsible for failing to reform the police, sabotaging the vetting of police officers, keeping tainted police officials and suspects in Euromaidan cases in key jobs, failing to investigate attacks on civic activists and numerous corruption scandals linked to him and his inner circle."<sup>24</sup>

Mustafa Nayyem, a longtime activist, journalist, and former MP, argues that in Ukraine Internal Affairs has historically been the most important ministry in Ukraine for maintaining political control and the second most powerful post after the president.<sup>25</sup> Divided political control over law enforcement not only hinders reform and cooperative investigations, but has also led to several high-profile clashes between various law-enforcement agencies, for example, the arrests of Mikhail Saakashvili and Oleksandr Avakov (Avakov's son) on charges of corruption.<sup>26</sup> Similarly, law-enforcement institutions have carried out raids on each other, including the Prosecutor General's raid on NABU in August 2016 on charges of illegal wiretapping, and a raid on the NABU by the recently created State Bureau of Investigations in April 2019.<sup>27</sup> Lucan Way argues that Ukraine's divided political elite, while undermining governance, also prevents would-be autocrats from consolidating power and authority in what he calls "pluralism by default."<sup>28</sup>

Reforming personnel policies in police departments is extremely challenging because of the politicization of police through patronage appointments and corrupt personnel practices.<sup>29</sup> That Ukraine has achieved any success in reforming these institutions during an armed conflict and economic crisis is remarkable, but the limitations and setbacks of unsuccessful attempts to create politically independent institutions provide a natural case study to examine the effects of institutional design and the involvement of civil society and foreign actors on law-enforcement reform. As the cases detailed in the second section will show, political elites at the national, regional, and local levels have sought to corrupt and influence law-enforcement reform policies to protect or deepen their control over personnel decisions. They have done this by a variety of methods, including the deployment of fake civil society organizations in public hiring commissions and oversight forums designed to break political influence over these agencies. As the evidence will show, these efforts to subvert and capture these processes have been highly effective, even when they have been detected and exposed by Ukrainian civil society and journalists. It is only where civil society and international actors have been able to effectively insulate these institutions and processes from domestic political forces that reforms have proven more successful at limiting political influence.

#### CIVIL SOCIETY IN REFORMS

Following the outbreak of the Ukrainian-Russian war in 2014, Ukrainian civil society became heavily involved in national defense, supplying the armed forces, countering Russian propaganda, and overseeing reforms and lustration.<sup>30</sup> Rosaria Puglisi has called civil society the “de-facto security actor” in Ukraine, and argues that civil society can “positively affect the quality of

governance and contribute to the consolidation of democracy in Ukraine.”<sup>31</sup> Erica Marat argues that the failure of many police-reform programs in former Soviet republics is the result of the unwillingness of police and political leaders to listen to and cooperate with civil society and the public to create reform from the ground up.<sup>32</sup>

Ukraine’s Patrol Police reform was partly successful because it involved the public in drafting and advocating for legislative reforms, participating in the training of law enforcement, and overseeing and participating in the hiring and lustration of thousands of police officers. For example, civil society’s influence can be felt in the Law of Ukraine “On the National Police,” drafted in 2015 with substantial help from the international community and Ukrainian civil society groups, such as the Kharkiv Human Rights Protection Group and the Reanimation Package of Reforms. Public participation in drafting new police legislation has become an increasingly common part of police reform around the world. However, Ukraine is unique in allowing members of the public, civil society, and international actors to have a direct role in drafting the personnel policy of its law-enforcement institutions by personally interviewing, investigating, and reviewing individual candidates.

Ukrainian civil society members have participated in the hiring and lustration of police through their involvement with commissions that include members of law enforcement as well as representatives of the public. These public commission members have the authority to interview employees and candidates, and request their personnel documents, financial disclosures, and disciplinary records; they can also require a candidate to submit to a polygraph test. Public selection commission members have equal voting power with other commission

members over whether a candidate is recommended for service or continued tenure in the police. In addition to personnel commissions, Ukraine has set up a series of public oversight mechanisms called Civil Control Councils to oversee new institutions, such as the National Anti-Corruption Bureau of Ukraine and the State Bureau of Investigations. These councils, each composed of fifteen members of the public, exercise control and oversight over hiring, employee discipline, and cooperation between these agencies and civil society.<sup>33</sup>

Cooperation with civil society is considered to be a central component of any democratic police reform, but Ukraine's civil society is also notoriously weak, fractured, and susceptible to political capture.<sup>34</sup> Lucan Way warns that civil society in fractured societies such as Ukraine can potentially reinforce and deepen violence and division.<sup>35</sup> Marina Zaloznaya, William Reisinger, and Vicki Claypool found that, in certain cases in Ukraine, civil society was undermining the fight against corruption either through faux collaboration or obstructionism.<sup>36</sup>

Ukraine scholars have increasingly raised concerns about the growth of politically dependent civil society groups that are often front groups for political or business interests.<sup>37</sup> These groups are often referred to as *karmanchiki* ("pockets," from the Russian *karman*), individuals who are paid to show up to certain protests, picket in front of rival businesses, or engage in violence like the *titushky*, those muscular, violent mercenary agents who frequently attack demonstrators or act as agent provocateurs to justify police violence against protestors. Of primary concern for this study is political capture of reform processes whereby fake civil society groups are mobilized to participate in new public forums to advance the political interests of their patrons by ensuring control over hiring and firing of personnel. For example, the Public

Integrity Council (*Hromads'ka Rada Dobrochesnosti*, HRD) was a council of civil society representatives who were appointed to the selection committee of judges, with the goal of purging unfair judges from the Ukrainian judiciary. Civil society members of the Public Integrity Council began resigning en masse in 2018, arguing that their presence was being used to legitimate a fake judicial reform that retained corrupt judges. They complained of several unfair tactics, including unreasonably short interview times, averaging six minutes, with judicial candidates, and unqualified members on the commission, including those without qualifications or who had not filed asset declarations, and unfair submission deadlines and procedures that invalidated the conclusions of the HRD.<sup>38</sup>

These strategies of trying to control who is on public commissions, hamstringing the process, and ignoring or invalidating results when they are undesirable have become common in almost all Ukrainian reforms involving civil society. This builds on the institutional legacy of stage-managed democracy inherited from the Soviet period, when elections and appointments were supposedly open and competitive but, in reality, were tightly managed by key loyalists. This sentiment was best embodied in the title of Stalin's 1935 speech, "Cadres Decide Everything."<sup>39</sup> Bohdan Harasymiw argues that Ukrainian civil society has been an ineffective tool in the fight against corruption in Ukraine because the country lacks sufficient levels of press freedom, political party competition, and government transparency for them to function effectively.<sup>40</sup> He argues that the "sandwich" model, in which civil society organizations work with external actors to pressure the Ukrainian government into enacting reforms, has failed to produce reform. "[Thus] its positive results were limited, in part because the 'sandwich' mechanism operated only

on the policy's initiation, not its implementation. Nor was civil society capable of compensating for the lack of leadership, bureaucratic infighting, and obstructionism, which together circumscribed the effort to control corruption."<sup>41</sup>

While recognizing both the potential benefits and risks of civil society's role in law-enforcement reform, this article argues that reforms involving the public can result in better institutional reform under the right circumstances; specifically, when members of the public are chosen from among politically independent actors and when bureaucracies are properly insulated against patrimonial practices. The benefits go beyond the "sandwich" model of collaboration on initial policy proposals, and can be sustained throughout the implementation phase, when civil society and external actors remain vigilant and involved in the process, when firm rules are outlined and enforced, and when there exist mechanisms for detecting corruption. As the case studies presented in this article will show, the critical difference in insulating bureaucracies and selecting independent civil society for these commissions is often Western leverage over local decision makers and their close cooperation with domestic civil society.

