

WHAT CAN THE UNITED STATES LEARN FROM ABROAD ABOUT RESOLVING DISPUTED ELECTIONS?

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INTRODUCTION

This symposium's focus, "Helping America Vote: The Past, Present, and Future of Election Administration," is a timely effort to assess the progress made and lessons that remain to be learned in the decade since *Bush v. Gore*. While other participants have discussed such important topics as Election Day voting mechanics and voter registration reform, this paper addresses the less frequently considered question of what to do when an election goes awry. Central to this topic is the fact that post-election disputes will continue to occur, despite reforms to the earlier stages of the election administration process. Furthermore, it is clear that the United States today lacks an ideal mechanism for resolving these disputes. Any number of domestic election disputes could confirm this, but the purpose of this paper is to inquire whether there are lessons to be learned from abroad about what institutions and processes are best suited to resolving post-election disputes.

The awkward conclusions to both the 2010 parliamentary elections in Iraq¹ and the 2009 presidential election in Afghanistan² are but two of the most recent reminders that a variety of approaches exist for conducting and reviewing elections around the world, and that many mechanisms for resolving contested elections are flawed, sometimes critically. Nonetheless, some democratic nations employ election processes, and specifically dispute resolution mechanisms, that may offer advantages over U.S. institutions and practices. For instance, while many countries rely on their regular courts to adjudicate election disputes,³ others use constitutional courts,⁴ still others use special electoral tribunals,⁵ and some use their legislatures,⁶ or even ad hoc bodies.⁷ Yet very little comparative or systematic analysis of

1. See Steven L. Myers, *Iraqi Recount Barely Begins as Premier's Bloc Objects*, N.Y. TIMES, May 4, 2010, at A10.

2. See, e.g., James Glanz & Richard A. Oppel Jr., *U.N. Officials Say Aide Had a Plan: Replace Karzai*, N.Y. TIMES, Dec. 17, 2009, at A1. After deducting votes deemed fraudulent, none of the twenty presidential candidates received the required majority on first ballot. A runoff election was then called, but was cancelled when one of the remaining two candidates withdrew. See Dexter Filkins & Alissa J. Rubin, *Karzai Rival Said to Be Planning to Quit Runoff*, N.Y. TIMES, Nov. 1, 2009, at A1.

3. See LOUIS MASSICOTTE ET AL., ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES 154-57 (2004); see also *Electoral Dispute Resolution*, ACE PROJECT, <http://aceproject.org/ace-en/topics/lf/lfb/lfb12> (last visited Sept. 30, 2010).

4. See *id.*

5. See *id.*

6. See *id.*

7. See *id.*

these various election structures has been conducted to date.⁸ This paper works to fill this gap and invites greater attention to the issue of how democracies have structured their election contest processes, with an eye to identifying the strongest institutions and practices.

From an international standpoint, the topic of election dispute resolution is an area of developing interest. For instance, organizations such as the Stockholm-based International Institute for Democracy and Electoral Assistance (International IDEA)⁹ and the Washington-based National Democratic Institute for International Affairs (NDI)¹⁰ have recently devoted increased attention to this issue, acknowledging that election dispute resolution is a relatively unstudied aspect of election administration internationally,¹¹ just as it is an understudied topic here in the United States.¹² Similarly, in 2007, a United Nations workshop on electoral dispute resolution took place in Vienna,¹³ and in early 2009, the Carter Center held an experts' meeting in Atlanta to

8. On the broader topic of election administration generally, in 2004, the Election Law Journal devoted one issue to what the United States could learn from its North American neighbors. See Symposium, *Democracy and Elections in North America: What Can We Learn From Our Neighbors?*, 3 ELECTION L. J. 396 (2004). Recently, other topics in comparative election administration have received preliminary study. See, e.g., Frederic Schaffer & Tova Wang, *Is Everyone Else Doing It? Indiana's Voter Identification Law in International Perspective*, 3 HARV. L. & POL'Y REV. 397, 397 (2009).

9. See *Electoral Dispute Resolution*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <http://www.idea.int/elections/edr.cfm> (last visited Sept. 29, 2010) (discussing a forthcoming publication on electoral justice and noting that "[a]part from some pioneering research efforts . . . there is at present not one single work that sets forth the principles, structures, characteristics and performance of [election dispute resolution] systems with a global perspective").

