

# ORANGE REVOLUTION IN RED, WHITE, AND BLUE: U.S. IMPACT ON THE 2004 UKRAINIAN ELECTION

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Ukraine declared its independence from Communist Russia in 1991 . . . . This fall, elections were held that were fraudulent. More than 200,000 citizens took to the cold streets in their orange scarves. Their leader—sick, disfigured and in great pain for daring to seek freedom—stood with them. The case went to their Supreme Court, just like our 2000 election. In both cases, the courts ruled and the people followed the rulings. . . . Ukraine now has a democratically elected leader for the first time in more than 60 years.<sup>1</sup>

## INTRODUCTION

In 2004, the Ukrainian Supreme Court followed the steps of the U.S. Supreme Court in *Bush v. Gore*<sup>2</sup> when it decided to lead the country toward the resolution of the election crisis.<sup>3</sup> The Court's ruling in the *Yuschenko* decision resonated world-wide, resulting in a victory for democracy and a bright future for American-Ukrainian relations. Yet, a major aspect of this decision has gone unnoticed: the Ukrainian Supreme Court used this case to exercise its power of judicial review. As the United States Supreme Court did in the landmark case *Marbury v. Madison*,<sup>4</sup> the Ukrainian Court claimed the authority to say "what the law is"<sup>5</sup> for the first time. The United States has

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1. Joe B. Whisler, *The Rule of Law*, 61 J. MO. B. 70, 70 (2005).

2. 531 U.S. 98 (2000).

3. *Id.* at 111 (2000) (ending an electoral recount in Florida by reversing a judgment of the Florida Supreme Court. The reversal resolved the disputed presidential election of 2000 in favor of appellant George W. Bush).

4. 5 U.S. (1 Cranch) 137 (1803).

5. *Id.* at 177. ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

played a key role in this revolution by helping to shape the Ukrainian democracy. But the language barriers made it difficult for most legal scholars to closely analyze this significant legal development.

This Note, therefore, provides procedural background to the *Yushchenko* case and explains how the Court's decision was influenced by the United States. Part I discusses the status of Ukrainian electoral law prior to the events of 2004. Part II elaborates on the framework of the *Yushchenko* case, explaining the jurisdictional issues, the structure of the Ukrainian judicial system, and the procedural history. Part III demonstrates how American leaders foresaw the problematic election, and what steps were taken to remedy the situation. Finally, Part IV considers the potential consequences of the *Yushchenko* decision both for the Ukrainian judiciary and for the country's prospects of joining the European Union.

## I. ELECTIONS BACKGROUND

The Ukrainian President is elected by popular vote for a five-year term.<sup>6</sup> The election process is similar to that of the United States.<sup>7</sup> For example, Ukrainian citizens who are eighteen or older have the right to vote.<sup>8</sup> Unlike the polls in the United States, however, Ukrainian polling stations are supervised by official observers, whose duty is to ensure a fair outcome of the elections.<sup>9</sup> After the votes are cast, regional protocols are prepared and delivered to the Central Election Commission (CEC), which then compiles the results and announces the winner.<sup>10</sup>

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6. KONSTITUTSIYA UKRAINI [Constitution] art. 103, available at <http://www.rada.kiev.ua/const/conengl.htm>.

7. *Id.* arts. 69–74 (polling stations are located in each district, and votes are cast by means of secret ballots). Currently only paper ballots are used, but the 2004 Ukraine Presidential election may have provided the government with sufficient incentives to invest in electronic voting machines. See Ambassador John Tefft, *U.S. Will Work with Winner of a Free, Fair Election in Ukraine*, U.S. Info. State. Gov. (Dec. 8, 2004), <http://usinfo.state.gov/eur/Archive/2004/Dec/08-651072.html>. Electronic voting machines were proposed in Florida after allegations of fraud in the 2000 U.S. Presidential election. See *Bush*, 531 U.S. at 104 (“After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.”).

8. KONSTITUTSIYA UKRAINI art. 70.

9. Central Election Commission of Ukraine [hereinafter CEC], <http://www.cvk.gov.ua/pls/vp2004/wp0011e> (follow “Official Observers from Foreign States and International Organizations” hyperlink) (last visited Oct. 31, 2005).

10. See generally *id.* (for information on the election procedures and results).

Presidential elections in Ukraine consist of two rounds.<sup>11</sup> In theory, a candidate who secures more than fifty-one percent of the votes could win based on the first round alone.<sup>12</sup> However, this never happens in practice. No single candidate, including incumbents, has ever won the first round by absolute majority.<sup>13</sup> Verkhovna Rada (the Ukrainian Parliament) houses a number of political parties, each endorsing its own candidate,<sup>14</sup> and additional candidates run independently.<sup>15</sup> This system results in the nomination of more than twenty candidates, which makes securing outright majority virtually impossible.<sup>16</sup> Thus, the top two candidates advance to the second round.<sup>17</sup> Thereafter, the winner is determined by a simple majority vote.<sup>18</sup>

In the first round of the 2004 presidential elections, candidates Victor Yushchenko and Victor Yanukovich received the two highest percentages of votes, though both fell short of obtaining the needed majority.<sup>19</sup> Yushchenko, a pro-Western Democrat who ran independently, promised to take steps toward securing Ukraine's membership in the European Union and improving its relations with the United States.<sup>20</sup> Yanukovich, nominated by the Party of Regions,

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11. See generally CEC, *supra* note 9 (follow "Results of Voting in Ukraine" hyperlink) (discussing the results of the two rounds of elections and the results of the repeated voting).

12. *Id.*

13. *Id.*; see also Official Website of the President of Ukraine, <http://www.president.gov.ua/en> (follow "President of Ukraine" hyperlink; then follow "The History of Presidency" hyperlink) (last visited Oct. 31, 2005).

14. See KATARYNA WOLCZUK, *THE MOULDING OF UKRAINE: THE CONSTITUTIONAL POLITICS OF STATE FORMATION* 131 (2001) (discussing party membership in Ukrainian Parliament in 1994); see also CEC, <http://www.cvk.gov.ua/pls/vp2004/wp0011e> (follow "Candidates to the Post of President of Ukraine" hyperlink) (last visited Oct. 31, 2005).

15. CEC, <http://www.cvk.gov.ua/pls/vp2004/wp0011e> (follow "Candidates to the Post of President of Ukraine" hyperlink) (last visited Oct. 31, 2005). Twenty-four candidates were listed on the ballot in the 2004 presidential elections, nine of whom, including Yushchenko, ran independently. *Id.*

16. *Id.*

17. See *id.*

18. See *id.*

19. CEC, <http://www.cvk.gov.ua/pls/vp2004/wp0011e> (follow "Results of Voting in Ukraine" hyperlink; then follow "The Elections of the President of Ukraine, 31 October, 2004" hyperlink) (last visited Oct. 31, 2005). In the first round of elections, Yushchenko received 39.9%, and Yanukovich secured 39.2% of the votes. *Id.*

20. Anna Melnichuk, *Ukraine's Opposition Scores Victory*, *CASPER STAR TRIBUNE*, Dec. 3, 2004, at 34 (Viktor Yushchenko, who was a former central bank chief and prime minister "campaigning for president on a promise to forge closer ties with the West"); see also Daniel Dombey et al., *Yushchenko Takes Over with Eye on Europe*, *FIN. TIMES*, January 24, 2005, at 6 (in his inaugural speech Yushchenko reiterated his campaign promise: "Our way to the future is the way of a united Europe. We, along with the people of Europe, belong to one civilization. Our place is in the European Union.").

promised to reestablish close ties with Russia.<sup>21</sup> Because neither candidate received the requisite absolute majority, a second round of elections was held.<sup>22</sup> This second round became the basis of the 2004 world-wide controversy.<sup>23</sup> Although Yanukovich won the second round by a narrow margin, numerous factors indicated that his victory was gained by fraud.<sup>24</sup>

The most significant evidence of fraud was a suspiciously high voter turnout reported at over ninety percent.<sup>25</sup> Ukrainians are active in politics, and high voter turnout is not uncommon.<sup>26</sup> Every five years close to seventy percent of eligible citizens vote in presidential and parliamentary elections — a considerably high percentage by international standards.<sup>27</sup> However, the single instance of a ninety-percent voter turnout was in 1991, when Ukrainians voted overwhelmingly for the nation's independence.<sup>28</sup> In presidential elections, voter turnout never before approached the ninety-percent benchmark.<sup>29</sup>

Other factors further pointed to a fabrication of the results. Many individuals were allowed to vote twice; thousands of absentee ballots went missing, only to reappear in the voting bins shortly before the polling stations closed; and some citizens complained of threats and coercion.<sup>30</sup> In several districts, international independent

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21. CASPER STAR TRIBUNE, *supra* note 20 (noting that Prime Minister Viktor Yanukovich “[c]ampaigned for the presidency on a promise to forge closer ties with Russia [and] received strong Kremlin backing”).

22. See CEC, <http://www.cvk.gov.ua/pls/vp2004/wp0011e> (follow “Results of Voting in Ukraine” hyperlink; then follow “The Elections of the President of Ukraine, 31 October, 2004” hyperlink) (last visited Oct. 31, 2005).

23. U.S. Congressman Jim Leach called Ukrainian election “one of the semifinal events of this new century.” 150 CONG. REC. E2198 (daily ed. Dec. 7, 2004) (statement of Rep. Leach).

24. Presidential Runoff Election in Ukraine, S. Res. 487, 108th Cong. (2004); see also *EU Urges Fair Ukrainian Elections*, BBC NEWS, Oct. 1, 1999, <http://news.bbc.co.uk/2/hi/world/europe/463192.stm>

25. See CEC, *supra* note 22.

26. International Institute for Democracy and Electoral Assistance, *Voter Turnout*, [http://www.idea.int/vt/country\\_view.cfm?CountryCode=UA](http://www.idea.int/vt/country_view.cfm?CountryCode=UA) (last visited Oct. 31, 2005).