#### INTERNATIONAL ACTORS AND REFORMS

Many state actors have been involved in providing reform assistance to Ukraine, including the governments of the US and Canada; EU-level institutions, such as the European Union Advisory Mission to Ukraine (EUAM) and the European Neighbourhood Policy (ENP); and through direct initiatives by individual EU member states, such as Poland, Germany, and Sweden. While not acting in an official state capacity, many officials from the administration of the former president of Georgia Mikhail Saakashvili (2004–2013) played key roles in Ukraine's law-enforcement

reform, most notably Khatia Dekanoidze, the first head of the National Police of Ukraine. Georgians provided important independent leadership and expertise in the first years of reform, but owing to the deteriorating relationships between Saakashvili, Avakov, and Poroshenko and the stalled pace of reforms, most Georgians left Ukraine or were pushed out of their positions by 2017. The US has furnished support for Ukrainian law-enforcement reform through the State Department's Office of International Law Enforcement and Narcotics (INL) and the Department of Justice International Criminal Investigative Training Assistance Program (ICITAP), which provided the bulk of funding, training, and implementation for the establishment of the Patrol Police and NABU. Canada has three separate law-enforcement reform initiatives, including Agriteam Canada, the Canadian Police Mission in Ukraine, and the Royal Canadian Mounted Police (RCMP) Mission in Ukraine.

The European Union's technical and financial assistance to Ukrainian law-enforcement reform through the EUAM and member states has been crucial. While European countries have long stressed the rule of law, human rights, and anti-corruption reform in Ukraine, Jozef Bátora and Pernille Reiker note that the outbreak of war in 2014 led the EU to make a strategic shift in its European Neighbourhood Policy, giving priority to support for reform and stabilization over democratization reforms.<sup>42</sup> Scholars debate whether the mechanism of leveraging the distant potential for EU accession, which had worked to produce strong anti-corruption and democratic reforms in Central and Eastern Europe in the 1990s, can work in a country like Ukraine, with its weak state capacity and no clear path for EU membership, particularly in the wake of Brexit. Bátora and Reiker note that the Baltic States, Poland, Slovakia, Sweden, and Denmark have all

expressly favored the potential for offering full EU membership, while the Southern European Union member states are more reluctant to provide Ukraine anything beyond a limited Association Agreement within the ENP framework.<sup>43</sup> They write: “That also applies to the then official standpoints of the German Government which has been increasingly cautious about deepening its relations with Ukraine, to avoid damaging relations with ‘the neighbours of the neighbours’—i.e. Russia.”<sup>44</sup> Even without the prospect of eventual accession, research has shown that even the prospect of a visa-free travel regime with the EU Schengen Area has been sufficient to make progress with the reforms required by the European Union in Moldova, Georgia, and Armenia.<sup>45</sup> The EU’s greatest source of leverage in Ukraine has been its Association Agreement, visa-free travel secured in 2017, and the distant promise of future membership, which is supported by a majority of Ukrainians.

The plethora of diverse actors involved in Ukraine’s law-enforcement reform poses substantial coordination problems for Ukraine because international actors have different definitions of the problems, solutions, and capacities for reforms. This tension often plays out in differences between American and European reform programs in Ukraine. For example, the EUAM favored reforms focused on the existing former State Automobile Inspectorate (*Derzhavna avtomobil’na inspektsiia*, DAI) and district police officers (*dil’nychni ofitsery politsii*) in the regions, whereas the US focused its efforts on hiring new officers through the establishment of the Patrol Police in 2015.<sup>46</sup> The EUAM, for its part, accused the US of promoting American-style militarized policing by placing undue emphasis on special forces and the establishment of SWAT teams, like the “rapid action response unit” (*Korpus Operatyvno-Raptovoi Dii*, KORD).<sup>47</sup>

Americans emphasized reforming Ukraine’s crowd-control police through improved tactics, and increased its “Tactical Operation Response” police (TOR) threefold to 1,600, while Sweden implemented a program of “dialogue police” to help diffuse protest tensions.<sup>48</sup>

Kataryna Wolczuk argues that in Ukraine, “[t]he EU has become a key transnational actor, working closely with domestic reformers to create “reform enclaves” inside state institutions to spearhead reform.”<sup>49</sup> Wolczuk reports that the most important part of EU-supported public administration reform has been independent EU funding to establish a special recruitment process to attract qualified, talented Ukrainians from outside government to serve in strategic posts across the government to establish “reform enclaves.”<sup>50</sup> Another critical distinction in foreign states’ approaches to Ukraine has been their level of cooperation with civil society and their willingness to exercise leverage over Ukrainian government partners. As this article will show, in the more successful reforms, member states have played a greater role in implementing and overseeing projects, and have leveraged their continuing support to promote qualified personnel and demand the removal of bad actors, rather than leaving crucial personnel decisions to local officials. Robert Peacock and Gary Corder note that American and Georgian advisers were intimately involved in personnel decisions during the launch of the Patrol Police and demanded that key personnel, such as Deputy Minister of Internal Affairs Eka Zguladze and the first chief of the National Police of Ukraine Khatia Dekanoidze, be given leadership positions.<sup>51</sup>

The success and sustainability of the various reform programs supported by international actors in Ukraine is beyond the scope of this paper, but the argument put forward here is that international actors can and should leverage their influence over government officials to

implement transparent personnel and civil service reforms and to ensure participation and oversight by independent and reputable domestic CSOs, technocrats, and activists. As this article will demonstrate, to the extent that international actors have been able to use their leverage to secure and enforce these conditions, reform has been more successful and has produced more independent, accountable, and less scandal-ridden institutions. Where external actors supported the reform of institutions through financing or technical support but had no control or oversight over staffing, these institutions were quickly politicized and incorporated into rival patron networks. This “sandwich” approach whereby international actors require and help to enforce participation in and oversight of these processes by independent civil society was absent in the later phases of police attestation, new police hiring, and most visibly in the creation of the State Bureau of Investigations. These institutions have subsequently been embroiled in corruption scandals and charges of politicization to a much higher degree than the Patrol Police and NABU, which had both strong external oversight in staffing and cooperation with civil society.

#### BUREAUCRATIC INSULATION THROUGH INSTITUTIONAL DESIGN

A key argument of this article is that for institutional reforms to become sustainable in a highly corrupt and politicized environment like Ukraine, law-enforcement institutions require a level of bureaucratic insulation often provided by neutral arbiters, such as international actors. Insulation should not be confused with impunity or lack of any accountability; it simply means that police and law enforcement are insulated from receiving illegal political orders (politicization) or from being captured and incorporated into patrimonial pyramids that seek to control decisions about staffing and oversight. This concept of bureaucratic insulation borrows heavily from both Barbara

Geddes's book *Politician's Dilemma* and from Elton Skendaj's work on the reform of public administration and police in Kosovo. Geddes argues that a political leader's decision on whether to pursue patrimonial or meritocratic civil service reform will be determined by the balance of control over bureaucratic organizations and whether the potential long-term "collective goods" of economic growth and efficiency outweigh the short-term goals of political support through patronage.<sup>52</sup> She maintains that it is only when executives resist the urge to manipulate personnel and policy in these institutions that they are able to create truly independent and effective institutions that serve the public good. For Geddes, only enlightened and politically secure executives have been able to overcome this "Politician's Dilemma," but in Ukraine this pressure has not come from far-sighted executives but from external actors. In his study of administrative reform in Kosovo, Skendaj shows that it was only the involvement of international actors in the selection and oversight of Kosovo's notoriously corrupt police and customs service that protected these institutions sufficiently for them to become legitimate, independent, and effective bureaucracies.<sup>53</sup> The methods for providing bureaucratic insulation include the establishment of a transparent and independent civil service through new laws, regulations, and exams, the posting of job competition results, the presence of public representatives on personnel commissions, and the publication of data on personnel decisions. In Ukraine, establishing specific procedures about the selection process for those who are nominated to represent the public on hiring and employee-review commissions has been a contentious issue that has involved foreign actors both serving on selection commissions and selecting public representatives.