10. PATRICK MERLOE, NAT'L DEMOCRATIC INST. FOR INT'L AFFAIRS, *PROMOTING LEGAL FRAMEWORKS FOR DEMOCRATIC ELECTIONS* (2008) (devoting five of its eighty-eight pages to "complaint mechanisms" for all aspects of the conduct of elections).

11. E.g., Avery Davis-Roberts, *International Obligations for Electoral Dispute Resolution*, THE CARTER CENTER 14 (2009), <http://www.cartercenter.org/resources/pdfs/peace/democracy/des/edr-approach-paper.pdf> ("Electoral Dispute Resolution is a critical part of the electoral process that requires greater research . . .").

12. See, e.g., Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 287–88 & nn.136–37 (2007).

13. See *United Nations Hold Electoral Dispute Resolution Workshop in Vienna*, ACE PROJECT (2007), <http://aceproject.org/today/feature-articles/united-nations-holds-electoral-dispute-resolution-workshop-in-vienna> (last visited Sept. 29, 2010). The Washington College of Law at American University also hosted a symposium on the topic in 2005, publishing a transcript of the symposium's two panel discussions. See Symposium, *Identifying International Principles for Resolving Election Disputes*, 57 ADMIN. L. REV. 829, 829–901 (2005) [hereinafter *AU Symposium*].

address how international observers should assess election dispute resolution processes under international law.¹⁴

Yet, important as these programs and events are to this developing field, they have tended to explore a very broad concept of “election disputes,” which covers disputes about almost every aspect of the election process, with a goal of promoting the stability and legitimacy of democratic systems more generally. This broad definition is perhaps especially understandable in emerging democracies, where serious disputes going to the underlying legitimacy of the election itself often surface throughout an election cycle. These disputes concern a range of issues, including candidate eligibility, voter registration, campaign conduct, polling locations and practices, voter intimidation, and election violence, in addition to post-voting issues of ballot counting or vote tampering.

This paper addresses the topic of election disputes more narrowly, focusing on the process for challenging election results based on claims of either fraudulent voting or errors in ballot marking and counting. This paper does not explore mechanisms for resolving questions about voter registration processes, candidate eligibility, campaign finance compliance, or the violation of districting principles, except to the extent that these issues may become cognizable in a contest over which candidate in a specific election has received the most valid votes. But even this paper’s comparatively narrow version of the question of how democracies determine the outcome of a “disputed election” is also in need of greater attention.¹⁵ As one team of comparative political scientists recently observed, “the legitimacy of the electoral game hinges to a large extent on what happens after election night.”¹⁶

This paper limits its scope to the election dispute resolution processes of countries with a presidential form of leadership. The paper is not concerned with parliamentary democracies in which the

14. *Electoral Dispute Resolution Experts’ Meeting*, THE CARTER CENTER (2009), <http://www.cartercenter.org/resources/pdfs/peace/democracy/des/electoral-dispute-resolution-meeting.pdf>. In a similar vein, in 2000, the Organization for Security and Co-operation in Europe’s Office for Democratic Institutions and Human Rights published a paper on standardized election dispute monitoring. Denis Petit, Org. for Sec. & Co-operation in Eur. [OSCE], *Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System* (2000), http://www.osce.org/publications/odihr/2000/08/12350_130_en.pdf [hereinafter *Resolving Election Disputes*]. This monograph grew out of a 1998 effort to implement a set of best practices for monitoring election disputes in Ukraine, Kazakhstan, and Kyrgyzstan.

15. See MASSICOTTE ET AL., *supra* note 3, at 160 (noting that “the process for challenging election results” “needs further examination”).

16. *Id.*

Prime Minister is the primary elected leader, because in parliamentary systems, the nature of an election dispute about the nation's most prominent political leader is fundamentally different. That is because the parliament itself chooses that leader, and in the process serves, if needed, as the dispute resolution mechanism. In contrast, harder legal and structural questions about ensuring the legitimacy of an election emerge when the outcome of a popular election of a president is in dispute, and at stake is determining how the public has spoken in the most critical of democratic acts.

Part I of this paper reviews a few recent disputed elections around the globe. It begins by reflecting on the roles in Afghanistan's 2009 election dispute of that country's Independent Election Commission and Electoral Complaints Commission. It then looks at Mexico's disputed 2006 presidential election, which was resolved by Mexico's Federal Electoral Tribunal, as well as the 2004 Ukrainian presidential election, in which the Ukrainian Supreme Court responded to evidence of election fraud by ordering a new election. These examples come from different regions of the globe and include a brand new democracy, an emerging democracy, and an established democracy, albeit one with a troubled history of electoral problems.