27. *Id.* Between 1994 and 2002, approximately seventy percent of eligible Ukrainians voted in presidential and parliamentary elections. *Id.* In the USA, voter turnout during the same period hovered around fifty percent. *Id.*

28. Richard C.O. Rezie, Note, *The Ukrainian Constitution: Interpretation of the Citizens' Rights Provisions*, 31 CASE W. RES. J. INT'L L. 169, 183 (1999); see also Judge Bohdan A. Futey, *Comments on the Constitution of Ukraine*, E. EUR. CONST. REV., Spring/Summer 1996, at 29.

29. See International Institute for Democracy and Electoral Assistance, [http://www.idea.int/vt/country\\_view.cfm?CountryCode=UA](http://www.idea.int/vt/country_view.cfm?CountryCode=UA) (last visited Oct. 31, 2005).

30. S. Res. 487, 108th Cong. (2004).

observers were denied entry into the polling stations.<sup>31</sup> Additionally, there were instances of assaults on electoral observers, illegal voting, and usage of counterfeit ballots.<sup>32</sup> A hotline, established by an independent U.S. organization, registered 7,476 calls from concerned citizens complaining about these violations.<sup>33</sup>

But the most egregious wrongdoing was yet to be discovered. On September 6, 2004 Yushchenko reported to a local hospital.<sup>34</sup> There were rumors that he was poisoned, but doctors were unable to find traces of poison in his blood.<sup>35</sup> Only three long months later, after numerous tests and examinations in the best medical facilities, doctors were able to conclusively establish that Yushchenko was poisoned by dioxin.<sup>36</sup> He survived the attack and was able to remain in the presidential race, despite numerous hospital visits and continuing treatment.<sup>37</sup> However, as a result of the poisoning, his face became badly disfigured.<sup>38</sup> Yushchenko and his supporters blamed this al-

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31. *Id.*

32. *Id.*

33. See American Bar Association, Central European and Eurasian Law Initiative in Ukraine, [http://www.abanet.org/ceeli/countries/ukraine/ukraine\\_2004\\_elections\\_activities](http://www.abanet.org/ceeli/countries/ukraine/ukraine_2004_elections_activities) (last visited Oct. 31, 2005).

34. Elizabeth Rosenthal, *American Doctors Helped Identify Ukraine Leader's Poisoning*, N.Y. TIMES, Mar. 13, 2005, at 13; *U.S. Doctors Treated Yushchenko; Secret Team Helped Find Dioxin*, WASH. POST, March 11, 2005, at A01 (doctors initially suspected inadvertent food poisoning, but it soon became clear that poisoning was intentional).

35. Elizabeth Rosenthal, *American Doctors Helped Identify Ukraine Leader's Poisoning*, N.Y. TIMES, Mar. 13, 2005, at 13.

36. *Id.* Dioxin is "one of the most toxic chemicals known to science." Dioxin Homepage, <http://www.ejnet.org/dioxin/> (last visited Oct. 31, 2005). There is no "safe" level of dioxin: it is linked to cancer and is known for its ability to damage the immune system. *Id.* Dioxin is present in food, and most of it comes from the consumption of beef. *Id.* It is extremely difficult to detect, as most laboratories do not have the necessary equipment and do not routinely test for dioxin; moreover, in most people, levels of dioxin are not high enough to be detected. Questions and Answers about Dioxins, U.S. Department of Health and Human Services <http://www.cfsan.fda.gov/~lrd/dioxinqa.html> (last visited Oct. 31, 2005).

37. See Elizabeth Rosenthal, *American Doctors Helped Identify Ukraine Leader's Poisoning*, N.Y. TIMES, Mar. 13, 2005, at 13.

38. *Id.* ("Mr. Yushchenko, who is still suffering from disfiguring cysts of his face, will need long-term treatment for his skin, . . . drugs to help his body dispel the dioxin, [and] close monitoring for signs of cancer . . ."). Presently, doctors are strongly advising Yushchenko against plastic surgery. *Id.*

leged assassination attempt on the opposition.<sup>39</sup> Nevertheless, there was no physical evidence linking Yanukovych to the poisoning.<sup>40</sup>

Even after the U.S.S.R. relinquished its control of the state, Ukraine had seen its share of repression.<sup>41</sup> The government had always retained extensive control over mass media, and “many members of the press have been murdered, after printing articles about government corruption and theft.”<sup>42</sup> Yet, never before<sup>43</sup> corrupt attempts to secure presidency have been so extensive, so bold, and so egregious.<sup>44</sup>

International organizations and foreign nations were stunned by the events in Ukraine.<sup>45</sup> News reports about Ukrainian elections flooded the internet and television.<sup>46</sup> The European Union issued a public opinion, calling for a new and fair election,<sup>47</sup> and the United Nations called “on all sides to exercise maximum restraint and to re-

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39. *Security Official Denies Role in Poisoning*, CHI. TRIB., Dec. 19, 2004, at 25 (“Yushchenko has accused the authorities of poisoning him in an attempted ‘political murder’ to push him out of the presidential race, saying he most likely was poisoned at a dinner Sept. 5 with Ukraine’s security agency chief . . .”).

40. Doctors suspected the poisoning was intentional because Yushchenko’s levels of dioxin exceeded normal levels 1,000 times, but they “would not speculate on the source.” See Elizabeth Rose nthal, *Yushchenko Able to Serve, But Will Need Longtime Care*, N.Y. TIMES, Dec. 27, 2004, at 12.

41. See Rezie, *supra* note 28, at 204 (discussing former President Kuchma’s blatant disrespect for the rule of law).

42. See *id.*; see also WOLCZUK, *supra* note 14, at 277-78.

43. With the exception of the murder of a Ukrainian journalist in 2000, which was linked to the administration. See *Kuchma to Be Quizzed Over Journalist’s Death*, THE INDEPENDENT (London), Mar. 10, 2005, at 21 (“Ukrainian prosecutors want to talk to former president Leonid Kuchma as part of their investigation into the killing of a journalist . . . Mr Kuchma’s opponents have accused him of involvement in the death of the investigative journalist Georgiy Gongadze, who was killed in 2000.”).

44. Reportedly, the Supreme Court Justices even “have been physically threatened to rule in favour of Prime Minister Viktor Yanukovych.” Stephen Mulvey, *Tough Choice for Ukrainian Court*, BBC NEWS, Nov. 29, 2004, <http://news.bbc.co.uk/2/hi/europe/4051641.stm>. In fact, the names of the Justices were “kept secret until the last minute to protect them from outside interference.” *Id.*

45. See INT’L ELECTION OBSERVATION MISSION, PRESIDENTIAL ELECTION (REPEAT SECOND ROUND), UKRAINE, *available at* <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN019428.pdf>. (last visited Oct. 31, 2005).

46. Inquiries about the Ukrainian Elections generated 4,730,000 hits on Google on December 17, 2005. See <http://www.google.com> (last visited Dec. 17, 2005).

47. Presidency Conclusions 16238/04, Declaration on Ukraine, Annex I, 2004 O.J. Benita Ferrero-Waldner, Comm’r for External Relations & European Neighborhood Policy, Situation in Ukraine: Address before the European Parliament (Jan. 12, 2004), *available at* [http://europa.eu.int/comm/external\\_relations/news/ferrero/2004/speech04\\_506\\_en.htm](http://europa.eu.int/comm/external_relations/news/ferrero/2004/speech04_506_en.htm) (last visited Oct. 31, 2005).

frain from divisive political statements that could endanger the stability of the country.”<sup>48</sup> Members of the United States Congress recommended a new election.<sup>49</sup> Finally, yielding to the pressure, on December 1, the Ukrainian Parliament passed a non-binding “no-confidence vote,” urging the Court to step in.<sup>50</sup> Despite the worldwide political pressure, a lawsuit challenging the election results appeared to be the only viable remedy.

Resorting to the Administration was not an option, because the President had no power to select the winner.<sup>51</sup> As for the Ukrainian Parliament, although it arguably had the power to act in the emergency circumstances,<sup>52</sup> its involvement would have been detrimental to either candidate. For Yushchenko, Parliament’s involvement meant losing the election because Yanukovych, who was a Prime Minister at the time, had substantial support of the Parliament and the President.<sup>53</sup> Likewise, a victory would be short-lived for Yanukovych because there was a significant risk that Ukrainians would revolt if the Parliament appointed Yanukovych the president.<sup>54</sup>

Consequently, after the fraudulent results were announced, Yushchenko immediately appealed the results to the Ukrainian Supreme Court.<sup>55</sup> He claimed violations of the election laws and asked the

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48. Highlights of the Spokesman’s Noon Briefing, Annan Calls for Patience and Respect Amid Court Review of Ukrainian Election, (Nov. 29, 2004), *available at* <http://www.un.org/News/Press/docs/2004/Nov/20041129.unsecsm1101.html> (last visited Oct. 31, 2005).

49. See 150 CONG. REC. E2138 (daily ed. Nov. 24, 2004) (statement of Rep. Davis); 150 CONG. REC. E2198 (daily ed. Dec. 7, 2004) (statement of Rep. Leach); 150 CONG. REC. S12021 (daily ed. Dec. 8, 2004) (statements of Sens. Frist and Reid); Presidential Runoff Election in Ukraine, S. Res. 487, 108th Cong. (2004).

50. Ambassador John Tefft, Deputy Assistant Sec’y for European & Euraisan Affairs, Testimony Before the House International Relations Committee: U.S. Will Work with Winner of a Free, Fair Election in Unkraine (Dec. 7, 2004), *available at* [http://www.usembassy.it/file2004\\_12/alia/a4120802.htm](http://www.usembassy.it/file2004_12/alia/a4120802.htm); Presidential Runoff Election in Ukraine, S. Res. 487, 108th Cong. (2004).