Even though relying on foreign governments to administer reform can seem paternalistic and denies the state a level of sovereignty, public opinion data collected by the International Republican Institute reveals that Ukrainians have very low levels of trust in their government to address issues of corruption and reform or even to handle the prosecutions of individuals who were involved in violence during the Euromaidan.<sup>54</sup> Given the enduring challenge of establishing independent and effective institutions in Ukraine, some in this country have argued for creating institutions modeled on Guatemala's International Commission against Impunity in Guatemala (CICIG), an anti-corruption institution that was created by the United Nations in 2007, after a series of high-profile murders in Guatemala involving police.<sup>55</sup> Independent of the Guatemalan government and staffed and funded entirely by foreigners, the CICIG has retained its political independence and proven to be highly effective in successfully prosecuting high level-corruption by officials.<sup>56</sup>

The cases of Guatemala and Kosovo demonstrate that extensive foreign involvement in institutional reform is often critical to achieving sustainable institutional reform in highly corrupt states. This article argues that, instead of ceding complete control to foreign states to manage their bureaucracy, a key to the success of some areas of law-enforcement reform has been that external actors have used their financial and political leverage to insulate nascent bureaucracies and promote the involvement of independent local civil society in their reforms.

As the following five case studies show, various methods of selecting public representatives have included political quotas for the president, the Cabinet of Ministers, and Parliament (in the case of the DBR), selection by the ministry or bureaucracy being reformed,

selection by international actors, selection by Parliament, oblast and municipal legislatures, and online voting. These widely varying processes have naturally produced different qualities and levels of independence in these public participatory bodies. Similarly, the powers and authorities given to these commissions vary widely and include the hiring, promoting, demoting, or firing of personnel, including the selection of leadership, the requirement to provide annual reports or disclose certain information, and the power to promote cooperation between civil society and the institution. Finally, as the following cases will show, the effect of these different public bodies has been dependent on their statutory authority in certain cases and not in others. For example, the 2015 Law of Ukraine “On the National Police” provides for public participation in the hiring of new police through “police commissions” that include members of the general public (Law of Ukraine “On the National Police,” Article 51, section III), but the process of attestation was authorized under an Interior Ministry decree no. 1464 of 17 November 2015, which was subsequently deemed unconstitutional by Ukrainian courts.<sup>57</sup> This ruling meant that after nearly twelve months of lustration with the involvement of the public, requiring the unpaid participation of hundreds of ordinary citizens, nearly all of the 5,200 (7%) of police officers who were recommended for dismissal by the attestation commissions were allowed to return to work, with back pay—a humiliating defeat for accountability advocates (who suspected that the decision was intentionally created to be legally fallible, so that the dismissals could be challenged after the fact).<sup>58</sup> In other cases, the decision is legally binding for the institution, but the implementation of that decision is left up to the same institution that rarely executes the mandate of the public council. The following section shows how political competition over law

enforcement, capture of civil society, and bureaucratic insulation have shaped the evolution of law-enforcement reform in post-Maidan Ukraine.

#### PATROL POLICE

The establishment of the Patrol Police in July 2015 was one of the first major tangible reforms that Ukrainians could feel in their daily lives. The reviled State Automobile Inspectorate was replaced overnight in the capital by 2,000 young, photogenic, and polite Ukrainians, the overwhelming majority of whom had never worked in law enforcement. Many of these officers had higher education degrees and successful careers in the private sector and were motivated by an altruistic desire to change their country. Despite several well-documented mistakes of the inexperienced new Patrol Police, they initially inspired a level of trust in the public for their refusal to take bribes and had an approval rating of over 50% in some cities.<sup>59</sup> While critics of Ukraine's police reform have lamented the fact that other divisions of the police, such as the investigators and operatives from the Criminal Division have not undergone similar reforms, few today would question that Ukraine's Patrol Police are the most qualified, professional, and independent division of the National Police.

How did this happen? The short answer is that the Patrol Police project was heavily managed by the United States Embassy and the US Department of Justice, which provided technical assistance, training, and crucial assistance in hiring and personnel decisions. ICITAP (part of US DOJ), along with Georgian advisers, negotiated with the Ministry of Internal Affairs to provide strict recruitment and hiring qualifications, competitive civil service tests, and professional training before reforms were funded or supported. These US advisers had

substantial leverage because they were funding the Patrol Police project, and the Georgian police advisers who had previously worked under the Saakashvili administration had institutional support from their compatriots, Eka Zguladze, former Deputy Minister of Internal Affairs, and Khatia Denakoidze, the first chief of the National Police of Ukraine. In Ukraine, it is widely believed that the success in establishing Ukraine's Patrol Police and its increased public support rests on the inclusion of public selection commissions, in addition to competitive testing and published exam results. The Georgian reformers, namely, Zguladze and Dekanoidze, with assistance from the US International Investigative Training Assistance Program (ICITAP), helped to establish independent National Recruitment Centers (NRCs) for the recruitment of new Patrol Police, as well as a new system of training.<sup>60</sup> These centers helped to establish independent recruitment and selection commissions consisting of new patrol officers and members of independent civil society, who would interview and could rule against all prospective Patrol Police candidates. Peacock and Corder note: "The stand-up of the National Patrol Department was accomplished largely outside of the existing MIA [MoI] bureaucracy. Applications were taken online or at independent municipal facilities outside MIA [MoI] control. Interview commissions included activists and civil society representatives. The selection process and training curriculum were designed and overseen by Georgian advisers, using staff provided with donor support."<sup>61</sup>

Using this same process, the Patrol Police has grown to nearly 15,000 officers and has a separate chain of command within the police department, reporting vertically by city to the National Police rather than to the regional directorate of Police (GUNP). While the initial optimism for the Patrol Police has somewhat dampened since 2015, when they were established

throughout Ukraine, the role of foreign advisers and civil society oversight helped to largely root out the patrimonial practices in the Patrol Police that remain endemic in the rest of Ukraine's law enforcement.

#### NEW HIRING IN THE NATIONAL POLICE OF UKRAINE

The hiring of new police officers outside of the Patrol Police, such as investigators (*slidchi*), criminal police "operatives" (*operatyvnyky*), and district inspectors (*dil'nychni*), consists of a less rigorous process than Patrol Police recruiting. Although these officers must also be interviewed then approved by a "police commission," as required by the Law of Ukraine "On the National Police," the US and its European partners played a much less direct role in this hiring, and the NRC had a minor role in non-Patrol Police hiring. The police commission that hired non-Patrol Police officers includes appointees from the National Police, the Ministry of Internal Affairs, and two members of the public, appointed by either the Parliamentary Ombudsman for Human Rights or the Oblast Council (City Council in Kyiv) "with an impeccable reputation, high professional and moral qualities commanding respect among the public" (2015 Law of Ukraine "On the National Police," Article 51, section III).<sup>62</sup> While this statutory requirement for public representatives on the hiring commissions should, in theory, deepen public accountability over hiring, in practice, local elected officials rather than members of the independent civil society are often appointed as representatives on these commissions. The system of police commissions with members of the public was meant again to address the issue of transparency and public accountability, but it, too has run into similar issues of political competition and manipulation. The establishment of local police commissions throughout Ukraine was delayed by political

competition over representation, and this led to scandals over public representatives in several cities, including Rivne.<sup>63</sup> A 2018 report on the effectiveness of police commissions found a mixed record of success.<sup>64</sup> While the report commended the success of the commissions in improving civil society oversight, ensuring transparency, and rejecting on average 30% of all applicants, the authors of the report noted that over 60% of the appointed commission seats that were designated for “representatives of the public” were actually going to elected officials or persons with affiliations to the Ministry of Internal Affairs rather than independent members of civil society. They also expressed concern that, while the commissions are legally entitled to review promotions as well as hiring, in practice they were not exercising oversight over promotions. The failure to exercise this responsibility means that promotions and transfers remain mostly guided by patrimonial logic rather than transparent meritocratic procedures, which are needed for deep institutional change. The case of new hiring in the police shows that public hiring commissions, when not properly insulated, are ripe for political capture and can become another arena for political competition over the control of law enforcement.