With these examples in mind, Part II of the paper considers the recent dramatic increase in the number of democratic states around the globe and the choices these states have made in how to structure their government and democratic institutions. As the "oldest continuous democracy,"¹⁷ the United States remains a primary model for new democracies, even if most emerging democracies depart from the U.S. blueprint in important ways. This part explores how and why some of their electoral structures are different. This part also focuses on the attention that these countries pay to ensuring that, as part of their democratic election system, they have in place a dispute resolution mechanism that is legitimate and fair in both perception and reality.

Part III of the paper analyzes the impact of the different choices that various nations have made concerning how to resolve an election dispute. The focus of this final part is on the prospects for creating and using an independent dispute resolution forum to expedite the fair conclusion of close or contested elections and enhance the legitimacy of the candidate ultimately determined to have won such an election. In addressing these prospects, this part not only reflects on what is happening globally, but also suggests that these lessons are relevant to

17. Todd A. Eisenstadt, *Settling Election Disputes: What the United States Can Learn from Mexico*, 3 ELECTION L. J. 530, 530 (2004).

possible reforms here at home. In particular, the paper concludes that independent electoral tribunals, like those successfully in use in a minority of democratic nations, offer significant advantages for resolving prominent election disputes over the ordinary courts more commonly in use in Europe and the United States.

I.

A FEW NOTEWORTHY ELECTION DISPUTES FROM AROUND THE GLOBE

As a prelude to discussing the variety of processes that other democratic countries employ to resolve election disputes, it is valuable to describe in brief several actual recent election disputes. Reviewing a few examples will make concrete the difficulties of resolving an election contest. Although there are many recent examples from which to choose—from Romania's extremely narrow presidential race in December 2009, to the November 2007 gubernatorial elections in provinces of both Indonesia and the Philippines that were each bitterly in dispute well into 2009, to the close elections in Georgia in 2008 or Taiwan in 2004—this part of the paper addresses three election disputes: the 2009 presidential election in Afghanistan, the 2006 presidential election in Mexico, and the 2004 presidential election in Ukraine.

These three examples permit comparisons between new, established, and emerging democracies and democratic institutions. They also represent different regions of the world, with distinct political histories and traditions. These examples are similar, however, in that they all involve disputed presidential elections. Precisely because so much is at stake, presidential election disputes are the ones most likely to test the strength of an election system, and, in particular, the fairness and independence, both actual and perceived, of its dispute resolution processes. Each of the three examples also post-date the disputed U.S. presidential election of 2000, another important dispute that will provide some points of comparison in Part III.

A. *Afghanistan 2009*

The Islamic Republic of Afghanistan held its second presidential election on August 20, 2009. This was essentially a referendum on the government of Hamid Karzai,¹⁸ whose primary challenger was Abdullah Abdullah, Karzai's former Minister of Foreign Affairs. Karzai won

18. See Peter Graff & Jonathon Burch, *Afghans Turn Out to Vote Despite Sporadic Violence*, REUTERS (Aug. 20, 2009, 6:10 PM), <http://www.reuters.com/article/idUSTRE57E0D620090820>.

his country's first presidential election in 2004, receiving over 55% of the vote, against several rivals, in an election with a turnout of more than 75% of the eligible population. Although the 2004 election encountered problems, including a failure of the indelible ink system intended to prevent multiple voting, concerns over the legitimacy of that election were quickly resolved when an international panel of experts concluded that those irregularities had not affected the outcome.¹⁹

In contrast, Afghanistan's 2009 presidential election proved far more problematic. A combination of intimidation by the Taliban and voter apathy resulted in turnout of only about 35%.²⁰ The election then was marred by fraud, coercion, and intimidation, and its outcome remained in dispute for two months. Days before the polls opened, reports surfaced that voting identification cards were being sold for ten dollars each.²¹ On Election Day, the Free & Fair Election Foundation of Afghanistan (FEFA), an independent election monitor based within the country, reported widespread election violations, including underage voting, voter coercion, and improper interference by local staff of the Afghanistan Independent Election Commission (IEC).²² The IEC is a political body consisting of seven members, appointed by the President under the Afghan constitution to prepare, organize, and oversee all elections.²³ Additionally, votes were returned from a number of polling places that had been closed on Election Day, increasing the suspicion about the election's legitimacy.²⁴

As the Independent Election Commission counted the votes and released partial totals, Karzai's percentage slowly climbed, from

19. See *AU Symposium, supra* note 13, at 840–47 (panel statement of Oren Ipp, Nat'l Democratic Inst.) (analyzing electoral problems in Afghanistan). The international panel quarantined twelve ballot boxes and ultimately disqualified them, but concluded that they had not affected the outcome. *Id.* at 846–47.