51. See *generally* KONSTITUTSIYA UKRAINI arts. 102-12 (outlining the powers of the Ukrainian president, which do not include the authority to select a new president).

52. See KONSTITUTSIYA UKRAINI art. 85 (pointing out that Verkhovna Rada [The Ukrainian Parliament] has the power to remove “the President of Ukraine from office” through impeachment).

53. See Tefft, *supra* note 50 (discussing “abuse of state resources to support the government’s candidate, Prime Minister Viktor Yanukovych [and] a near-monopoly of media attention for Yanukovych”).

54. See *generally* Presidential Runoff Election in Ukraine, S. Res. 487, 108th Cong. (2004) (describing protests of tens of thousands of people against declaring Yanukovych the winner).

55. Rishennia Verkhovnogo Sudu Ukraini [Decision of the Ukrainian Supreme Court] of December 3, 2004, <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=n0090700%2D04>. An

Court for injunctive and declaratory relief.<sup>56</sup> The lawsuit was met with skepticism because the Ukrainian Supreme Court had never before declared an election invalid, nor it ever asserted its power to interpret the election laws.<sup>57</sup> Nevertheless, thousands of Yushchenko's supporters, dressed in orange—Yushchenko's campaign color—gathered in the nation's capital.<sup>58</sup> They protested peacefully, although the threats that the country would divide were circulating on the streets of Kiev.<sup>59</sup>

Despite the very cold Ukrainian winter, protestors were on the streets day and night, sleeping in tents and relying on food that was delivered by international organizations. An independent Ukraine had never before seen such determination.

On December 3, 2004 the Supreme Court issued a ruling, announcing that evidence of numerous violations made it impossible to fairly calculate the results of the elections and ordering a runoff.<sup>60</sup> While the Court did not go so far as to proclaim Yushchenko the winner, his supporters rejoiced. Yushchenko subsequently won the runoff election by a lead of more than two million votes.<sup>61</sup> In his public address delivered after his victory, Yushchenko proclaimed: “[A]fter the Orange Revolution, the country and the nation have changed. Not only do we have an independent country, we have a free country . . . .”<sup>62</sup>

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excerpt in English is available at  
<http://www2.pravda.com.ua/en/archive/2004/december/3/5.shtml> (last visited Oct. 31, 2005).

56. *See id.*

57. *See* Matthew Schofield, *Ukraine Supreme Court Orders New Election*, PITTSBURGH POST-GAZETTE, Dec. 4, 2004, at A1 (“Beyond canceling a faked vote, the decision establishes the Supreme Court’s independence, which had been in doubt.”); *see also* Matthew J. Spense, *American Prosecutors as Democracy Promoters: Prosecuting Corrupt Foreign Officials in U.S. Courts*, 114 YALE L.J. 1185, 1188 n.15 (2005) (“[T]he Supreme Court of Ukraine showed unexpected independence in ruling against then-Prime Minister Viktor Yanukovich’s attempt to assume the presidency through a corrupt election.”).

58. Tefft, *supra* note 50. (The protests began shortly after the preliminary results of the second round of election were announced).

59. *See* Presidential Runoff Election in Ukraine, S. Res. 487, 108th Cong. (2004).

60. Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

61. Yushchenko supporters expected him to lead the runoff election by a wide margin; however, Yushchenko led by a narrower margin, securing 52% of popular vote, which was nevertheless sufficient to secure victory. C. J. Chivers, *Yushchenko Wins 52% of Vote; Rival Vows a Challenge* N.Y. TIMES, Dec. 28, 2004, at A3 (Yushchenko led Yanukovych by 52.06 percent to 44.14 percent).

62. Press Release, The White House, Vice President’s Remarks with Ukrainian President Yushchenko (Jan. 27, 2005), available at <http://www.whitehouse.gov/news/releases/2005/01/20050127-1.html>.

International media referred to the Court's decision as a surprise and as the new democracy in Ukraine.<sup>63</sup> In front of the Supreme Court, thousands of people gathered, cheering and waving orange flags.<sup>64</sup> December 3—the day on which the Ukrainian Supreme Court ordered a new, democratic election—was forever engraved in history as the date of the “Orange Revolution.”<sup>65</sup>

## II. PROCEDURAL HISTORY OF THE *YUSHCHENKO* CASE

### A. Jurisdiction and Composition of the Supreme Court

The *Yushchenko* case was filed directly before the Supreme Court.<sup>66</sup> The Ukrainian Supreme Court is the “highest judicial body in the system of courts of general jurisdiction.”<sup>67</sup> Its decisions are final and cannot be appealed.<sup>68</sup> While the Court ordinarily hears appeals from lower courts, it has original jurisdiction over election matters.<sup>69</sup> Importantly, even when the Court has jurisdiction to decide a case, it must refer constitutional questions to the separate and distinct Constitutional Court, which is the sole judicial body for deciding constitutional matters.<sup>70</sup>

The *Yushchenko* case was heard before a panel of nineteen Justices and the presiding Chief Justice.<sup>71</sup> The Civil Division, which has jurisdiction to decide election matters, currently has twenty-two Jus-

63. See, e.g., Brady Williamson, *Ukrainians Decide Future-Sense of Momentous Turning Point Marks Vote*, THE CAPITAL TIMES, Dec. 27, 2004, at 1A.

64. Tefft, *supra* note 50 (noting that the protests began shortly after the preliminary results of the second round of the election were announced).

65. Press Release, Vice President's Remarks, *supra* note 62.

66. See Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

67. KONSTITUTSIYA UKRAINI art. 125.

68. Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

69. During a meeting with CEELI representatives, Chief Justice Yarema explained that the Court decides election matters as the court of first instance, within five days after the case is filed—as required by Ukrainian law. See *Zustrich iz Predstavnikami Misii OBCE* [Meeting with CEELI Representatives], (Oct. 15, 2004)

<http://www.scourt.gov.ua/clients/vs.nsf/0/EC4F7F0910EF3D77C3256F9D002AB6DF?OpenDocument&CollapseView&RestrictToCategory=EC4F7F0910EF3D77C3256F9D002AB6DF>; see also *Zakon Pro Sudoustriy Ukraini*, Glava 8, Stattya 47; [Law on the Structure of the Ukrainian Judiciary, ch. 8, art. 47],

<http://www.scourt.gov.ua/clients/vs.nsf/0/F7FE086C2BD85DD342256C9B003F1550?OpenDocument&CollapseView&RestrictToCategory=F7FE086C2BD85DD342256C9B003F1550> (last visited Oct. 31, 2005).

70. KONSTITUTSIYA UKRAINI art. 147; Rezie, *supra* note 28, at 171.

71. Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

tices on the panel.<sup>72</sup> The Court cannot deny certiorari, and hence the docket is always full.<sup>73</sup> There are currently 25,000 cases pending before the Civil Division alone.<sup>74</sup> This means it may take several years or longer for a case to be decided.<sup>75</sup> However, the law defines circumstances under which the Supreme Court must give priority and decide a case immediately.<sup>76</sup> Accordingly, election matters must be decided within three to five days.<sup>77</sup> The Court may delay announcing its decision if it must certify a question to the Constitutional Court.<sup>78</sup> However, in this instance, the Supreme Court chose to decide the entire matter itself.<sup>79</sup> Although it complied with the five-day requirement, there is a question as to whether it violated the Constitution by deciding a constitutional issue without referring it to the Constitutional Court.<sup>80</sup>

### B. *Yushchenko*: The Landmark Decision

On December 3, 2004, the Ukrainian Supreme Court issued its stunning decision.<sup>81</sup> Citing numerous violations and instances of fraud, the Court declared the actions of Central Election Commission invalid and ordered a new runoff election to be held on December 26.<sup>82</sup> This complaint was filed by Yushchenko's representatives against the CEC, and Yanukovych intervened as an "interested person."<sup>83</sup> Petitioners asked the Court (1) to find that the CEC acted unlawfully during the counting stage, (2) to invalidate the CEC's announcement that Yanukovych had won the second round, (3) to find that serious violations of election law had occurred during the second round of election, (4) to invalidate the results of the second round,

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72. Meeting with CEELI Representatives, *supra* note 69.

73. Verkhovniy Sud Ukraini [Official Website of Ukrainian Supreme Court], *Sudova Praktyka: Sudova Statistika* [Judicial Practice: Judicial Statistics], <http://www.scourt.gov.ua> (last visited September 26, 2005) (noting that 67,000 cases were filed with the Court in 2004) (translation by author).

74. *Id.*

75. *Id.*

76. See *Law on Structure of the Ukrainian Judiciary*, *supra* note 69, ch. 8, art. 47.

77. *Id.*

78. *Id.*

79. Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

80. See Futey, *supra* note 28, at 32 (relying on Chapter VII of Ukrainian Constitution to conclude that the Supreme Court "can neither interpret laws, nor declare laws and acts unconstitutional").