#### LUSTERATION/ “ATTESTATION”

Given public ire at police following the repressions against civilians during the Euromaidan protests, a major demand of the Ukrainian public was not simply new police but a lustration, or “attestation,” of existing police officers to decide which members of the *militsiia* (the previous name of the Ukrainian regular police) would be allowed to serve in the newly created National Police of Ukraine. As this section will demonstrate, the initial phase of attestation, which was heavily overseen by foreign actors (US Department of Justice–ICITAP) and Ukrainian civil society,

demonstrated the possibility of holding police accountable and increasing public faith in the process. However, the second phase of attestation, overseen by the Ministry of Internal Affairs, reversed this progress by decreasing the number of officers purged and marginalizing civil society, which led to a decrease in public trust in the process and outcome.

Re-attestation in Ukraine has two legal foundations that govern the process. The first is Interior Ministry Decree №1465 passed on 18 November 2015.<sup>65</sup> This document details the regulations and procedure of re-attestation, including scrutiny of those who will be subject to re-attestation, and the creation of commissions and their competence and powers, but the order was the subject of controversy and criticism from civil society and legal observers. Many argued that the process of police vetting “re-attestation” was created via an intentionally flawed Interior Ministry decree (№1465 of 2015), which would allow any purged police officers to dispute the legality of their dismissal and appeal to the courts for reinstatement. Thousands of police officers did so.<sup>66</sup>

Re-attestation is also mentioned in the Law of Ukraine “On the National Police” passed in 2015. Article 57 of this law states: “Assessment of police officers is held to evaluate their general proficiency, professional competency, personal qualities, academic level, physical fitness, and career prospects based on an in-depth and comprehensive review.” Attestation created mixed commissions with members of the public, the police, and the Ministry of Internal Affairs to review the personnel record, disciplinary record, financial disclosures, and any complaints on file about any staff member. Attestation commissions were empowered to interview each individual officer to ask them about their professional record, financial disclosure, or personal motivations for

...serving in the police. Many activists who were involved in these commissions recall that they were often not provided with records or given minimal information about these former militia officers and asked to review their cases in mere minutes before interviewing a candidate. In many cases, local activists were able to perform independent research on police candidates through social media before in-person interviews, which revealed that they or their relatives possessed expensive cars and homes not declared in their financial disclosure. These representatives could then present them with photographic evidence of their luxurious lifestyles that were not commensurate with their meager state salaries and to question them about this discrepancy. Attestation commissions were also empowered to require police officers to submit to a polygraph test, and in certain cities the test results revealed extensive personal and criminal misconduct. After reviewing documents, interviewing candidates, and deliberating, attestation commissions made a recommendation by majority vote for dismissing the person (not recommending for service), promoting, or demoting the candidate. Peacock and Cordner note that in late 2015 the National Police established five regional National Recruitment Centers to administer attestation and new police hiring using aptitude tests, integrity tests, and interviews with independent commissions, including members of civil society. “In December [2015], the first 12 commissions were established for Kyiv Oblast and the capital city with the majority composed of NGO representatives ranging from human rights activists to new patrol officer representatives. [...] Modeled after civil service commissions operating in North America, the centers will operate with considerable autonomy and the National Police has requested donor support to allow the

centers to operate over the long term as NGOs handling the testing and ranking of police recruits even after the new National Police has been full stood up.”<sup>67</sup>

The National Recruitment Center was largely funded by the US Embassy and staffed by Ukrainians paid by the United States rather than from the Interior Ministry’s budget. Furthermore, the attestation process also included commissions with members of the public, but it only dismissed 5,256 of 68,135 (approximately 7.7%) former militsiia officers, nearly all of whom were later reinstated by courts after appeal. The first phase of attestation began in late 2015 in Kyiv then Kyiv oblast, Khmelnytskyi, Rivne, Odesa, and Mykolaïv, where between 10 and 18.8% of officers were dismissed. While not without its initial missteps, this first phase of attestation included commissions representing a broad array of Ukrainian civil society, and participants said they felt that the process was fair and that their decisions were being implemented.<sup>68</sup> After March, the Ministry of Internal Affairs halted attestation and decided that, rather than allow ICITAP and the NRC to select the public commission members, the ministry would determine and appoint the public representatives on attestation commissions. This change led to a number of controversial figures being included on attestation commissions as “representatives of civil society,” including an organized crime figure, local politicians, and former law-enforcement officers. Many CSOs had no membership and no online presence, and were registered days or weeks before the process, and appear to have been created solely for the purpose of exerting control over attestation. For example, in Zhytomyr, Igor Fadeev (nickname: “Moscow”), a former organized crime figure notorious for racketeering and violence during the

1990s, appeared as a public representative on an attestation commission as a representative of civil society.<sup>69</sup> After the selection process for attestation commissions changed, they began to function effectively as rubber stamps, ruling favorably on a much higher percentage of former officers, decreasing from a high of nearly 20% to an average of less than 5%.<sup>70</sup> For example, in all other oblasts the number of officers not recommended for service decreased to less than 5%.

Figure 1



Figure 1 shows the levels of officers dismissed by the attestation commission in each Ukrainian oblast. Note that the first six regions of Kyiv city, Kyiv oblast, Khmelnytskyi, Rivne, Odesa, and Mykolaiv had higher percentages of officers dismissed before the Ministry of Internal Affairs took over the attestation commission appointment process. *Source:* Dmytro Bondar, “Moia stara militsiia’: lak skandal’ni ta skomprometovani kadry pereishly pratsiuvaty v politsiuii,” *Hromadske.ua*, 12 December 2016, <http://hromadske.ua/posts/moia-stara-militsiia-yak-skandalni-ta-skomprometovani-kadry-pereishly-pratsiuvaty-v-politsiuii>.

In June 2016 members of the activist groups AutoMaidan and Narodnyi Tyl (People’s Homefront) held a press conference to announce that they would be withdrawing their

participation in the attestation process because “Avakov’s team had occupied the police re-attestation process.”<sup>71</sup> They noted specifically that the police had begun to outnumber members of the public on the commissions; chairmen of the commissions in the regions were advisers to Minister of Internal Affairs Arsen Avakov; and the selection of “civic activists” for the commissions was now being made by the local police commissions (dominated by police) rather than by ICITAP or other independent advisers.<sup>72</sup> This change in the selection and composition of attestation commissions between the first and second phase perfectly embodies the previously described concept of institutional capture of supposedly public oversight institutions.

When not constrained by foreign donors or domestic civil society, patrimonial interests in Ukraine have proven extremely adept at evolving, and they dominate these public institutions by putting forward politically dependent individuals to public commissions. The effect of this institutional capture is strikingly clear given the lower level of officers dismissed in oblasts where public commission members were selected by the National Recruitment Center and oblasts where they were selected by the Ministry of Internal Affairs. The predominance of insider interests and the marginalization of independent civil society during the second phase of attestation led to dramatically lower numbers of dismissed officers and a loss of confidence in the process and outcome, with many former proponents of the reform and those involved and familiar with the process regarding it as a “farce” or a failure. To add insult to injury, the majority of officers who did not pass attestation during either phase were able to appeal successfully for reinstatement and receive back pay, through a legal challenge to Interior Ministry decree №1465 of 2015.

What accounts for the difference between the system of Patrol Police recruitment, which has introduced professionalism and increased public trust, and the processes of re-attestation and non-Patrol Police hiring through police commissions? Public representatives on police hiring commissions in the establishment of the Patrol Police, as well as the first six cities of attestation (which, coincidentally, saw the highest number of officers dismissed) were, in part, selected by foreign advisers, including the US, through the International Criminal Investigative Training Assistance Program.<sup>73</sup> This foreign oversight guaranteed quality and independent civil society representation on these commissions, which led to positive outcomes, the hiring of politically independent and qualified candidates for the Patrol Police, and higher numbers of former militsiia members with questionable backgrounds being deemed “unfit” for future employment. Conversely, in the case of the second phase of attestation and new hiring in the NPU, control over civil society representation has been firmly in the hands of the Ministry of Internal Affairs, the National Police, and national and local political officials, a situation that has resulted in low numbers of militsiia officers being excluded from service and some questionable new hiring. The case of the establishment of the Patrol Police and the first phase of attestation show how bureaucratic insulation of nascent and reforming institutions can help prevent institutional capture of these public oversight institutions by political actors.