20. See KENNETH KATZMAN, CONG. RESEARCH SERV., RS 21922 AFGHANISTAN: POLITICS, ELECTIONS, AND GOVERNMENT PERFORMANCE 32 (2010), available at <http://www.fas.org/sgp/crs/row/RS21922.pdf>.

21. See *Afghan Poll: Main Fraud Allegations*, BBC NEWS (Sept. 17, 2009, 7:13 GMT), http://news.bbc.co.uk/2/hi/south_asia/8244125.stm.

22. See *Election Day Press Statement*, FREE & FAIR ELECTION FOUNDATION OF AFGHANISTAN (Aug. 20, 2009), <http://www.fefa.org.af/pressrelease/FEFA-Election%20Day%20Statement-Aug20.pdf>; Nader Nadery, Chairperson, Free & Fair Election Found. of Afg., Remarks at Press Conference (Aug. 22, 2009), (transcript available at <http://www.fefa.org.af/pressrelease/Unedited%20Transcript-August22-2009-FEFA.pdf>).

23. See Katzman, *supra* note 20, at 28; see also INDEPENDENT ELECTION COMMISSION OF AFGHANISTAN, <http://www.iec.org.af> (last visited Sept. 29, 2010).

24. See Dexter Filkins & Carlotta Gall, *Fake Poll Sites Favored Karzai, Officials Assert*, N.Y. TIMES, Sept. 7, 2009, at A1.

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around 40% in the first returns, to above 54% by the final complete count.²⁵ Then Afghanistan's Electoral Complaints Commission (ECC) became involved.

The ECC is an independent dispute resolution body, established under Article 61 of the Electoral Law of Afghanistan to deal with electoral offenses, complaints, and challenges.²⁶ It consists of five members: one member appointed by the Supreme Court, one member appointed by the Afghanistan Independent Human Rights Commission, and three members appointed by the Special Representative of the U.N. Secretary General in Afghanistan.²⁷ In response to over 2,600 complaints of election irregularities, most of which were filed at polling stations on Election Day, the ECC performed a statistical sampling of 3,376 polling stations, to evaluate and audit the 2009 election results.²⁸ The ECC found clear and convincing evidence of voting fraud²⁹ and faced the task of rectifying it. The ECC's approach was to determine a "coefficient of fraud" for various categories of polling stations, and then to order the IEC to reduce each candidate's vote total in each of the 3,376 stations proportionately.³⁰

After applying the fraud-correction coefficient, Karzai's percentage of the total vote fell below the 50% threshold required for election.³¹ On October 20, 2009, under heavy international pressure,³² Karzai acceded to a run-off, which the IEC set for November 7. Shortly before the scheduled run-off, Abdullah withdrew from the race, citing "the best interests of the country."³³ He said that, because there had been no improvements to the election system, and particularly to the IEC, a transparent election was not possible.³⁴ The IEC

25. See Carlotta Gall, *Wide Fraud is Charged as Afghans Tally Votes*, N.Y. TIMES, Aug. 26, 2009, at A6; Mark Landler & Helene Cooper, *Marred Vote Has U.S. Asking Afghans to Pause*, N.Y. TIMES, Sept. 9, 2009, at A1.

26. See ELECTORAL COMPLAINTS COMMISSION, <http://www.ecc.org.af/en/> (last visited Aug. 12, 2010). The ECC operated under Article 52 of the 2005 Electoral Law. See *Final Report: 2009 Presidential and Provincial Council Elections*, ELECTORAL COMPLAINTS COMMISSION 17 (2010), <http://www.ecc.org.af/en/images/stories/pdf/ECC%20Final%20Report%202009.pdf>.

27. See *Commissioners*, ELECTORAL COMPLAINTS COMMISSION, http://www.ecc.org.af/index.php?option=com_content&view=article&id=46&Itemid=29 (last visited Sept. 29, 2010).