81. See Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

82. *Id.*

83. *Id.*

and (5) to choose the winner based on the results of the first round alone.<sup>84</sup>

Petitioners presented evidence of numerous violations of election law, instances of fraud, and other irregularities that occurred on the election day.<sup>85</sup> Not surprisingly, Yanukovych and the CEC objected to Petitioners' request, claiming that even if violations did occur, they "did not impact and could not impact the results of the elections."<sup>86</sup> The Court disagreed. After being presented with evidence of fraud that it found to be credible, the Court granted the first four of Petitioners' requests, noting the following violations:<sup>87</sup>

1. The CEC failed to examine the regional protocols and to check them for authenticity.
2. The CEC failed to comply with Article 83(6) of the Presidential Elections Act.
3. The CEC neglected to consider timely complaints of violations.
4. Some citizens were allowed to vote twice.
5. In many instances, ineligible individuals were allowed to vote.
6. Absentee ballots were cast and delivered without due control on the part of the CEC.
7. There were numerous instances of voting outside the designated poll areas.
8. Many independent observers were denied the opportunity to observe the voting process.<sup>88</sup>

The Court concluded that these circumstances were sufficient to establish violations of Articles 38, 71, and 103 of the Ukrainian Constitution and Article 11(2) of the Presidential Elections Act.<sup>89</sup> Because it was "impossible to determine the actual will of the voters," the Court ordered the CEC to hold a new election.<sup>90</sup> Thus, the Court granted Petitioners' first four requests but denied the fifth request, noting that the outcome of the election could not be determined by

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84. *Id.*

85. *Id.*

86. *Id.*

87. Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

88. *Id.*

89. *Id.*

90. *Id.*

the results of the first round alone.<sup>91</sup> Neither candidate achieved an outright majority vote in the first round, and the Presidential Elections Act specifically provided for a second round of voting in such circumstances.<sup>92</sup>

This decision was “final,” which meant it could not be appealed.<sup>93</sup> However, a question remains as to whether the Court had jurisdiction to decide constitutional matters.<sup>94</sup> As some commentators have suggested, the Supreme Court “can neither interpret laws, nor declare laws and acts unconstitutional.”<sup>95</sup> Nonetheless, by finding violations of certain articles of the Constitution and the Presidential Elections Act, the Court effectively claimed the power to decide these matters.<sup>96</sup> The proper procedure would have been for the Court to make factual determinations and then refer the question to the Constitutional Court.<sup>97</sup> However, the Court did not do so—most likely for two reasons. First, due to obvious time constraints, it was impractical to refer the question. Second, a referral would undermine the Court’s authority in the future.

Like Chief Justice John Marshall in *Marbury v. Madison*, the Ukrainian Supreme Court Justices were concerned about judicial supremacy and felt that it was sound to assert the Court’s power of judicial review in a decision that the entire world was awaiting.<sup>98</sup>

Importantly, the jurisdictional issue was never raised by the Respondents. Perhaps they failed to catch this error, or perhaps they actually believed that the Court had the authority it claimed to have.<sup>99</sup> It is equally possible that this was a tactical attempt by the Respon-

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91. *Id.*

92. *Id.*

93. Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

94. See Futey, *supra* note 28, at 33.

95. See *id.* (interpreting Chapter VII of the Ukrainian Constitution).

96. See WOLCZUK, *supra* note 14, at 259-60 (pointing out that, although the Ukrainian Constitutional Court “was conceived as a powerful institution,” it found itself in a vulnerable position, often striving “to limit the impact of its rulings by carefully seeking out the middle ground”).

97. See KONSTITUTSIYA UKRAINI art. 147 (“The Constitutional Court of Ukraine shall be the sole body of constitutional jurisdiction in Ukraine.”). See also KONSTITUTSIYA UKRAINI art. 150 (noting that the Constitutional Court has the sole authority to decide the constitutionality of laws passed by the Parliament).

98. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

99. See Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

dents to curtail lengthy judicial proceedings.<sup>100</sup> Finally, Respondents may have simply desired a ruling from a more prestigious and authoritative court.<sup>101</sup> Despite this failure to object to jurisdiction, Yanukovich and his supporters continued to litigate aggressively, bringing three additional complaints shortly after the *Yushchenko* case was decided.<sup>102</sup>

### C. Subsequent Cases

On December 24, 2004 forty-six members of the Verchovna Rada (Ukrainian Parliament) filed a case in the Constitutional Court, asking it to declare the Presidential Elections Act unconstitutional.<sup>103</sup> In this case, Petitioners claimed that the Act violated rights and freedoms of Ukrainian citizens.<sup>104</sup> The Act provided that all citizens had to report to the polling stations in order to vote.<sup>105</sup> Petitioners argued that the Act violated the right of those disabled citizens who were unable to attend the polling stations.<sup>106</sup> After hearing the testimony of numerous experts, the court granted this request.<sup>107</sup> The court held that Article 6 of the Act restricted disabled citizens' right to vote by prohibiting voting outside the polling stations.<sup>108</sup> Moreover, Article 6 requires certain proof of disability, which—in the court's view—made

100. Yanukovych may have also believed that the Constitutional Court would easily give in under pressure and rule for Yushchenko. See WOLCZUK, *supra* note 14, at 259-60.

101. Additionally, parties may have rightly believed that the Ukrainian people would be more inclined to accept the negative outcome from the Supreme Court, rather than from the Constitutional Court, since European constitutional courts do not receive the same kind of deference as the high courts of general jurisdiction. See Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1601 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)) (noting that “constitutional courts of Europe . . . combine ultimate interpretive authority with a high degree of insulation from popular opinion”).

102. See *infra* text accompanying notes 103-19. The first case was filed in the Constitutional Court by the members of the Ukrainian Parliament, challenging constitutionality of the Presidential Election Act; the second and third cases were filed by Yanukovych, who claimed CEC's non-compliance with the Act and asked the Court to order yet another runoff election.

103. See Rishennia Konstitutsiyogo Sudu Ukraini [Decision of the Ukrainian Constitutional Court] of December 24, 2004, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v022p710%2D04> (last visited Sept. 26, 2005).

104. See *id.*

105. See *id.*; see also KONSTITUTSIYA UKRAINI art. 46 (guaranteeing “the right to be protected in the event full, partial, or temporary disability”).

106. Decision of the Ukrainian Constitutional Court of December 24, 2004, *supra* note 103.

107. *Id.*

108. *Id.*

it more difficult for disabled citizens to exercise their right to vote.<sup>109</sup> The court thus declared Article 6 of the Act unconstitutional.<sup>110</sup>

On December 25, 2004, one day before the runoff election, Yanukovych filed a claim in the Supreme Court.<sup>111</sup> Relying on the above decision of the Constitutional Court, Yanukovych claimed that the CEC continued to act improperly, violating rights of disabled citizens.<sup>112</sup> This case was Yanukovych's tactical attempt to delay the runoff election or to invalidate possibly unfavorable results, so that Parliament could intervene and declare him the winner.<sup>113</sup> However, the Court rejected his claim, and used this as an opportunity to have its own *Marbury v. Madison* moment.<sup>114</sup> The Court pointed out that the CEC had a right to require proof of disability.<sup>115</sup> Thus, without specifically overruling the Constitutional Court—which it did not have the authority to do—the Supreme Court issued a ruling that was, in part, contrary to the Constitutional Court's decision. Once again, the

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109. *Id.* The Act provided that only citizens with "category I" disability (those who were immobile) could vote outside the voting poll areas. They had to present notary-certified copies of official documents, evidencing disability, or other various documents if notary was not available. The court found that this violated rights of those disabled citizens whose disabilities did not fall under category I, and that the means required by the Act to prove disability were too burdensome. *See id.*

110. Decision of the Ukrainian Constitutional Court of December 24, 2004, *supra* note 103. One judge wrote a concurring opinion, pointing out that the court should have also considered the right to vote via absentee ballots as the reason for invalidating the Act. *Id.* Another judge dissented on the grounds that proof required to show disability was not burdensome, and that local governments should be the ones responsible for encouraging and providing an opportunity for the disabled citizens to attend the polls. *Id.*

111. Rishennia Verkhovnego Sudu Ukraini [Decision of the Ukrainian Supreme Court] of December 26, 2004, <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=n0119700%2D04> (last visited Oct. 31, 2005). Refusing to accept the outcome of the runoff election, Yanukovych claimed that this time nearly five million people—one tenth of the Ukrainian population did not have a chance to vote. Chivers, *supra* note 61, at A3.

112. Decision of the Ukrainian Supreme Court of December 26, 2004, *supra* note 111.

113. Yanukovych, who was a Ukrainian Prime Minister at the time of the elections controversy, had substantial support of the Parliament and the outgoing President, and there were rumors that, absent adequate and timely actions on behalf of the Court, the Parliament would step in and appoint Yanukovych the President. *See* Tefft, *supra* note 50 (discussing "abuse of state resources to support the government's candidate, Prime Minister Viktor Yanukovych").

114. *See* Decision of the Ukrainian Supreme Court of December 26, 2004, *supra* note 111; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.")

115. Decision of the Ukrainian Supreme Court of December 26, 2004, *supra* note 111. In fact, contrary to the Constitutional Court's view, the Court held that the CEC could require *any proof it deemed necessary*. *See id.*

Supreme Court indicated that it viewed itself as the highest judicial body, with jurisdiction to decide *all* cases and to hear appeals from *all* courts.<sup>116</sup>

On January 14, 2005, having lost the election, Yanukovych filed yet another claim against the CEC before the Supreme Court.<sup>117</sup> He argued that the CEC violated certain rules and procedures in the December 26 election and asked the Court (1) to invalidate the results and (2) to order yet another runoff election.<sup>118</sup> The Court denied both requests after finding that Yanukovych failed to meet his burden of proof,<sup>119</sup> and that the CEC had complied with the law.<sup>120</sup> This line of Supreme Court decisions not only resulted in a truly democratic election, but also set a promising precedent for the assertion of the constitutional power by the Ukrainian judiciary.