NATIONAL ANTI-CORRUPTION BUREAU OF UKRAINE

On 14 October 2014 Ukraine moved to create a National Anti-Corruption Bureau, which deals with so-called “Grand Corruption” over 689,000 hryvnias (roughly \$26,000 USD). This project was begun under the aegis of Poroshenko ally Yuri Kosiuk, but the draft laws and training were

completed by Ukrainian NGOs, such as the Anti-Corruption Action Center (ANTAC), while implementation and project management were largely handled by Georgians and FBI personnel. Like the Patrol Police, this project received major funding from the US State Department's Bureau of International Narcotics and Law Enforcement (INL). The creation of NABU had been a major demand of the IMF and was initially heralded as a success story. Poland's anti-corruption agency also helped set up NABU.<sup>74</sup> Despite the difficulty in securing successful high-level convictions, experts agree that NABU is one of Ukraine's most independent organizations, and this is due to institutional design and policies that prevented the political capture of NABU. The strong involvement of European, American, and Georgian personnel as well as local Ukrainian anti-corruption activists, such as Vitaliy Shabunin and Daria Kaleniuk, assured a transparent and independent hiring policy.

By 16 April 2015 President Poroshenko had already appointed NABU's first director, Artem Sytnyk.<sup>75</sup> Before the end of April 2015 two deputy directors, including Gizo Uglava, a Georgian-born prosecutor from the Saakashvili administration, were appointed. In May competitions began for a hundred staff members, including administrators and investigators. On 5 June the first public oversight commission was formed through the election of fifteen members, who immediately became involved in the hiring process of NABU personnel.<sup>76</sup> During the summer and fall of 2015 NABU quickly recruited and trained a core staff and signed memorandums of understanding and cooperation with other state agencies and law enforcement. By December 2015 they had become functional, meaning, they had entered criminal proceedings into the Universal Register of Pre-Trial Investigations: three criminal

proceedings on the theft of state property valued at one billion Ukrainian hryvnias (USD \$38,020,000).<sup>77</sup> As of 31 December 2017, NABU had initiated 489 proceedings, served 165 notices of suspicion, and brought 107 cases to court, leading to 19 convictions and the recovery of millions of dollars to the Ukrainian budget.<sup>78</sup> According to the report for 2017, during its first two years NABU was responsible for the return of 253.3 million UAH to the state, and was able to prevent embezzlement of more than two billion UAH.<sup>79</sup>

Despite this promising start, NABU's limited effectiveness in securing corruption convictions in Ukraine in the absence of a special corruption court and special corruption prosecutor has led to a severe loss of the Ukrainian public's trust in connection with NABU's supposed "impotence."<sup>80</sup> Many have criticized NABU for its inability to secure high-level convictions despite lengthy investigations. NABU's director, Artem Sytnyk, has long argued that this is due to the delay in creating a special anti-corruption court, but after such a court was established in 2019, he noted that cases had greatly accelerated.<sup>81</sup> Further proof of NABU's success and independence has been the persistent attacks on NABU by other law-enforcement institutions, such as the National Anti-Corruption Agency (Natsional'ne ahentstvo z pytan' zapobihannia koruptsii, NAZK), the Prosecutor General's Office, and many of Ukraine's most powerful politicians and oligarchs. During its brief tenure, NABU made enemies of both President Poroshenko and Interior Minister Avakov, and also came under fire for its investigations of Ukraine's two richest men, Ihor Kolomoisky (PrivatBank) and Rinat Akhmetov (Rotterdam Plus).<sup>82</sup> In October 2017 NABU detectives arrested Oleksandr Avakov, son of the current Interior Minister, on suspicion of involvement in an illegal price-fixing scheme to provide military

backpacks to Ukraine's security forces in 2015.<sup>83</sup> In February 2018 NABU detectives arrested former Odesa mayor Gennadii Trukhanov in Boryspil' on suspicion of misappropriating over 100,000,000 UAH for road repairs.<sup>84</sup> In February 2020 demonstrators protested outside of NABU's headquarters, demanding the resignation of Sytnyk, who declared that this demonstration and parliamentary efforts to remove him were part a campaign by Avakov and Kolomoisky to hinder his investigations into their corruption.<sup>85</sup>

Ukrainian experts concur that the keys to the successful establishment and operation of NABU were political pressure from external allies and Ukrainian civil society, effective civilian oversight by the Civil Oversight Council, and political independence in decision making and operations. The presence of these outside forces allowed for public and international oversight, which resulted in an independent hiring process that produced a politically independent institution in a relatively quick time frame. Writing about NABU and SAPO, Lough and Dubrovskiy note: "The rigorous staff selection procedures for both and the efforts of civil society backed by international partners to ensure their institutional independence have produced agencies made from a different fabric from the rest of the law-enforcement system."<sup>86</sup> In the five years since NABU's launch, the Ukrainian public's frustration with this institution has increased owing to its limited results in successfully addressing high-level corruption as a result of political sabotage and the absence of a high anti-corruption court. Nevertheless, when compared to similar institutions, such as the Prosecutor-General's Office, the NAZK, or the SAPO, NABU stands out for its political independence, integrity, and professionalism.

In addition to having had a hand in creating NABU, civil society plays an ongoing oversight role with respect to NABU through the Civil Control Council. The regulatory basis for the RHK is Presidential Decree №272 of 2015 “The Issues of the Civil Oversight Council at the National Anti-Corruption Bureau of Ukraine,” which states that the council has control over hiring and promotions, employee discipline, oversight, and cooperation between NABU and civil society, international organizations, and NGOs.<sup>87</sup> Creating civilian oversight was also a key demand of Western donors, including the US, which played a role in advocating for the inclusion of respected civil society and requiring online voting for electing the membership of the Civil Oversight Council. Online election for the RHK resulted in the election of highly respected anti-corruption activists, such as Oleksandra Drik and Artem Romaniukov in 2018, Oleksii Hrytsenko (2016) and Vitalii Shabunin (2015).<sup>88</sup> These activists are widely known in Ukraine and abroad for their independence and work in combatting corruption. Activists argued that direct online voting was crucial in promoting independent and well-respected members of the anti-corruption community to the Civil Oversight Council. As the case of the State Bureau of Investigations’ Civil Oversight Council shows, the absence of a credible nomination procedure, such as online voting, resulted in a much lower quality of public representation in a similar institution.