28. See *Final Report*, *supra* note 26, at 8–9.

29. See *id.* at 36–37.

30. See *id.* at 9–10, 36–37.

31. See *id.* at 10.

32. See Filkins & Rubin, *supra* note 2.

33. See *Abdullah Pulls Out of Afghan Vote*, BBC NEWS (Nov. 1, 2009), http://news.bbc.co.uk/2/hi/south_asia/8336388.stm. Abdullah had previously questioned the legitimacy of the IEC, given President Karzai's role in appointing its members.

34. See Filkins & Rubin, *supra* note 2.

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announced Karzai's victory the following day, but his democratic legitimacy, both at home and abroad, had clearly suffered compared to his 2004 election.³⁵

B. Mexico 2006

The 2006 Mexican Presidential Election involved a heated political battle between the Mexican left and right, which produced the closest presidential election in Mexico's modern history.³⁶ The top candidates were Felipe Calderón, a conservative National Action Party (PAN) candidate and former energy minister, and Andres Manuel Lopez Obrador, a populist Institutional Revolutionary Party (PRI) candidate and former mayor of Mexico City.³⁷ After the July 2 election, Calderón led Obrador by just over one-half of a percent, out of forty-one million votes.³⁸ Over the next six weeks, the closeness of the margin between the two candidates would test the soundness of the election system, which was the product of decades of conscious efforts to reform Mexico's election processes.³⁹

On Election Day, the Federal Electoral Institute (IFE), an autonomous public agency that organizes Mexico's federal elections,⁴⁰ produced a statistical "quick count," which revealed that the election would be too close to call.⁴¹ The closeness of the election was exacerbated when election officials stated that as many as 13,000 tally sheets, covering nearly 2.6 million voters, had been set aside because they were illegible or had other inconsistencies.⁴² Obrador filed an

35. See *id.*; Landler & Cooper, *supra* note 25. The status of the ECC was thrown into question earlier this year, when President Karzai attempted to reconstitute its membership. See Richard A. Oppel Jr. & Taimoor Shah, *Afghan Lawmakers Resist Karzai's Aim to Control Election Panel*, N.Y. TIMES, Apr. 1, 2010, at A4. Meanwhile, in response to international pressure, Karzai also ousted certain members of the IEC. See Richard A. Oppel Jr., *Pressed to Act, Karzai Fires Vote Monitors*, N.Y. TIMES, Apr. 8, 2010, at A6.

36. See Ginger Thompson & James C. McKinley Jr., *Videos, Doubts, and a Backlash in Mexican Election*, N.Y. TIMES, July 14, 2006, at A8.

37. *Id.*

38. *Id.*

39. See Eisenstadt, *supra* note 17.

40. See *IFE: Nature and Attributions*, FEDERAL ELECTORAL INSTITUTE, http://www.ife.org.mx/portal/site/ifev2/IFE_Nature_and_Attributions (last visited Aug. 4, 2010).

41. See Hector Tobar, *Election Turmoil in Mexico*, L.A. TIMES, July 3, 2006, at A10.

42. See James C. McKinley Jr. & Ginger Thompson, *Vote-by-Vote Recount Is Demanded*, N.Y. TIMES, July 5, 2006, at A3.

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800-page complaint with the federal election tribunal, alleging ballot box stuffing and other misconduct.⁴³

The Federal Electoral Tribunal, a seven-member High Central Court with final authority for resolving federal election disputes,⁴⁴ unanimously found that there was sufficient evidence to order recounts in about 10% of the polling places.⁴⁵ Fifteen members of the five regional Federal Electoral Tribunal panels, and over 180 additional magistrates and judges, oversaw the opening of ballot packets during the recount.⁴⁶ The Federal Electoral Tribunal found no evidence of fraud, but ordered the annulment of 81,080 votes for Calderón and 76,897 votes for Obrador.⁴⁷ Although Obrador gained a small number of votes overall, he could not overcome Calderón's lead of over 200,000 votes.⁴⁸

Throughout the recount process, and until Calderon's inauguration, Obrador supporters staged sit-ins and engaged in civil disobedience, in protest against the election process and the court's ruling. Yet the FET's role, and the resolution it provided, were widely accepted throughout the country. In previous decades, many Mexican election disputes, particularly at lower levels of government, had been resolved through informally negotiated agreements among the candidates, known as "concertaciones," rather than through formal electoral institutions.⁴⁹ The swift resolution of the 2006 presidential election, by a public institution, in a transparent manner, heralded a significant shift in Mexican electoral processes. According to some knowledgeable observers, today Mexico's Federal Electoral Tribunal is "one of the world's more respected electoral institutions."⁵⁰

43. See David Osborne, *Videos Show Mexico Election Was Rigged*, THE INDEPENDENT, July 12, 2006, at 21.

44. See *High Chamber*, FEDERAL ELECTORAL TRIBUNAL, <http://www.trife.org.mx/ingles/todo.asp?menu=2> (last visited Aug. 4, 2010).

