

Elections in Ukraine

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on

Ukraine's Upcoming Elections: A Pivotal Moment

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Good afternoon ladies and gentlemen, members and staff of the Helsinki Commission. My name is Gavin Weise, I am the Deputy Director for Europe & Asia at the International Foundation for Electoral Systems, also known as IFES.

IFES is a global leader in democracy promotion. We advance good governance and democratic rights by providing technical assistance to election officials, empowering the under-represented to participate in the political process and applying field-based research. Since 1987, IFES has worked in 135 countries, from developing to mature democracies.

IFES has been active in Ukraine over the past two decades. IFES has provided support to nascent electoral institutions following Ukraine's independence; offered legislative assistance to fundamental laws; gauged citizens' sentiment and attitudes through annual public opinion research; and worked with a diverse range of civil society groups and experts to improve the quality and transparency of elections in the country. Currently we are actively promoting debate and analyses of electoral laws and other election issues among civil society experts; building the capacity of civic organizations to play a meaningful role in electoral and political processes and reform; supporting the Central Election Commission in its efforts to prepare for the 2012 elections; and will embark on longer-term institutional reforms.

Before moving to my remarks, I want to first pause and sincerely thank the Helsinki Commission for inviting IFES to speak today, but more so for simply holding this event. Over the past two years, really since Ukraine's last presidential election in 2010, organizations such as IFES, and those of my colleagues here today, have followed events closely in the country with an eye toward this October's parliamentary elections. While Ukraine had a record of relatively competitive, considerably free and fair, and competently run elections for several years up through the 2010 presidential election, the local elections in the fall of that year gave us all cause for serious concern. The conduct of those elections, subsequent deterioration of rights and freedoms as documented by a number of organizations, the much-publicized and seemingly selective political persecution of former government and current opposition figures, and recent developments with regards to the upcoming October election, have only heightened those concerns.

Since I am joined by my colleagues of the two political party institutes, I will focus my remarks on IFES' core competencies, namely the legal framework and administration of elections. In doing so, I will touch upon a number of persisting or new weaknesses in the electoral legislation, draw your attention to some recent developments in preparation for October's elections, and finally and perhaps most importantly, highlight what additional issues may surface in the coming months based on IFES' experience, observations and work in the country.

First of all, in regards to the current electoral legislation and the context under which it has come about, I would begin with the 2010 local elections, which were widely regarded as the most problematic elections in the recent history of Ukraine. For an account of the 2010 local elections and some of the issues encountered, you may refer to the U.S. Embassy in Ukraine's own statement of November 3, 2010. This preliminary statement cited concerns over insufficient training of election officials, ballot

lottery, commission membership and complicated registration procedures, among others. It also stressed weaknesses in the recently passed local election law which changed the rules of the game late in the process and, in the opinion of most experts, to the detriment of the opposition parties and several prominent independent candidates. In that statement the embassy also indicated a willingness to provide assistance to future electoral reforms in Ukraine.

On the heels of these elections, President Yanukovich announced his intent to embark on comprehensive electoral reform. Reform is of course a natural, ongoing process when a government, legislature or interest group seeks to improve and amend an institution or practice. Our own country shows no shortage of controversial topics that many would like to change in one way or another: campaign finance, redistricting and the electoral college, just to name a few. And while this commitment to legal reform was welcome in Ukraine, many stakeholders were surprised, and indeed dismayed, by the government's choice to begin with the parliamentary election law, a law that was regarded by many as being the least flawed of Ukraine's four primary election laws.

A reluctance of many stakeholders within the opposition, civil society and international organizations to participate in the government's working group on election reform was increased by the fact that the government made many key decisions, including a change in the electoral system, even before the working group's first meeting. Out of this process a new draft parliamentary election law was put forward. IFES, together with assessments of the Council of Europe's Venice Commission and OSCE/ODIHR, has drawn attention to both positive and negative provisions in the law through its formal assessment of the law, and subsequent analysis. This analysis is available on our website and copies are also available here today. Of note, the final version of the law prepared by the parliament's temporary special committee was not broadly discussed with experts and adopted in the first and final reading during one day with a number of changes from the drafts analyzed by international organizations. IFES later prepared its comments on the final law after its adoption which it circulated widely among stakeholders and the diplomatic community.

And it is of course this law which will regulate these elections in October.

Now, I would like to make a general comment regarding the electoral system, itself. Since the beginning of the reform process, the government of Ukraine let it be known that the electoral system would be a parallel electoral system, whereby half the deputies would be elected through proportional representation according to a nationwide vote, and half would be elected in winner-take-all electoral constituencies (not unlike our elections for the House of Representatives).