#### STATE BUREAU OF INVESTIGATIONS (DBR)

Plans to create the Ukrainian State Bureau of Investigations date back to the 1996 Constitution and were required by the 2012 Criminal Procedure Code. Article 216 also establishes the State Bureau of Investigations as the sole agency with jurisdiction for crimes, including official

malfeasance, military crimes, crimes against justice (torture, coerced confession, miscarriage of justice), grave general crimes, and certain corruption crimes<sup>89</sup> (Ukrainian Criminal Procedure Code, 2012<sup>90</sup>). This mandate clearly empowers the DBR to investigate malfeasance by state authorities and eliminates—in theory—conflict of interest in investigations, as the DBR is responsible for pre-trial investigations while the prosecutor is responsible for trying cases in court. At the same time, the broad scope and mandate to review high-level crimes by elected officials, official malfeasance, military crimes, and crimes against justice mean that the new organization poses substantial threats to current and former political elites. The draft law on the State Bureau of Investigations, prepared by experts from the Center for Political and Legal Reforms and drafted in August 2013, before the Euromaidan, originally envisioned an organization focusing mostly on violence by state officials, but it has subsequently evolved into a larger anti-corruption agency.<sup>91</sup> The revised draft law was introduced in Parliament by Andrii Kozhemiakin, chair of the Parliamentary Committee on Affairs concerning Law Enforcement on 10 April 2014 (№3042-d). After years of waiting, in November 2015 the Cabinet of Ministers approved a resolution on the State Bureau of Investigations, which came into effect in March 2016. According to the regulations, the DBR was to have a central office and seven regional offices throughout Ukraine: in Lviv, Khmelnytskyi, Kyiv, Poltava, Mykolaiv, Melitopol, and Kramatorsk. Official plans required that the agency have a staff of approximately 1,500, that all managers and investigators (about half the positions) must possess a higher legal education, and that no more than 49% of future investigators may have previous work experience in the PGO or

other law-enforcement agencies. Staff members' highly competitive salary of 29,000 UAH (\$1,076 USD) per month is twenty times the minimum wage.<sup>92</sup>

According to the Ukrainian Criminal Procedure Code, the DBR needed to be functioning and operational<sup>93</sup> by 20 November 2017 (the fifth anniversary of the adoption of the 2012 Criminal Procedure Code) in order to have jurisdiction over crimes committed before this date. But by early November 2017 no director or staff had been selected because of disagreement among members about the Competition Commission that was to select the candidates, as well as about issues regarding the verification of the administration of polygraph tests for candidates.<sup>94</sup> This led to considerable frustration among families and victims of the Euromaidan violence, who felt that their cases would not be investigated by the DBR. On 8 November 2017, days before the PGO's jurisdiction over these crimes expired, Acting Prosecutor General Yuri Lutsenko declared that the 15,000 cases waiting to be investigated by the DBR would instead be investigated by the National Anti-Corruption Bureau and other law-enforcement agencies. Lutsenko blamed the delay to launch the DBR on the political design of the selection commission. "The selection commission formed by higher institutions has not coped with its work for a long time. From my point of view, exclusively for political reasons, I cannot name any legal reasons for such a sad result or, rather, its absence," he said.<sup>95</sup> Many speculated that the transfer of these cases to the National Anti-Corruption Bureau was both an attempt to create amnesty for officials who would be subject to investigation (which NABU could not conduct, as they were well aware) and a further attempt by the PGO to hamstring NABU, each of whose investigators deals with hundreds of cases. At the last minute, Parliament intervened and was able to pass the norm

requiring the prosecutor to finish investigating these cases, which would have overloaded NABU and the nascent DBR.<sup>96</sup> In addition to the external commission, an internal commission and a civil oversight council will play a role in the selection of future personnel to the DBR.

#### EXTERNAL SELECTION COMMISSION

After enacting the law on the new State Bureau of Investigations, the first task was to staff the new organization. For this purpose, an “external” hiring commission was created in 2016 to select the director, two deputy directors, the heads of regional branches and central offices, and the heads and employees of departments of Internal Affairs.<sup>97</sup> The selection of the director and two deputies is so important because, “[a]ccording to the Law, the Director of the Bureau is dependent on his Deputies and may exercise personnel, organizational and financial powers only with their consent.”<sup>98</sup> The external commission consisted of nine members, three appointed by Parliament, three appointed by the Cabinet of Ministers, and three appointed by the Presidential Administration. The external commission was a political compromise meant to ensure that no one political faction would be able to dominate the leadership of the new organization. In fact, the formula for choosing the leadership simply imbued the new institution with political competition from its inception, which has led to staffing shortages, institutional paralysis, and a lack of credibility perceived by the Ukrainian public and Ukraine’s international partners.

This external commission nominated their finalists to the president for appointment upon confirmation by the prime minister. After the selection of the director and two deputy directors, all other management posts were to be nominated by the external committee and confirmed by the director of the DBR. The law stipulated that this external selection commission would consist

of nine members: three appointed by the president of Ukraine, three appointed by parliament, and three appointed by the cabinet of ministers. Because the nine-member commission included members who were public officials and who represented the interests of both parties, it took the external commission an inordinate amount of time, nearly one and a half years, to select the director and two deputy directors. According to Oleksandr Lemenov, the reason for the long delay in choosing the director was that “the main political forces—the BPP and the NF—could not agree among themselves who would lead the newly created superpower law-enforcement body.”<sup>99</sup> At first, it appeared that the first likely director of the DBR would be the Poroshenko protégé and *nahliadach* (overseer) Oleksii Horashchenkov. However, he was eliminated over a scandal that triggered allegations that he had influenced the investigations of NAZK and over a disputed property in November 2017.<sup>100</sup> Instead, the commission selected Roman Truba as the first director of the DBR, and Olga Varchenko and Oleksandr Buriak as his deputy directors. Truba, a former district prosecutor from Lviv oblast with private sector experience, was supported by People’s Front deputies Serhii Pashyns’kyi with the tacit approval of former interim president Oleksandr Turchynov.<sup>101</sup> According to the journalist Oleksii Bratushchak, the five-member BPP majority initially favored Horashchenkov, but after he was eliminated by scandal, Alexander Granovsky, an MP from BPP, proposed a solution whereby Truba, the favored candidate of the People’s Front and Turchynov, would serve as a weak symbolic director, while real power would lie with the BPP-supported deputy directors Varchenko and Buriak.<sup>102</sup>

Truba, a former regional prosecutor, was criticized for his role in the prosecution of political activists in the Lviv region during the Euromaidan in 2013–2014. Many argued that these

actions made Truba subject to the law on lustration barring him from holding public office. However, in August 2019 the Sixth Appeal Administrative Court declared that Truba was not subject to lustration (Law of Ukraine on Purification of Power).<sup>103</sup> Another cause for concern was that initially Truba did not apply for the director of DBR but for the post of deputy director, which also makes his candidacy and subsequent actions potentially susceptible to future legal challenge.<sup>104</sup> Like the inclusion of two members of the external selection commission without the requisite legal education, this could be one of the intentional errors that provides a fail-safe to future political forces upset with the DBR's decisions or actions. Truba was consistently criticized for slow progress in investigating corruption, refusing to share power with his deputies, excessively exercising his veto in the hiring process, and delaying the launch of the DBR in an attempt to favor loyalists for management posts in the DBR.<sup>105</sup> In the summer and fall of 2018 he refused to certify the results of twenty-seven middle-level managers selected by the external hiring commission, but after mounting pressure he eventually relented and appointed all but four.<sup>106</sup>

Following the election of Volodymyr Zelens'kyi and the change in government in 2019, the fate of the DBR leadership was uncertain. In December 2019 Truba was pushed out as director after his personal friend and close associate, Ihor Shcherbyna, was caught on video extorting a \$150,000-dollar bribe from a developer to close a criminal investigation.<sup>107</sup> In December 2020 the Verkhovna Rada overwhelmingly passed a law firing Truba and his two deputies—thereby restarting the personnel selection process under the direction of the president (without the prime minister or Cabinet of Ministers)—and transferring the Maidan cases from the Prosecutor

General's Office to the DBR.<sup>108</sup> In December President Zelens'kyi named Iryna Venediktova, a former Servant of the People MP, acting director of the DBR until the external commission names a new candidate for director and deputy directors.<sup>109</sup> It will likely take much less time for the external selection commission to select a new director and deputy directors because political power is much more consolidated under the Zelens'kyi administration than under the Poroshenko administration.