45. See James C. McKinley Jr., *Mexican Tribunal Rejects Leftist's Demand for Total Vote Recount*, N.Y. TIMES, Aug. 6, 2006, at A6.

46. See James C. McKinley Jr., *Mexico Recount Begins, and Protests Go On*, N.Y. TIMES, Aug. 10, 2006, at A6.

47. See James C. McKinley Jr., *Court Rejects Challenges to Mexico Presidential Vote*, N.Y. TIMES, Aug. 29, 2006, at A10.

48. See *id.*

49. See Todd A. Eisenstadt, *The Origins and Rationality of the "Legal Versus Legitimate" Dichotomy Invoked in Mexico's 2006 Post-Electoral Conflict*, PS: POLITICAL SCIENCE AND POLITICS, Jan. 2007 39, 39, available at <http://www.apsanet.org/imgtest/PSJan07Eisenstadt.pdf>.

50. *Id.*

C. Ukraine 2004

The 2004 Ukrainian Presidential election pitted Viktor Yanukovich, the incumbent Prime Minister and designated heir of retiring president Leonid Kuchma, against Viktor Yushchenko, the opposition candidate and former Prime Minister of Ukraine.⁵¹ Yushchenko, who ran on a platform of reform, was disfigured by a severe dioxin poisoning during the campaign.⁵² In the initial round of voting on October 31, neither of the two leading candidates (among twenty total candidates) garnered close to 50% of the vote, as required to secure election.⁵³ In the November 21 runoff election, exit polls showed Yushchenko with a sizable lead over Yanukovich.⁵⁴ On November 24, however, the Central Election Commission (CEC), Ukraine's permanent election administration body, declared Yanukovich the winner, with 49.46% of the vote, while Yushchenko's share was 46.61%.⁵⁵

In what became known as the "Orange Revolution," "uncountable thousands" of Yushchenko's supporters protested the election results.⁵⁶ U.S. Secretary of State Colin Powell was among those who rejected the results, on the view that the election did not meet international standards and because there had not been an investigation of the numerous and credible reports of fraud and abuse.⁵⁷ The Organization for Security and Co-operation in Europe (OSCE), and its Office for Democratic Institutions and Human Rights (ODIHR), stated that both the first and second rounds of voting suffered from several problems, including failure to ensure the secrecy of the vote, the presence of unauthorized persons in polling stations during polling and tabulation of results, ballot box stuffing, forged Absentee Voting Certificates, repeat voting, and examples of implausibly high voter turnout

51. See Org. for Sec. & Co-operation in Eur. [OSCE], *Ukraine Presidential Election, 31 October, 21 November and 26 December 2004, OSCE/ODIHR Election Observation Mission Final Report* 4–5 (2005), http://www.osce.org/documents/odihr/2005/05/14224_en.pdf [hereinafter *OSCE Report*].

52. See C.J. Chivers, *Pro-West Leader Appears To Win Ukraine Election*, N.Y. TIMES, Dec. 27, 2004, at A1.

53. See *OSCE Report*, *supra* note 51, at 30.

54. See C.J. Chivers, *Premier Claims He's the Winner in Ukraine Vote*, N.Y. TIMES, Nov. 23, 2004, at A1.

55. See *OSCE Report*, *supra* note 51, at 31.

56. See C.J. Chivers, *It Was Dec. 3, But in Kiev, New Year Began Yesterday*, N.Y. TIMES, Dec. 4, 2004, at A8; C.J. Chivers, *Pro-West Leader Appears To Win Ukraine Election*, *supra* note 52.

57. See Peter Finn, *Tension Rises Over Ukraine Vote; Opposition Calls National Strike After Panel Declares Premier the Winner*, WASH. POST, Nov. 25, 2004, at A1.