### III. U.S. INFLUENCE ON UKRAINIAN JURISPRUDENCE

The U.S. influence on Ukraine began in 1991, when this newly independent country commenced drafting its constitution. As one commentator noted, “[c]onstitutions do not develop in a political vacuum.”<sup>121</sup> When a country is engaged in the constitution-drafting process, it looks “to well-tested constitutional models and attempt[s] to rebuild them in the context of [its] own geopolitical circumstances.”<sup>122</sup> Ukraine turned to the U.S. constitutional model, which has been tested by centuries of judicial opinions.<sup>123</sup> However, the U.S. Constitution was not the only thing borrowed by Ukraine in the process. Substantial resources were expended by the U.S. government and nongovernmental organizations with the goal of improving

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116. A similar assumption was made by the Supreme Court in the December 3 opinion, when it decided the constitutionality of the CEC acts without referring the question to the Constitutional Court. See *supra* text accompanying notes 94-101.

117. See Rishennia Verkhovnogo Sudu Ukraini [Decision of the Ukrainian Supreme Court] of January 20, 2005, <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=n0001700%2D05> (last visited Oct. 31, 2005). Yushchenko intervened as an interested party. *Id.*

118. *Id.*

119. *Id.*; see also Chivers, *supra* note 61, at A3 (“It was easier to make allegations . . . then to demonstrate them with facts.”).

120. Decision of the Ukrainian Supreme Court of January 20, 2005, *supra* note 117. Importantly, international observers similarly “declared that the conduct of the voting on [December 26] was a substantial improvement over previous rounds.” Chivers, *supra* note 61, at A3.

121. Rett R. Ludwikowski, *Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis*, 33 GA. J. INT’L & COMP. L. 1, 4 (2004).

122. *Id.*

123. *Id.* at 12.

Ukraine's judicial system and electoral process.<sup>124</sup> Ukrainian judges were educated on how to decide election controversies,<sup>125</sup> and high Ukrainian officials were "instructed" by the United States to refrain from improperly influencing election commissioners.<sup>126</sup> In 2004, it became clear that the United States succeeded in its goal of fostering democracy in Ukraine and made the Orange Revolution possible.

#### A. U.S. Influence on the Ukrainian Constitution

The U.S. Constitution undoubtedly had an impact on the drafters of the Ukrainian Constitution.<sup>127</sup> Ukraine adopted its Constitution on June 28, 1996, five years after declaring its independence.<sup>128</sup> While the drafters of the Ukrainian Constitution continuously debated over its form, it was clear that the contents would be borrowed from the U.S. Constitution.<sup>129</sup> First, the U.S. Constitution was a model that was convenient, well-known, and tested by centuries. Second, the U.S. government spared no time, efforts, or money persuading Ukraine to adopt a U.S.-modeled constitution. In fact, during the drafting stage, the U.S. government sent representatives to the Ukrainian Parliament to participate in the constitutional debates, to assist the drafters, and to persuade them to adopt a democratic version of the Constitution. The final version of the Ukrainian Constitution was, in fact, very democratic.

The U.S. influence on the final draft of the Ukrainian Constitution is evident from substantial similarities between the two documents.<sup>130</sup> First, both constitutions rely on the concept of separation of

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124. Richard W. Soudriette, *What Iraq's Elections Teach Us About Democracy Building*, HUM. RTS. Spring 2005, at 22 ("America has provided essential funding for elections and for associated democratic practices—such as political party development, rule of law, civil society, and governance—through the National Endowment for Democracy, the U.S. Agency for International Development, and the U.S. Department of State.”).

125. American Bar Association, Central European and Eurasian Law Initiative in Ukraine, <http://www.abanet.org/ceeli/countries/ukraine/program.html>; [http://www.abanet.org/ceeli/countries/ukraine/ukraine\\_2004\\_elections\\_activities](http://www.abanet.org/ceeli/countries/ukraine/ukraine_2004_elections_activities) (last visited Oct. 31, 2005).

126. Tefft, *supra* note 50 (“[I]f the [Ukrainian] election once again fails to meet democratic standards, there will be consequences for [U.S.-Ukrainian] relationship, for Ukraine’s hopes for Euro-Atlantic integration, and for individuals responsible for perpetrating fraud.”).

127. See Ludwikowski, *supra* note 121, at 4 (suggesting that the “drafters in post-socialist states looked most often to the liberal traditions of the United States”).

128. Rezie, *supra* note 28, at 170.

129. Ludwikowski, *supra* note 121, at 12 (noting that the Ukrainian Constitution “clearly borrowed from the American presidential system” and the U.S. Constitution).

130. See Rezie, *supra* note 28, at 181.

powers and provide for the three branches of government with exclusive executive, legislative, and judicial powers.<sup>131</sup> Second, the U.S. and Ukrainian constitutions list virtually identical fundamental rights.<sup>132</sup> Finally, both constitutions are considered “the supreme law of the land.”<sup>133</sup>

First, and perhaps the most significant similarity between the two constitutions is Ukraine’s borrowing of the U.S. principle of separation of powers,<sup>134</sup> set forth in Articles V, VI, and VIII of the Ukrainian Constitution.<sup>135</sup> Ukraine established this principle on paper and is currently moving towards implementing it in practice (albeit not without a struggle).<sup>136</sup>

As one legal scholar noted, in order to successfully implement a separation of powers system, “a constitution must establish branches of government that are not only separate but also coordinate and equal.”<sup>137</sup> Accordingly, the Ukrainian Constitution not only creates the three branches of government, but also attributes exclusive powers to each of these branches.<sup>138</sup> The president, although called the “Head of State,” performs functions of the Commander-and-Chief, similar to the U.S. president.<sup>139</sup> The Parliament, similar to the U.S. Congress, has legislative power.<sup>140</sup> Finally, the judicial branch has the sole power to interpret the law.<sup>141</sup>

131. Compare KONSTITUTSIYA UKRAINI arts. 75-112, 121-23 with U.S. CONST. arts. I-III.

132. See *supra* notes 147-54 and accompanying text.

133. Compare KONSTITUTSIYA UKRAINI art. 8 with U.S. CONST. art. VI, cl. 2. See also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 326-27 (1819) (“The constitution . . . shall be the supreme law of the land . . . and it confides to this Court the ultimate power of deciding all questions arising under the constitution and laws of the United States.”) (emphasis added).

134. Compare KONSTITUTSIYA UKRAINI arts. 75-112, 121-23 with U.S. CONST. arts. I-III.

135. See Futey, *supra* note 28, at 31.

136. Communists opposed the separation of powers, arguing that it was “a lofty principle, and that even in the USA the unity of the state power took priority over separation.” See WOLCZUK, *supra* note 14, at 142. On the other hand, national-democrats “argued that the principle of separation of powers would be best adopted to the Ukrainian conditions in a presidential system, which denoted a division of powers between the legislature and a directly elected, executive presidency modeled on the American system . . .” *Id.* at 145 (emphasis added).

137. Futey, *supra* note 28, at 31.

138. See KONSTITUTSIYA UKRAINI arts. 75-112, 121-23.

139. WOLCZUK, *supra* note 14, at 240.

140. KONSTITUTSIYA UKRAINI art. 75 (“The sole body of legislative power in Ukraine is the Parliament—the Verkhovna Rada of Ukraine.”).

141. KONSTITUTSIYA UKRAINI art. 124 (“Justice in Ukraine is administered exclusively by the courts. The delegation of the functions of courts, and also the appropriation of these functions by other bodies or officials, shall not be permitted.”).

The Ukrainian Constitution provides for a similar structure of courts to that in the United States: there are district courts, appellate courts, and the Supreme Court.<sup>142</sup> Like the U.S. Supreme Court decision in *Bush v. Gore*,<sup>143</sup> courts in “Ukraine took a decisive step towards the judicialization of political power, subjecting political disputes to judicial decisions, in order to resolve the power conflict . . . .”<sup>144</sup> However, unlike in the United States, there is an independent Constitutional Court in Ukraine, which has the sole power to interpret the Constitution and to decide constitutionality of laws.<sup>145</sup> Despite these minor differences, the separation of powers concept is live and well in Ukraine, and most of the functions and duties of the Executive, Legislative, and Judicial branches are similar to those in the United States.<sup>146</sup>

The second important similarity between Ukrainian and U.S. constitutions is a similar list of fundamental rights and freedoms. The Ukrainian Constitution contains “virtually innumerable” guarantees of individual rights, most of which are borrowed from the U.S. Constitution.<sup>147</sup> For example, both constitutions have identical guarantees of freedom of speech, religion, and movement; protection from double jeopardy; and the right to vote.<sup>148</sup> Both constitutions are also similar in that they set forth some limitations on individual rights and freedoms.<sup>149</sup> The Ukrainian Constitution enumerates those rights

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142. See KONSTITUTSIYA UKRAINI arts. 124, 125.

143. 531 U.S. 98, 111 (2000).

144. WOLCZUK, *supra* note 14, at 240.

145. *Id.* at 240 (“The principle of the separation of powers was vindicated in the provision of the Constitutional Court, which has given sole authority to constitutional jurisdiction . . .”).

146. See *id.* at 247, noting that the Ukrainian Constitution “was far from an ‘innovative leap,’ or ‘conceptual revolution’; it predominantly aspired to match and conform to uniform standards . . . rather than to invent new ones.”

147. Anna M. Kuzmuk, Recent Development, *Rule of Law and Legal Reform in Ukraine: A Review of the New Procuracy Law* 34 HARV. INT’L L.J. 611, 621-22 (1993); see also Rezie, *supra* note 28, at 207. For a list of Ukrainian fundamental rights, see Futey, *supra* note 28, at 32.