Inherently there is nothing wrong or right in such a system. However, I would like to draw your attention to the last time such a system was in place, exactly 10 years ago, during Ukraine's 2002 parliamentary elections. Those elections were held at a time of a government waning in popularity; yet eventually produced somewhat surprising results to the benefit of the pro-government political force, to the point of it successfully retaining significant control of the legislature. More specifically, in 2002, Nasha Ukraina received 23.57 percent of the popular vote in the nationwide constituency, and won 25 percent of the seats in the legislature, while pro-governmental pro-Kuchma "Zayedu" received 11.77 percent of the

vote in the nationwide constituency, yet won 22.4 percent of the seats. How did this happen? The pro-Kuchma “Zayedu” bloc did extraordinarily well in single-member districts. Academics have since shown how in districts where the lion’s share of the popular vote was clearly for one political party, the single member candidate vote in the same territory was rather oddly, not. A commonly held assertion among experts and academics was that in some cases use and control of administrative resource in certain territorial regions helped ensure a victory for pro-governmental candidates where the pro-governmental party did not enjoy a plurality of support.

What is important to note, is that today in Ukraine, we have a similar scenario unfolding: a parallel electoral system is now firmly in place. A number of polls, including IFES’ own from two weeks ago, shows the leading party in Ukraine, the governing Party of Regions, is in decline with support from only about 20 percent of the electorate. Meanwhile, the major oppositional parties cumulative support totals are polling now higher than the Party of Regions. So in a sense, we have a similar “mix” heading into the 2012 polls as we had in 2002; a governing force waning in popular support, about to compete in an election where half of the seats will be determined in single-member districts. In addition, the government holds considerable power at the local territorial level, clearly helped by the outcomes of those controversial local elections two years ago. Of course, we are not in 2002 but 2012 and can conclude nothing at this time. However, the parallel is striking and must not be dismissed.

A more technical issue we are now confronted with concerns the boundaries of those new single member-electoral districts. Just how many districts each administrative region of Ukraine would have was determined on April 28, 2012, and the borders of the districts were released made widely public on May 5. It is difficult to assess the Central Election Commission’s performance in creating the boundaries for these constituencies because the law included only three sub-articles to regulate this process. Efforts to develop a supplementary law on territorial organization of elections seem to have evaporated. Although there had been an earlier legislative intent, and indeed its creation was referenced in the early draft of the law, it simply did not happen. On a positive note, the Central Election Commission seems to have adhered to the 12 percent limit on the variation of voting population as prescribed by law, meaning the districts are to be relatively equal in population and thus the votes of citizens relatively equal. The Central Election Commission has allocated these districts to Ukraine’s regions proportionally to the number of voters registered there. We understand that attempts were recently made to challenge the new boundaries through the court system, but that the cases were dismissed on the ground that the plaintiff’s allegations, even if proven to be true, would not amount to a contravention of the law. In other words, it is proving difficult to challenge the legality of an act, when said act has little in the way to regulate it.

As IFES cautioned in several of its reports, leaving the law vague and devoid of several basic international norms of districting has yielded little in the way of predictability for contestants or guidance for election commissioners, potentially leaving the commission open to criticism as a consequence. Here we should also point out that between the initial draft of the new law and the final version, one of the *only* provisions in the draft law related to districts – that districts must be contiguous – was inexplicably removed. As the districts have now been unveiled, we not surprised to see that there are districts which are noncontiguous. Unless the desire is to keep, in the same election district, a

community of interest, such as an ethnic minority, or an established territorial unit (e.g. city, township, etc.) together, that, too, happens to be non-contiguous, by international standards there is no justifiable reason for doing this. In addition, there were no public or expert consultations, or certainly no expert input known to the public. How the districts were drawn in terms of political intentions, if they were indeed drawn for these reasons, will require some degree of political insight. A number of local groups have begun this analysis. Indeed, there is no doubt this expertise exists in Ukraine, and such information will certainly come to light. IFES, together with civil society partners, is itself working on a comprehensive technical analysis of the new districts which it hopes to release in the next week.

Another set of issues to watch relates to the formation of district and polling station election commissions, which are essentially the chief electoral bodies for their respective areas. This will take place by August 24, and September 26, respectively. Election commissioners in Ukraine, at each level of election administration, are chosen purely on a partisan basis. In other words: all commissioners are nominated by a political entity. Because of the number of registered parties in Ukraine, and the numbers expected to compete for these elections, places on these commissions will be at a premium.

Political factions already in the current parliament are guaranteed one place on each commission. With regards to the composition of the remainder of the commissions, there are a number of concerns. Instead of drawing lots from the entities competing in a district for the remainder of seats on the commission, on April 19 the Central Election Commission adopted a procedure whereby a single lottery will determine the ranking of political parties, which will then be used to fill each of the 225 district commissions around the country. This practice is contrary to an earlier IFES recommendation, as we believed separate lotteries for each district race should have been held. *Each* contestant to *each* electoral contest should have equal chance to gain the open positions on the presiding electoral commission. Should a party unfortunately draw near the bottom of the list in the lottery, they may lose any chance of getting even one of the 225 district commissions anywhere in the country. Drawing near the top gives them a high probability of membership or increased membership in every commission.