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figures.⁵⁸ In its report on the runoff election, the OSCE/ODIHR stated that the most notable deficiencies of the CEC included “its reluctance to grant legal redress against improper administrative decisions and violations of the electoral law, and its failure to make available a transparent and detailed tabulation of election results.”⁵⁹

Four days after the runoff election, the Ukrainian Supreme Court prohibited the CEC from publishing the election results until legal challenges were reviewed.⁶⁰ Under Ukrainian law, election results are not binding until they are published in government notices.⁶¹ Two days later, the Ukrainian parliament passed a resolution, supported by 307 of the parliament’s 450 members, declaring the runoff election invalid and expressing its lack of confidence in the CEC.⁶²

The Ukrainian Supreme Court then heard appeals from decisions of the lower courts and the CEC. In a five-day televised hearing, the Court heard Yushchenko’s challenge to the CEC’s publication of the final election results.⁶³ Five CEC members, including the Deputy Chair, testified before the Court. After all parties had the opportunity to present evidence and legal arguments, the Court concluded that the CEC acted unlawfully in determining the final results of the runoff election, and that it failed to address all election-related complaints prior to declaring the final result.⁶⁴ On December 3, the Court invalidated the election, citing systematic and massive violations, and declaring that the government illegally interfered with the election process.⁶⁵ The Court ordered a new election, scheduled for December 26.⁶⁶

Following the Court’s decision, the Ukrainian legislature amended the election law to require the appointment of a new CEC, and then it appointed new members to the commission.⁶⁷ In addition, the legislature enacted reforms intended to reduce vote fraud, which included restricting the number of absentee votes allowed in each pre-

58. See *OSCE Report*, *supra* note 51, at 1–2.

59. See *id.*

60. See *id.* at 31.

61. See C.J. Chivers, *Ukraine Court Delays Results in Vote Dispute*, N.Y. TIMES, Nov. 26, 2004, at A1.

62. See Peter Finn, *Ukrainian Parliament Declares Vote Invalid; Decisive Move Boosts Pressure to Hold New Presidential Election*, WASH. POST, Nov. 28, 2004, at A18.

63. See *OSCE Report*, *supra* note 51, at 32.

64. See *id.* at 24, 32.

65. See *id.* at 32.

66. See *id.*

67. See *id.* at 33.

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cinct.⁶⁸ The December 26 run-off election then proceeded comparatively well, with Yushchenko defeating Yanukovych with 52% of the total vote.⁶⁹ Yanukovych challenged the election results and filed nearly 100 complaints, but the CEC and the Supreme Court rejected his complaints, and Yushchenko assumed office.⁷⁰ Although the Ukrainian Supreme Court's actual power to resolve this election was not clear—Ukraine has a separate Constitutional Court that arguably should have handled this matter⁷¹—the Supreme Court was widely praised, both within the country and internationally, for bringing the election to a stable conclusion.⁷²

II.

STRUCTURAL CHOICES FOR RESOLVING ELECTION DISPUTES

The preceding case studies are but three of many examples resulting from the substantial increase in the number of democratic elections held around the globe over the past two decades.⁷³ Yet, even with the dramatic increase in the number of world democracies and accompanying elections, there is an “absence in international law of defined principles of election-dispute resolution.”⁷⁴ Nevertheless, the choices that individual democracies have made, as part of their basic constitutional structure, about how to conduct their elections provide insights into sound election practice, both for the United States and for others. As David Cardwell, Florida's former Director of Election Administration, observed about the rise of world democracy, “We have tried to export U.S. election laws and procedures to just about every

68. Ukraine's Constitutional Court subsequently overturned a measure limiting home voting to people who were severely disabled and unable to come to the polls. See Steven L. Meyers, *Ukrainian Court Overturns New Limit on Homebound Voters*, N.Y. TIMES, Dec. 26, 2004, at 7.

69. See OSCE Report, *supra* note 51, at 36–37.

70. See *id.* at 37–38; *Officials Reject Vote Challenge In Ukraine*, N.Y. TIMES, Dec. 31, 2004, at A17.

71. See Natalie Prescott, Note, *Orange Revolution in Red, White, and Blue: U.S. Impact on the 2004 Ukrainian Election*, 16 DUKE J. COMP. & INT'L L. 219, 228 (2006).

72. See, e.g., C.J. Chivers, *It Was Dec. 3, But in Kiev, New Year Began Yesterday*, *supra* note 56; Editorial, *Saying No to Vladimir Putin*, N.Y. TIMES, Dec. 4, 2004, at A18; Steven L. Meyers, *Ukrainian Court Orders New Vote For Presidency*, N.Y. TIMES, Dec. 4, 2004, at A1; *Update 1: U.S. Welcomes Ruling for Rerun Vote*, REUTERS (Dec. 3, 2004).