148. Compare, e.g., KONSTITUTSIYA UKRAINI arts. 21-68 with U.S. CONST. amends. I, V, XXVI.

149. For example, in some circumstances the government may limit individual’s right to free speech. See KONSTITUTSIYA UKRAINI art. 34 (guaranteeing the right to free speech, thought, and expression but providing that legal restrictions may be imposed on the exercise of these rights “in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.”); U.S. CONST. amend. I; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to

that are merely implied in the U.S. Constitution, for example the right to privacy, the right to family, and the right to education.<sup>150</sup> Having finally become independent, Ukrainians overemphasized the need for a guarantee of “liberties that Ukrainian people never possessed.”<sup>151</sup> Hence, numerous Parliamentary debates, amendments, and revisions resulted in a very elaborate constitution.<sup>152</sup> Enumerated rights in the Ukrainian Constitution have become so expansive that one legal scholar placed the Ukrainian Constitution among “the nine most ‘generous’ constitutions which list comprehensive social security, education, health care, work protection rights, and other socioeconomic rights . . . .”<sup>153</sup> Despite a concern that the rights may be too expansive to actually implement, the Ukrainian Constitution does make “great strides toward a democratic society.”<sup>154</sup>

The third important similarity between the two constitutions is the supremacy of the Constitution over legislative acts and judicial decisions. Both Article I of the Ukrainian Constitution and Article VI of the U.S. Constitution provide that the constitution is the supreme law of the land.<sup>155</sup> Importantly, neither constitution can be repealed or superseded by any law—it can only be amended.<sup>156</sup> Recent decisions show that, although the supremacy concept is more estab-

serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” (quoting *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984)). See Futey, *supra* note 28, at 30 for a detailed examination of limitations on the rights of Ukrainian citizens.

150. KONSTITUTSIYA UKRAINI arts. 31, 32, 53.

151. Futey, *supra* note 28, at 29. For example, some of the rights that were denied to Soviet citizens were the right to travel, the right to privacy, and the right to free speech. *Id.*

152. The Ukrainian Constitution was drafted by members of the Ukrainian Parliament, who began deliberations and revisions of the constitutional draft immediately after the breakup of the Soviet Union. See WOLCZUK, *supra* note 14, at 193. As the Eighth Circuit noted, the Ukrainian government “changed fundamentally following the breakup of the Soviet Union. The 1996 Ukrainian Constitution and a 1991 Law on Freedom of Conscience and Religion provide protection for religious freedoms, and current citizenship laws encourage the existence of a multi-ethnic country.” *Fisher v. I.N.S.*, 291 F.3d 491, 493 (8th Cir. 2002).

153. Wojciech Sadurski, *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*, 65 LAW & CONTEMP. PROBS. 223, 233 & n. 63 (2002). Moreover, the Constitution provides that this list of rights is not exhaustive, and new laws may guarantee additional rights. Ludwikowski, *supra* note 121, at 24.

154. Rezie, *supra* note 28, at 207.

155. Compare KONSTITUTSIYA UKRAINI art. 8 with U.S. CONST. art. VI cl. 2.

156. Compare KONSTITUTSIYA UKRAINI arts. 154-59 with U.S. CONST. art. V. In Ukraine, amendments must be ratified by two-thirds of parliament. KONSTITUTSIYA UKRAINI art. 156. The United States Constitution can be amended by ratification from the States. U.S. CONST. art. V.

lished in the United States, it is similarly respected by Ukrainian courts.<sup>157</sup>

The supremacy, separation of powers, and the fundamental rights provisions are the three most significant concepts borrowed from the U.S. Constitution. Minor differences in the constitutional structure, variety of enumerated rights, and deviations of powers of the three branches of government are relatively easy to reconcile. While mirroring the structure of the U.S. Constitution, the drafters had to expand the Ukrainian Constitution to tailor it to the needs of the post-Soviet emerging democratic government.<sup>158</sup> Despite this expansion, the substantial similarities between the Ukrainian and the U.S. constitutions vividly portray the extent of the U.S. impact on the Ukrainian Constitution.<sup>159</sup>

## B. U.S. Influence on the Ukrainian Judiciary

The U.S. Constitution was only one of many ways through which the United States influenced the Ukrainian judiciary. In the years since Ukraine's independence, various U.S. organizations have made a significant impact on practices and procedures implemented by Ukrainian judges.<sup>160</sup> Even at present, many of these organizations have offices in Ukraine.<sup>161</sup> They conduct various activities, sponsoring seminars and educating Ukrainian judges and law students on how to implement the "rule of law."<sup>162</sup> The "rule of law" is the concept enumerated in many European constitutions. One of its significant meanings is that the government can be sued for its acts—a concept previously unknown to the Soviet Ukraine.<sup>163</sup>

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157. See, e.g., Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

158. See WOLCZUK, *supra* note 14, at 193.

159. See Rezie, *supra* note 28, at 181.

160. See International Cooperation (1994-2002) <http://www.scourt.gov.ua> (last visited Oct. 31, 2005) (follow "Mijnarodni Zvyazki" hyperlink, then follow "Uchast u Navchalnih Programah" hyperlink) (discussing the "Rule of Law" program, under which the Ukrainian Supreme Court and the U.S. Government "work together to strengthen the capacity of judiciary and general courts' staff") [Hereinafter "International Cooperation"]; American Bar Association, *supra* note 125; Ukrainian Legal Foundation, Informational Resource Portal, <http://www.ulf.com.ua/eng/about.asp> (last visited Sept. 26, 2005).

161. American Bar Association, *supra* note 125.

162. America and the Court: Interview with Justice Sandra Day O'Connor (C-Span television broadcast July 24, 2005) (discussing her involvement with CEELI and the successful development of the rule of law in Ukraine).

163. See Futey, *supra* note 28, at 30.

The American Bar Association is one of the leading organizations providing legal training and financial assistance for such seminars in Ukraine.<sup>164</sup> As a result of these seminars, Ukrainian judges are now better equipped to decide cases, interpret the Constitution, and even write dissenting and concurring opinions.<sup>165</sup> The citizens are beginning to trust the judicial system and are increasingly relying on courts to decide many disputes for which they previously had no legal recourse.<sup>166</sup> More and more cases are being filed, and the Supreme Court already reports that its docket is full.<sup>167</sup> Other courts are flooded with lawsuits as well. For example, in one of the recent cases brought before the Ukrainian Constitutional Court, “[i]t took three years to finish oral arguments.”<sup>168</sup>

The Constitution now plays an important role in many decisions.<sup>169</sup> Similar to U.S. judges, Ukrainian judges interpret the Constitution by looking at its plain language and by analyzing the drafters’ intent and historical circumstances.<sup>170</sup> This decision-making approach was first articulated by the U.S. Supreme Court in *Martin v. Hunter’s Lessee* in 1816.<sup>171</sup>

The Ukrainian Supreme Court has also been taking significant steps towards establishing its authority as the highest court.<sup>172</sup> It emphasizes in every case that its decision is final and binding.<sup>173</sup> The Court also went so far as to assume it has jurisdiction over *all* legal matters.<sup>174</sup> In the *Yuschenko* case, the Court declared acts of the Central Elections Committee unconstitutional, without referring the

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164. See American Bar Association, *supra* note 125.

165. See *id.*

166. See Futey, *supra* note 28, at 29.

167. Sudova Statistica [Judicial Statistics for 2004], <http://www.scourt.gov.ua> (follow “Judicial Practice” hyperlink; then follow “Judicial Statistics” hyperlink; then follow “2004” hyperlink) (last visited Oct. 31, 2005). According to judicial statistics, the amount of claims that were filed with or appealed to the Ukrainian Supreme Court has increased by forty percent in 2004, with the Court having to decide 67,000 cases in 2004. *Id.*

168. Alexei Trochev, Constitutional Developments, *Ukraine: Constitutional Court Invalidates Ban on Communist Party*, 1 INT. J. CONST. L. 534, 536 (2003).

169. Futey, *supra* note 28, at 29.

170. See generally Official Website of Constitutional Court of Ukraine, Akti KSU: Rishenya KSU [Acts and Decisions of the Constitutional Court], <http://www.ccu.gov.ua/pls/wccu/P000?lang=0> (last visited Oct. 31, 2005) for a number of decisions interpreting the Ukrainian Constitution.

171. 14 U.S. (1 Wheat.) 304, 326-52 (1816).

172. See, e.g., Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

173. See *id.*

174. See *id.*

question to the Constitutional Court.<sup>175</sup> This unprecedented move suggests that the Court views itself as a binding authority with the power to decide all matters, including constitutional questions.<sup>176</sup>

On December 3, 2004, the Court had its own *Marbury* moment<sup>177</sup> when it considered and invalidated acts of the government.<sup>178</sup> This decision was also an implied declaration that the Court has the power to inevitably influence the outcome of the elections, and thus the very makeup of the coordinate branches of government.<sup>179</sup> While there is no direct evidence that Justices relied on *Marbury*, or on any precedent for that matter, they all attended the CEELI seminars, and they are most likely familiar with the U.S. landmark cases.<sup>180</sup> Because the Court's legal database is not sufficiently updated, it is unclear whether this was the first time that the Court undertook to declare a law unconstitutional.

It is quite possible that Ukraine will create its own system of precedents in the future.<sup>181</sup> Efforts are now being made to translate the decisions of the European Court of Human Rights into Ukrainian, which may lead to a system of *stare decisis*.<sup>182</sup> The cost of these translations is sponsored in large part by U.S. organizations.<sup>183</sup>

Overall, the United States has played a significant role in shaping the judiciary in Ukraine.<sup>184</sup> Some factors already demonstrate that

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175. *See id.*

176. *See id.*; an excerpt in English is available at <http://www2.pravda.com.ua/en/archive/2004/december/3/5.shtml> (last visited Oct. 31, 2005) ("The above circumstances give reasons to conclude that the violations of the principles of the law of elections envisaged in Art. 38, 71, 103 of the Constitution of Ukraine and of the fundamentals of the election process envisaged in Art. 11 part 2 of the President Election Act exclude any possibility to precisely establish the will of the voters.").

177. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

178. *See* Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

179. *See id.*

180. *See* America and the Court: Interview with Justice Sandra Day O'Connor, *supra* note 162 (noting that all Ukrainian Supreme Court Justices attended CEELI seminars).