#### INTERNAL SELECTION PROCESS

Unlike the external selection commission that was designed by a political formula, the membership of the internal selection commission, which selects non-management positions, such as investigators and other personnel, did include some truly independent and respected members of Ukrainian civil society. The political impetus for this seems to have come less from international actors and more from vigilant Ukrainian civil society organizations, such as State Watch and the UMDPL, who pressured for public inclusion in this hiring. In late January 2018 Truba approved the procedure for internal selection commissions, which will select 90% of DBR future employees, including regional and central apparatus management, investigators, and internal affairs officers. The process approved by Truba calls for internal selection commissions with five members, three of whom are employees of the DBR and two outside members with a higher legal education and specialization in law enforcement or prosecution. Activists, such as Oleksii Hrytsenko from AutoMaidan, who was formerly on the Civil Oversight Council at NABU, have criticized this formula, saying that it prevents an effective civil society veto on inappropriate hires.<sup>110</sup>

In January 2018 Truba commissioned a council to select the public representatives of the internal selection commission. This first council included Oleh Bazar from the Anti-Corruption Monitor, Dmytro Ostapchuk, and Viktor Taran. On 8 February the council selected the candidates for future commissions, including Oleksandr Lemenov from the UMDPL, Petro Varyshko from the Public Lustration Committee, Maksym Boldin from the Center for Legal Analysis and Political Risk Research, and Taras Boiko from the Center of Policy and Legal Reform for the first internal selection commission.<sup>111</sup> The first internal selection commission included Truba's assistant, Ruslan Biriukov (a former police officer who is alleged to have failed police attestation in 2016), Myroslava Pivtorak (from the Ministry of Justice), Oleksandr Lemenov as a representative of civil society, Oleksii Kolotylo (from the Specialized Anti-Corruption Prosecutor's Office), and Iryna Mostova (from the National Agency for the Prevention of Corruption).<sup>112</sup> Truba later replaced Kolotylo and Mostova with his two deputy directors, Varchenko and Buriak. According to Lemenov, the internal commission began receiving and reviewing applications for investigators and other personnel in the central headquarters (*aparatt*), but the competition was delayed due to a limited number of applicants (fewer than 500 for just over 200 vacancies). The first internal selection commission, which included respected anti-corruption activists, albeit in the minority, proved much more effective at quickly hiring and reviewing candidates for investigator positions. This commission has hired hundreds of staffers since March 2018 and cooperated closely with civil society groups, including Statewatch, AutoMaidan, and the European Union Consultation Mission. According to Lemenov, cooperation with and oversight by domestic civil society and international partners allowed the first internal commission to resist direct political pressure on

hiring decisions and to elect 80% of employees without a negative reputation.<sup>113</sup> He is on record as saying that the selection process in the regions, handled by the second internal selection commission, was mired in corruption and scandals, including the selling of test questions and answers.<sup>114</sup> Activists also uncovered many cases of candidates who had been rejected by the first internal selection commission being routed to the second commission and subsequently hired. While the noble efforts of civil society groups to participate in the internal commissions have helped to produce a fairer and more credible hiring process for new investigators in the central apparatus, the leadership of the DBR (selected by the external commission) remains mired in political infighting and has yet to undertake any serious investigations.

#### CIVIL OVERSIGHT COUNCIL

The first occurrence of the inclusion of the Civil Oversight Council was during the creation of NABU, when the RHK had control over hiring, employee discipline, oversight, and cooperation between NABU and civil society.<sup>115</sup> The creation of NABU's Civil Oversight Council took place by online voting, considered to be more independent, propelling such well-respected anti-corruption activists onto the control council as Vitalii Shabunin from the Ukrainian Anticorruption Action Center in 2015 and Oleksii Hrytsenko from AutoMaidan in 2016.<sup>116</sup> There were initial hopes and a tacit guarantee from Truba that the DBR would conduct the competition for members of the Civil Oversight Council through online voting.<sup>117</sup> However, in January of 2018 the Cabinet of Ministers, using a procedure from 2010, approved the process of in-person voting by delegate convention on 30 March 2018. Activists warned that under this model politically

dependent and fake civil society organizations (known as “pocket” NGOs) would be elected to the RHK because political parties would stack the convention. Former People’s Deputy Mustafa Nayyem warned, “Such a procedure for the formation of the RHK creates a very high risk that the lion’s share of the constituent assembly will consist of representatives of fake, or pocket, community associations that can be used both by political forces and by the management of the Bureau itself.”<sup>118</sup> Oleksandr Lemenov, the anti-corruption crusader and member of the Reanimation Package of Reforms, found that out of 107 candidates for the Civil Oversight Council, 46 had political ties, 22 had ties to law enforcement, and 37 candidates were related to other candidates, with major voting blocs being dominated by the BPP and the People’s Front.<sup>119</sup>

On 30 March the Civil Oversight Control was formed, and many observers noted that the majority of representatives elected to the council came to the meeting together, participated in bloc voting, and had ties to either politicians or law enforcement.<sup>120</sup> Writing in June 2019, Lemenov observed that, rather than working as a consultative oversight body, the DBR’s Civil Oversight Council has become dysfunctional and paralyzed by political conflict.<sup>121</sup>

The State Bureau of Investigations has faced many controversies since its difficult launch in the fall of 2017, but the agency was functioning in all regions by the summer of 2019 and conducting investigations. The most high-profile case has been brought against President Petro Poroshenko, based on information from Andriy Portnov, the former deputy head of the Presidential Administration during the Yanukovich presidency.<sup>122</sup> Poroshenko has refused to submit to questioning by the State Bureau of Investigations, accusing the leadership of the DBR of launching a politically motivated investigation against him. Lemenov has argued that the DBR

is already so dysfunctional and politicized that the best thing would be to begin anew: “We need to renew the leadership through a new competition in which the selection will be conducted not by representatives of the will of political groups (legally delegated representatives of the government, Parliament, or the president), but by domestic and international experts with a high reputation.”<sup>123</sup> While there are no immediate plans for international cooperation in the selection process of the new leadership of the DBR, Truba’s ouster in 2019 will inevitably result in another political compromise candidate for the head of the agency.

#### CONCLUDING REMARKS

The Euromaidan and its aftermath were the impetus for the expansion of civil society activity and involvement in public administration throughout Ukraine, in order to address very real and necessary social needs that the state failed to do, such as provisioning soldiers, providing security after the Euromaidan, and distributing mutual aid and services to those affected by the conflict.<sup>124</sup> As Ukrainian civil society took on more functions of the state in the aftermath of the Euromaidan, it also demanded a greater voice in designing, implementing, and overseeing reforms and government administration. The greater role that Ukrainian civil society has played in reform has been a net positive for Ukraine, making the badly discredited and dysfunctional public sector more transparent and accountable. In this article I have demonstrated that, despite these undeniable benefits, the creation of new democratic forums for civil society participation in public administration also carries risks and dangers if not carefully monitored by civil society and international actors. The danger is not an excess of democracy but, rather, that parallel to Ukraine’s civil society boom has been a growth of farcical civil society groups created and

deployed by political elites to exploit these new democratic institutions for their own interests. While the state has largely normalized and incorporated most of its contingents under central control since 2015, fake civil society groups backed by particular interests have flourished in Ukraine and continue to be deployed in business and political disputes. Mikhailo Minakov warns that, if left unchecked, “the nexus between civil society, business, and politics will introduce a new shade of systemic corruption and reduce the resources for the further democratic development of Ukraine.”<sup>125</sup>

Ukraine’s various experiments with public participation in law enforcement yield a variety of interesting conclusions. The first observation would be that, although public participation in selection or oversight institutions has the possibility to improve the cadres, credibility, and effectiveness of these law-enforcement structures, the independence and quality of public representation on these selection or oversight institutions are the critical factors in determining their future effectiveness. The most successful institutions, such as the Patrol Police and NABU, tend to have common elements of political insulation: extensive Western adviser oversight and leverage, cooperation with civil society groups, and transparent selection procedures. In the case of NABU’s Civil Oversight Council, online voting was crucial to producing an institution with well-respected members of civil society, whereas the DBR’s Civil Oversight Council was packed with politically dependent individuals with relatively unknown profiles in Ukraine’s civil society. Similarly, the process of police attestation demonstrated that, as soon as the Ministry of Internal Affairs regained control over the selection of civil society representatives on attestation

commissions after Mykolaiv and Odesa, they selected questionable representatives of civil society for attestation commissions. These individuals rubber-stamped and approved the vast majority of former militsiia personnel for service in the new National Police of Ukraine, despite massive evidence of corruption and abuse by these former officers.