Also, the timeframe for submission of the candidates for membership in the commissions is very tight – three days. If there are any mistakes in the submission, the nominating party or candidate is informed and must file a corrected submission the very next day or an application is rejected. However, the manner in which parties and candidates are informed of such decisions is not clearly defined by the law. If a political entity misses the slim deadline because they did not learn until later that there was an issue with their submission, this is potentially an unfair practice. Should it be systemic, it could result in significant underrepresentation of certain parties and candidates on the commissions.

In terms of electoral administration, I should start by saying the Central Election Commission of Ukraine has an unenviable task. Training up to half a million election commissioners in a matter of a few weeks would be a difficult charge for any country. While organizations like IFES are willing partners of the election commission and will contribute some technical advice in planning, design and execution of training programs, overall, the burden of responsibility falls on the commission, itself.. The Central Election Commission will also face a significant challenge in educating voters on changed voting

procedures. Again, IFES and other members of the international community can be of assistance here, but ultimate responsibility will rest with the election commission.

Another challenge is that the commission will be overburdened with tasks in the upcoming months – it has to register candidates in each of the 225 single-member districts and the national party lists for the national district, accredit thousands of local and international nonpartisan observers, and thousands more candidates, party proxies and observers. Recently the election commission responded to this challenge through draft amendments to the parliamentary law, seeking to transfer some of its obligations to the district election commissions. However, experts do not believe this will prove successful. Understandably, there is resistance to further amending the legal framework so soon before an election.

Beyond mere logistical challenges, we must remember that in Ukraine election commissions are *de facto* not independent from political influence as they are formed by the political entities whose interests they represent on the commission. Such a concern has been raised by international organizations that observed previous elections, such as the OSCE/ODIHR. This issue is of crucial importance as commissions in Ukraine have a legal function to adjudicate certain types of election challenges and disputes; essentially deciding for or against a political entity's interests is arguably better served with a certain degree of neutrality.

Finally, I would point to a few additional issues to be cognizant of in the upcoming campaign and election. First, is the possibility that voters will be able to use the option in Ukraine of voting in their current temporary location to strategically change their polling place. This was a potential problem that IFES highlighted in its analysis of the draft law and should be closely monitored. In this regard it is worth noting that the system of voting in place, of temporary stay, bears a similarity to the absentee ballot system that was a major source of fraud during the 2004 Presidential elections.

Second, concerns the commonly recognized phenomenon that all major political entities receive financial and other support from Ukraine's wealthiest benefactors – a factor in perpetuating the corruption that is one of the hallmarks of political life in Ukraine. However, the legal framework does little to regulate or bring transparency to such relationships. The new parliamentary election law requires only the most basic level of disclosure and leaves ample room for campaign costs to be hidden as third party expenditures or services in-kind. Furthermore, discrepancies between the election law and the law on political parties make it easy for candidates to conceal both the sources of their funding and the full extent of their spending by funnelling it through political parties.

Third, Election Day, itself, may well be complicated by unwieldy procedures that ought to be clarified by the Central Election Commission in advance of the election; and of course, the ever present possibilities of abuse of state resources, vote buying schemes and other illegal practices that can thrive with impunity under a weak system of law enforcement.

Let me conclude by stating what the international community, including the United States, could do to support consolidation of democracy in Ukraine through a transparent, competitive and credible election this October.

First, do not take your eye off ball now. It is understandable that organizations such as IFES, NDI, IRI and others who are deeply invested in electoral and political reform perhaps put greater priority on these developments in countries like Ukraine, and for a longer period of time. But now we are less than six months from Election Day. Over the next few months important developments will take place that will surely tell us just how transparent, credible and evenly contested these elections might be. Today's testimony has given you only highlights of some concerns; many others will be seen in the upcoming weeks and months, and I urge you all to stay focused on these concerns.

To this end, it is of course vital for the U.S. and the larger international community to support nonpartisan observation efforts. We must pay close attention to and respond to electoral administration needs and help non-partisan human rights organizations, NGOs and media outlets have meaningful access to needed resources – especially through statements from entities such as your own, that continue to show that the U.S. is supportive of a democratic, free and fair election in Ukraine.

Second, I urge you to not take your eye off the ball *later*. Ukraine fatigue in the West has correlated positively with the government's recidivism with respect to human rights, obvious aggressions towards political rivals and efforts to solidify the hold on power. For our part, IFES has and will continue to advocate for improved democratic electoral legislation and practices, and compliance with international standards and best practices, but with an understanding of nuances and particularities of the country. We hope that the U.S. will continue to value and advocate for the continued role of international organizations like IFES, the Venice Commission and others to their Ukrainian counterparts.

Despite issues or concerns raised today, I would say that we certainly do not know what the outcome of these elections will be. But however the conduct – and whatever the outcome – it will be necessary to continue to engage Ukraine. Performance in the elections will determine in large part just how that engagement may take shape.

Thank you for the opportunity to testify today and I am happy to answer any questions you may have.