181. *See* Ukrainian Legal Foundation, *supra* note 160 (discussing an implementation of the system of precedents by Ukrainian courts for human rights cases).

182. *Id.* ("In 1999, the Ukrainian Legal Foundation launched a project providing for the translation of judgments of the European Court of Human Rights into the Ukrainian language and their publication . . .").

183. *Id.*

184. *See id.*; *see also* International Cooperation, *supra* note 160, (noting the steps taken by the United States to educate the Ukrainian judiciary).

Ukraine is moving toward a semi-common-law system.<sup>185</sup> With the proper assistance from the United States, Ukrainian democratic future and unbiased judicial opinions are realistic goals.

### C. Role of the United States in the 2004 Ukrainian Election

The most important evidence of the U.S. impact on Ukraine was the U.S. involvement in the 2004 Ukrainian presidential election. Both the United States government and U.S. nongovernmental organizations played an active role in the elections.<sup>186</sup> Undoubtedly, Ukraine owes its Orange Victory in part to the United States.<sup>187</sup>

The United States influenced the Ukrainian elections in four very important ways. First, for a year preceding the elections, the American Bar Association sponsored seminars to educate Ukrainian judges on the elections process and on the role of the judiciary in political elections.<sup>188</sup> Second, the United States provided 147 independent observers to monitor the elections.<sup>189</sup> Third, the United States offered help to the protestors and thus ensured that they were able to continue protesting peacefully.<sup>190</sup> Fourth, U.S. ideals and political pressure positively encouraged justices of the Ukrainian Supreme Court to decide the case fairly.<sup>191</sup>

Remarkably, the United States was able to foresee problems with the election process in Ukraine long before this controversial election took place.<sup>192</sup> In 2003, the American Bar Association implemented a “USAID-funded elections project assisting judges, lawyers, election officials and the general public in the run-up to Ukrainian presidential election.”<sup>193</sup> This project was launched through the

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185. For example, it is not uncommon for Ukrainian judges to issue concurring or dissenting opinions or to cite other cases or international law in their decisions. See, e.g., Trochev, *supra* note 168, at 537.

186. See Presidential Runoff Election in Ukraine, S. Res. 487, 108th Cong. (2004).

187. The term “Orange Revolution” was coined by the media because Yushchenko’s campaign color was orange, and his supporters wore orange scarves and carried orange flags while protesting the fraudulent elections.

188. American Bar Association, *supra* note 125.

189. CEC, *supra* note 9, *Official Observers*.

190. See generally Presidential Runoff Election in Ukraine, S. Res. 487, 108th Cong. (2004) (for a discussion of the steps the United States government implemented to ensure a peaceful resolution of the elections conflict).

191. See S. Res. 487; see also Tefft, *supra* note 50 (for a discussion of the steps the United States undertook to ensure the fair election process in Ukraine).

192. See American Bar Association, *supra* note 125.

193. *Id.*

ABA's Central European and Eurasian Law Initiative (CEELI).<sup>194</sup> The former United States Supreme Court Justice Sandra Day O'Connor was actively involved in this program.<sup>195</sup>

In the year preceding the elections, CEELI held a number of seminars for Ukrainian judges on the role of the judiciary in the democratic elections.<sup>196</sup> Justice O'Connor, who took part in organizing these seminars, noted that the "program was attended by every one of the Justices" of the Ukrainian Supreme Court.<sup>197</sup>

Only two months before the decisive election, CEELI held "ten regional trainings for judges on election legislation and its application."<sup>198</sup> The training sessions were a great success, with approximately seventy judges attending each session.<sup>199</sup> When the time came to decide the landmark case, the Supreme Court was prepared to handle the issue.

CEELI also took active steps in educating Ukrainian citizens on their right to vote,<sup>200</sup> including holding classes and issuing public media announcements in the week before the elections and encouraging Ukrainians to vote.<sup>201</sup> Furthermore, CEELI registered a hotline where citizens could report election irregularities.<sup>202</sup> On election day, the hotline had registered over seven thousand calls from concerned voters.<sup>203</sup> According to CEELI, at least ten percent of the Ukrainian population was denied the right to vote in the second round of presidential elections.<sup>204</sup>

The United States Government did not stand by passively either. In light of the election problems and allegations of fraud, the United States sent independent observers to Ukraine to monitor the electoral process.<sup>205</sup> Among the observers was Senator Richard Lugar, desig-

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194. *Id.*

195. America and the Court: Interview with Justice Sandra Day O'Connor, *supra* note 162 (discussing her involvement in CEELI and her observations of the Ukrainian election).

196. American Bar Association, *supra* note 125.

197. America and the Court: Interview with Justice Sandra Day O'Connor, *supra* note 162.

198. American Bar Association, *supra* note 125.

199. *Id.* ("Each participating judge received training materials that CEELI had developed. These materials were also sent to every court in Ukraine.")

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. American Bar Association, *supra* note 125.

205. CEC, *supra* note 9, *Official Observers*.

nated by President Bush as the official U.S. representative.<sup>206</sup> When Yushchenko supporters began their peaceful protests on the streets of Kiev, the U.S. nongovernmental organizations were among the countries providing food, blankets, and medical care to protestors. After the second problematic round of elections, several members of Congress made statements concerning the Ukrainian elections. These statements were entitled “Election in Ukraine,”<sup>207</sup> “Stakes in the Ukrainian Election,”<sup>208</sup> and “Presidential Runoff Election in Ukraine.”<sup>209</sup>

On November 24, shortly after the controversial second round, Representative Jo Ann Davis noted that, “[r]egrettably, and despite every effort we were told would be made by the [Ukrainian] Government for a free and fair election, the rhetoric was not matched by the actions.”<sup>210</sup> Representative Davis called upon the incumbent Ukrainian President Leonid Kuchma, the Ukrainian Parliament, and the Ukrainian Supreme Court “to conduct a thorough review” of the elections, to investigate charges of fraud, and to hold new elections.<sup>211</sup> In the event that the dispute was not resolved, Representative Davis urged the Bush administration to “take whatever actions may be necessary to express [the U.S.] displeasure with the actions of the Ukraine government.”<sup>212</sup> History has illustrated that this statement was not disregarded by high Ukrainian officials.

In his statement, Representative Leach used an even more condemning tone, referring to Ukrainian citizens “standing up against forces of injustice and oppression.”<sup>213</sup> He urged that “free elections are not an issue on which the United States should” compromise.<sup>214</sup> The following day, the Senate passed a resolution condemning the widespread fraud and expressing support for a “peaceful and legal settlement . . . that reflects the will of the people of Ukraine.”<sup>215</sup>

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206. See Presidential Runoff Election in Ukraine, S. Res. 487, 108th Cong. (2004) (“Whereas such reports of fraud were also echoed by Senator Richard Lugar of Indiana . . . *an observer to the runoff election designated by President George W. Bush.*”) (emphasis added).

207. 150 CONG. REC. E2138 (daily ed. Nov. 24, 2004) (statement of Rep. Davis).

208. 150 CONG. REC. E2198 (daily ed. Dec. 7, 2004) (statement of Rep. Leach).

209. 150 CONG. REC. S12021 (daily ed. Dec. 8, 2004) (statements of Sens. Frist and Reid); S. Res. 487, 108th Cong. (2004).

210. See *id.*

211. *Id.*

212. *Id.*

213. 150 CONG. REC. E2198 (daily ed. Dec. 7, 2004) (statement of Rep. Leach).

214. *Id.*

215. Presidential Runoff Election in Ukraine, S. Res. 487, 108th Cong. (2004).

The United States promised to work with the winner of a free and fair election.<sup>216</sup> Such actions, coupled with U.S. financial support and the political pressure that the United States exerted on Ukraine, greatly contributed to the fair outcome of the 2004 Presidential election.<sup>217</sup>

The Ukrainian Supreme Court followed the steps of the U.S. Supreme Court in *Bush v. Gore* by deciding to play an active role in the outcome of the presidential election.<sup>218</sup> In a unanimous decision, the Justices declared that the results of the second round of election were fraudulent and ordered a new runoff.<sup>219</sup> Like *Bush v. Gore*, the *Yushchenko* case was a decision that shook the world and established the Court's power to decide elections controversies.<sup>220</sup> Justice O'Connor, who closely followed this hearing, commented on the unprecedented level of transparency during the hearing, noting that, for the first time in the history of the Ukrainian Supreme Court the court proceeding was televised.<sup>221</sup> She also declared that the Ukrainian election was a "success in our efforts to promote the rule of law and the independent judiciary."<sup>222</sup>

Without the multitude of ways in which the United States provided continuous support, the 2004 Orange Revolution—and a democratic Ukraine—would probably not have been possible. The United States prepared Ukraine for cases like *Yushchenko* by helping Ukraine shape its Constitution, by assisting the judges in issuing unbiased decisions, and by encouraging the Ukrainian Supreme Court to assert its *Marbury v. Madison* power.

#### IV. CONSEQUENCES OF THE YUSHCHENKO DECISION

The *Yushchenko* decision resulted in two significant developments. First, the Supreme Court's decision catalyzed Ukraine's political relations with the West. Second, it strengthened the Ukrainian Supreme Court's authority. Today, the *Yushchenko* decision is one of

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216. Tefft, *supra* note 50.

217. *See id.*

218. *See Bush v. Gore*, 531 U.S. 98, 111 (2000).

219. *See* Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

220. *See Bush v. Gore*, 531 U.S. 98, 111 (2000); *see also* *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

221. *See* America and the Court: Interview with Justice Sandra Day O'Connor, *supra* note 162.