Another takeaway has been that the legislative basis of these institutions is a less critical factor in selecting quality public representatives on these councils than the presence of international actors and independent civil society. For example, the police commissions that hire new police officers outside of the Patrol Police have a stronger statutory basis in the Law of Ukraine “On the National Police” for public participation than did the Patrol Police hiring. Yet, the ad-hoc manner of selecting local civil society members by Western and Georgian advisers through the National Recruitment Center seemed to have produced a higher quality of public representatives both in Patrol Police hiring and in the first round of attestations. This is not to say that reformers should not seek legal guarantees and formulas for public representatives on decision-making bodies, but, rather, that it is often the political will of elected officials, the vigilance of civil society, and the leverage of external advisers that ensure that hiring and personnel review are conducted in a transparent and meritocratic manner. Instead, reformers should focus on developing bureaucratic insulation through a variety of methods, including international cooperation and involvement in the selection of new agency staff and public commission representatives, on-line voting, and other measures to promote transparency which ensure that real civil society members are appointed to these commissions, and by working with a vigilant members of civil society who can detect cheating by agencies and efforts to install

politically dependent representatives of the “public.” Given Ukrainians’ low level of trust in public institutions and vibrant civil society, the efforts to increase public participation and oversight in reforms of law enforcement and other institutions should be seen as an impressive feat not only in Ukraine, but also in the global effort to increase law-enforcement accountability. The lessons learned from Ukraine are that public representation is important, but the question of who constitutes a legitimate member of the public or civil society is an equally important concern in establishing independent oversight over law-enforcement institutions. This article, while not intended as a policy paper, suggests several potential strategies to prevent patrimonial capture of institutions in states undergoing reform processes.

At this point, a fair question to ask is how Western states are able to identify and distinguish between independent civil society from “fake” civil society. While there is no easy answer, the US, Canada, and members of the EU have diplomats and advisers in Ukraine with years of experience in dealing with established local civil society groups. A fair critique of this argument is that by allowing Western states to be the arbiters of civil society credibility, they will have an obvious preference for groups that are older and larger, and which publish materials in English and other languages targeting an international audience. One critique of these “established” civil society groups in Ukraine and other countries is that they are rent-(grant-) seeking and often have deeper ties to external donors than their local communities. While this critique is not without merit, all civil society is in some degree financially dependent, and it is preferable that these organizations be dependent on international sources of funding rather than domestic political oligarchs. These criticisms aside, there are many truly independent civil society

groups in Ukraine that engage in local grassroots projects, have domestic legitimacy and large followings, and which have consistently demonstrated their political independence and willingness to call out corruption and misconduct on the highest levels. The process of identifying independent civil society will rarely be a scientific endeavor. But the inverse—identifying politically dependent, “fake” civil society—is very simple. These groups rarely have any institutional history and may exist only on paper. They lack a membership base, and quick social media searches will often show direct connections between the leadership of these members of “civil society” and the individuals whom they are meant to oversee. Western diplomats and advisers and their local staffs have adapted these and other methods to vet civil society groups in Ukraine. The argument developed in this article and the cases provided demonstrate that civil society involvement in hiring, vetting, and oversight can play an important role in reforming law-enforcement institutions by hiring quality candidates, firing corrupt law-enforcement officers, identifying organizational priorities, and overseeing these institutions. But the key factor is often Western leverage and political insulation. These new powers can go a long way toward improving the efficiency and legitimacy of law enforcement. However, because these new arenas for public participation afford important powers, they become targets for political capture and must be protected by independent arbiters. Without bureaucratic insulation, these new participatory forums will be colonized by political interests that will increase patrimonialism and decrease the credibility of these institutions. Reformers hoping to learn from the case of administrative reform in Ukraine should look to both the successes and failures in Ukraine’s struggle to control

patrimonial capture of institutions through bureaucratic insulation and cooperation with international actors and domestic civil society.

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<sup>2</sup> For more on the role of the European Union and other states in Ukraine’s reform, see Jozef Bátora and Pernille Rieker, “EU-supported Reforms in the EU Neighbourhood as Organized Anarchies: The Case of Post-Maidan Ukraine,” *Journal of European Integration* 40, no. 4 (2018): 461–78; Bohdan Harasymiw, “Civil Society as an Anti-Corruption Actor in Post-Euromaidan Ukraine,” *Canadian Slavonic Papers* 61, no. 3 (2019): 288–320; Rosaria Puglisi, *A People’s Army: Civil Society as a Security Actor in Post-Maidan Ukraine* (Rome: Istituto affari internazionali, 2015); idem, *Heroes or Villains?: Volunteer Battalions in Post-Maidan Ukraine* (Rome: Istituto affari internazionali, 2015); Olena Tregub, *Ukrainian Activism for Transparency and Accountability: Two Steps Forward, One Step Back* (Washington, D.C.: United States Institute of Peace, 2019); Kataryna Wolczuk, “State Building and European Integration in Ukraine,” *Eurasian Geography and Economics* 60, no. 6 (2019): 736–54.

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<sup>6</sup> Steven Levitsky and Lucan Way, “The Rise of Competitive Authoritarianism,” *Journal of Democracy* 13, no. 2 (2002): 51–65; Taylor, *State Building in Putin’s Russia*, 1.

<sup>7</sup> Taras Kuzio, “Russianization of Ukrainian National Security Policy under Viktor Yanukovich,” *The Journal of Slavic Military Studies* 25, no. 4 (2012): 558–81; Erik S. Herron, Nazar Boyko, and Michael E. Thunberg, “Serving Two Masters: Professionalization versus Corruption in Ukraine’s Election Administration,” *Governance* 30, no. 4 (2017): 601–19; Maria Popova and Daniel J. Beers, “No Revolution of Dignity for Ukraine’s Judges: Judicial Reform after the Euromaidan,” *Demokratizatsiya: The Journal of Post-Soviet Democratization* 28, no. 1 (2020): 113–42.

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<sup>11</sup> Puglisi, *People’s Army*; idem, *Heroes or Villains?*

<sup>12</sup> Ioulia [Yulia] Shukan, “Security and Justice from Below: Vigilantism in Ukraine: The Case of Odesa” (Paper presented at the 2016 ASN Convention, New York, 14–16 April 2016).

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<sup>15</sup> Matthew Light, “Police Reforms in the Republic of Georgia: The Convergence of Domestic and Foreign Policy in an Anti-Corruption Drive,” *Policing and Society* 24, no. 3 (2014): 318–45, <http://doi.org/10.1080/10439463.2013.784289>.

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<sup>18</sup> Ibid., 237.

<sup>19</sup> Levitsky and Way, “Rise of Competitive Authoritarianism,” 53.

<sup>20</sup> Lucan Way, *Pluralism by Default: Weak Autocrats and the Rise of Competitive Politics* (Baltimore, Md.: Johns Hopkins University Press, 2015).

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<sup>32</sup> Erica Marat, *Reforming the Police in Post-Soviet States: Georgia and Kyrgyzstan* (Carlisle, Pa.: Strategic Studies Institute, 2013), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a588027.pdf>; idem, *Politics of Police Reform*.

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<sup>38</sup> Olena Makarenko, “Civil Society Growing Tired: Public Watchdog Withdraws from Ukraine’s ‘Faked’ Judicial Reform,” *Euromaidan Press*, March 26, 2018, <http://euromaidanpress.com/2018/03/26/public-integrity-council-withdraws-from-evaluating-judges-claims-ukraines-judicial-reform-was-faked/>.

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<sup>42</sup> Batora and Rieker, “EU-supported Reforms,” 464.

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<sup>50</sup> Ibid, 12.

<sup>51</sup> Peacock and Cordner, “Shock Therapy,” 84–85.

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<sup>93</sup> Meaning, having entered its first case into the Universal Pre-Trial Registry.

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<sup>96</sup> “NABU Report: July–December 2017,” 12.

<sup>97</sup> Monastyr’s’kyi, “State Bureau of Investigation.”

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