222. *Id.*

the most widely read documents on the country's online legal database.<sup>223</sup>

The Supreme Court's order to hold a new runoff election resulted in a victory for Yushchenko.<sup>224</sup> The Court's ruling was perceived as the first truly democratic event in the post-Soviet Ukraine. However, Yushchenko's victory "has been seen . . . as hostile to Russia," which openly supported Yanukovich during the elections.<sup>225</sup> As Representative Leach aptly explained, "[f]or the KGB alumni who dominate the Kremlin, Ukrainian democracy is more than an embarrassment."<sup>226</sup>

By demonstrating its political stand as a democratic government, Ukraine secured world-wide recognition and enhanced prospects for EU membership. Joining the European Union has been one of Yushchenko's long-term goals for Ukraine.<sup>227</sup> Now, as President, he is actively lobbying the European Community to consider Ukraine's candidacy.<sup>228</sup> Yushchenko's efforts yielded some success: recent polls demonstrate great popular support among EU citizens for Ukraine joining the European Union.<sup>229</sup> The European Parliament "has given overwhelming support to a resolution that would offer a 'clear European perspective' to Ukraine."<sup>230</sup> However, the European Commission says that Ukraine's membership is "not on the agenda,"<sup>231</sup> and Yushchenko announced recently that Ukraine does not plan to apply for EU membership until 2007.<sup>232</sup>

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223. See *Zakonodavstvo Ukraini* [Ukrainian Legal Database], Populiarni Dokumenti [Popular Documents], <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?user=d> (ranking the *Yushchenko* case among the most popular documents on the database) (last visited Oct. 31, 2005).

224. Yushchenko won the court-ordered runoff election by a lead of 2.2 million votes. Chivers, *supra* note 61, at A3.

225. Yushchenko Urges EU to Admit Ukraine (Dec. 11, 2004), <http://www.razom.org.ua/en/news/4934/>; see also 150 CONG. REC. E2198 (daily ed. Dec. 7, 2004) (statement of Rep. Leach) ("Differing with Russia may be politically awkward, but once the flame of freedom is ignited, the U.S and other western democracies have no ethical choice except to stand up in support of the people of Ukraine.").

226. 150 CONG. REC. E2198 (daily ed. Dec. 7, 2004) (statement of Rep. Leach).

227. Brief—Yushchenko: Ukraine Aims to Open EU Entry Talks in 2007 (Feb. 24, 2005), <http://www.euractiv.com/Article?tcaturi=tcm:29-135898-16&type=News>.

228. *Id.*

229. European Voters: Ukraine Would Be Most Welcome (Mar. 24, 2005), <http://www.euractiv.com/Article?tcaturi=tcm:29-137241-16&type=News>.

230. MEPs Raise EU Membership Prospect for Ukraine, Jan. 14, 2005), <http://www.euractiv.com/Article?tcaturi=tcm:29-134156-16&type=News>.

231. *Id.*

232. Brief—Yushchenko: Ukraine Aims to Open EU Entry Talks in 2007, *supra* note 227.

Ukraine's relationship with the United States has also improved significantly. The runoff elections received significant support from the U.S. Congress.<sup>233</sup> Additionally, during just the first six months of his presidency, Yushchenko met several times with President George W. Bush, who reaffirmed his support for Ukraine's democratic goals.<sup>234</sup>

In addition to world-wide recognition, the Court's ruling provided Ukraine with another important benefit. Similarly to *Marbury v. Madison*, the *Yushchenko* decision is an implied declaration that the Supreme Court can interpret the law.<sup>235</sup> By undertaking to interpret the Constitution, the Court finally claimed the power available to its counterparts in other democratic countries.<sup>236</sup> For a country that has been independent for just over a decade, this is a significant step indeed.

The Supreme Court's decision points towards a gradual establishment of an informal body of case law. Although there is no clear system of *stare decisis*, the Ukrainian Supreme Court's rulings are published in a reporter, and the Court often refers to its prior rulings and even sometimes considers decisions of other courts and laws of other nations.<sup>237</sup> With U.S. assistance, the Justices recently launched a program educating Ukrainian judiciary on proper interpretation of the law and proper observations of judicial proceedings.<sup>238</sup> Efforts have been made to translate European Court of Human Rights cases into Ukrainian, so that Ukrainian judges can have access to a foreign body of law.<sup>239</sup> Additionally, more and more Ukrainian sources are

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233. See 150 CONG. REC. E2138 (daily ed. Nov. 24, 2004) (statement of Rep. Davis); 150 CONG. REC. E2198 (daily ed. Dec. 7, 2004) (statement of Rep. Leach) ("The Ukrainian election . . . is one of the seminal events of this new century. As members of the American people's House, we are obligated to express our support for the aspirations of Ukrainians."); 150 CONG. REC. S12021 (daily ed. Dec. 8, 2004) (statements of Sens. Frist and Reid); Presidential Runoff Election in Ukraine, S. Res. 487, 108th Cong. (2004).

234. See generally, Official Website of the President of Ukraine, News, [http://www.president.gov.ua/en/news/scrolls/news\\_1\\_1.html](http://www.president.gov.ua/en/news/scrolls/news_1_1.html) (last visited Oct. 31, 2005) (listing the President's scheduled meetings with foreign leaders); see also U.S. Congress Cheers Ukraine Leader (Apr. 6, 2005), <http://news.bbc.co.uk/1/hi/world/americas/4417901.stm> (last visited Oct. 31, 2005).

235. See *supra* notes 178-84 and accompanying text.

236. Decision of the Ukrainian Supreme Court of December 3, 2004, *supra* note 55.

237. See generally Verkhovniy Sud Ukraini [Official Website of Ukrainian Supreme Court], <http://www.scourt.gov.ua> (last visited Sept. 26, 2005) (describing cases in Ukrainian discussing the Court's deference to foreign law).

238. Ukrainian Legal Foundation, *supra* note 160; see also International Cooperation, *supra* note 160 (noting the steps taken by the United States to educate the Ukrainian judiciary).

239. *Id.*

translated into English. For example, the Central Elections Commission has recently launched an English version of its website.<sup>240</sup>

Because of these efforts, the Ukrainian people now have more confidence in the administration and the judiciary. One of Yushchenko's campaign promises was to fight corruption, and he now has the Supreme Court to back him up. More and more cases are being filed in courts, demonstrating a rising level of confidence in the government.<sup>241</sup> Overall, the Supreme Court has gained substantial power and support as the result of its landmark case.

## CONCLUSION

The 2004 Ukrainian Presidential election was proclaimed "one of the seminal events of this new century" by a member of the United States Congress.<sup>242</sup> The election controversy that divided the country and almost shook its constitutional core was—for the first time in Ukraine's history—resolved by peaceful and democratic means.<sup>243</sup>

From the day of Ukraine's independence in 1991 through election day in 2004, the United States played a crucial role in the development of Ukraine's legal system. The U.S. involvement began at the constitution-drafting stage in 1991, resulting in an elaborate Ukrainian Constitution that adopted the U.S. model. The U.S. government also actively contributed to Ukrainian legal education by providing Ukrainian law students with an opportunity to study abroad. The U.S. nongovernmental organizations further supported the development of the constitutional process by funding Ukraine's legal libraries, sponsoring translations of foreign case law into Ukrainian, and organizing CLE seminars for local judges. Finally, the U.S. government, having sent independent observers to monitor the election, fur-

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240. See Official Website of Central Election Commission of Ukraine, [tp://www.cvk.gov.ua/pls/vp2004/wp0011e](http://www.cvk.gov.ua/pls/vp2004/wp0011e) (last visited Sept. 26, 2005).

241. See Verkhovniy Sud Ukraini [Official Website of Ukrainian Supreme Court], [Judicial Statistics], <http://www.scourt.gov.ua> (follow "Sudova Praktika" hyperlink, then follow "Sudova Statistika" hyperlink) (last visited Oct. 31, 2005). According to judicial statistics, the amount of claims that were filed in Ukrainian courts has increased by approximately thirty percent in 2004. *Id.*

242. 150 CONG. REC. E2198 (daily ed. Dec. 7, 2004) (statement of Rep. Leach).

243. Futey, *supra* note 28, at 34:

In reaching a political consensus and adopting a constitution based on broadly democratic principles, the members of Parliament have taken a step toward securing Ukraine's place among democratic societies. Above all, as in previous instances, such as reaching an accord on the constitutional agreement in 1995, Parliament and the president solved their differences in a diplomatic and civilized manner, rather than through the use of force. This is therefore an auspicious beginning.

ther exerted political pressure on Ukraine's administration to assist the Supreme Court without undue interference. President Bush issued several official statements to that effect, and three congressional hearings were held discussing elections violations in Ukraine.

The U.S. efforts resulted in an unprecedented level of transparency and effectively provided Ukrainians with an opportunity to vote in a truly democratic election for the first time. However, the U.S. government contemplated a mutual benefit, as it understood that its involvement in the Ukrainian legal sphere would prove highly expedient in the long run. First, the 2004 election significantly improved Ukraine's chances of joining the European Union and bringing Ukraine in line with Western ideology. Second, the United States has firmly secured Ukraine's support in the international political arena. Most importantly, the United States can be certain that Russia may no longer rely on Ukraine as its permanent political ally. Instead, Ukraine—incidentally the largest country in Europe—has turned to the United States for guidance.

Needless to say, Ukraine has also benefited endlessly from the U.S. involvement. The Supreme Court has finally established its authority as part of an independent branch of government, as well as the highest judicial body in Ukraine. The Court asserted its power to decide the validity of Ukrainian law in its relation to the Constitution. In the future, the Court may further expand its power by adopting such useful common-law concepts as the system of precedents and the dissenting opinions. Already, polls indicate a significant boost in popular confidence with regard to the Ukrainian judiciary. Overall, the Orange Revolution—sponsored in part by the Red, White, and Blue Nation—has been a great success for Ukraine and for the rule of law.