73. See MASSICOTTE ET AL., *supra* note 3, at 4–5; Francisco Ramos Romeu, *The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions*, 2 REV. L. & ECON. 103, 104 (2006), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1043&context=rle>.

74. AU Symposium, *supra* note 13, at 832.

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corner of the world, and . . . some of those countries do not appreciate that because they say we still have yet to figure it out.”⁷⁵

A. *Primary Options in Structuring Election Dispute Institutions*

As the paper’s three introductory case studies indicate, election systems can have very different types of dispute resolution mechanisms, relying variously on regular courts (Ukraine), dedicated election tribunals (Mexico), or transitional bodies (Afghanistan). Before taking a closer look in Part II.B at the particular choices that individual countries have made in deciding which type of institution will resolve election disputes, a brief description of the primary types of electoral dispute resolution structures is in order.

Preliminarily, it also is helpful to describe the broader frameworks employed by different countries for conducting the elections themselves. Although international election observers properly note that, around the world, “there are many ways to reach [the] goal” of letting citizens freely decide who will lead them,⁷⁶ these many electoral structures can be grouped into two main categories. In one category, responsibility for general election administration lies with the executive branch of government. Under this arrangement, an appointed government minister or elected public official supervises and conducts elections. According to one recent survey of sixty-three global democracies, this method is in use in about one-quarter of the countries studied, including Canada and the United Kingdom.⁷⁷ This is also the structure in many of the fifty United States, in which an elected Secretary of State is the state’s chief elections officer, with primary and extensive responsibilities for the administration of elections.⁷⁸

A second option is to establish an independent elections commission and task it with running elections. Though this option is less familiar to the United States and other established democracies, this is the administrative structure in use in over two-thirds of the world’s democratic nations,⁷⁹ as well as in a few U.S. states.⁸⁰ The processes through which members of these commissions are appointed vary widely, but almost all aim to create a body with diverse representation

75. *Id.* at 897.

76. MASSICOTTE ET AL., *supra* note 3, at 6.

77. *See id.* at 11, 96–97.

78. *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 974–76 (2005).

79. *See* MASSICOTTE ET AL., *supra* note 3, at 94–95.

80. *See* Hasen, *supra* note 78, at 974–76.

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and political independence, so that its actions are more likely to be publicly accepted as fair, rather than tainted by the partisan or other biases of a single official.⁸¹

The type of election administration structure that a country employs may in turn affect how the country chooses to resolve disputes over the outcome of an election. The types of institutions tasked with election dispute resolution in democratic systems around the globe can be grouped into four basic categories: (1) traditional courts, including constitutional courts, (2) legislatures and parliaments, (3) special electoral tribunals, and (4) ad hoc bodies.

Some weak correlations seem to exist between each of these four categories of election dispute resolution and the two general categories of election administration. For instance, a country that administers its elections with an independent election commission is more likely to use a special election court to resolve contested election outcomes, while a country using a minister of elections to oversee the administration of its elections is more likely to use regular courts or a legislative body. But other factors also affect a country's choice of election dispute resolution system, as the OSCE observed in a 2000 report about monitoring election disputes:

Obviously, there is no single method [of resolving election disputes] that is equally suited to all countries. Which model is endorsed largely depends upon the degree of consolidation reached in the democratic process. However, a country's discretion in its choices is not unlimited and must be exercised consistently with international standards. The right to a remedy for violation of human rights is itself a human right. The same applies to all rights associated with voting.⁸²

The aspirations animating all of these models are to “[remove] post-electoral contention from the streets,”⁸³ and instead to resolve issues in a fair manner, so that the citizens will trust the system to protect their voting rights. Although conducting a successful election without generating an election contest “is a precious collective achievement that should not be taken for granted,” the fact that an election outcome is challenged is not necessarily a sign that the election system is flawed or untrustworthy.⁸⁴ Instead, the important question is whether the dispute resolution process itself provides a fair and

81. *See id.* at 978–83.

82. *Resolving Election Disputes*, *supra* note 14, at 5.

83. Eisenstadt, *supra* note 17, at 530.

84. MASSICOTTE ET AL., *supra* note 3, at 150 (noting also that “in the 19th century it was common for the results of British elections to be challenged in scores of seats”).

legitimate means of policing and completing an election, including elections that, in all other respects, are “free and fair.”⁸⁵

Although international attention to election dispute processes has recently increased, so far there has been little direct comparative assessment of dispute resolution *institutions*. Instead, attention has focused more on developing guidelines and standards for resolving disputes, by whichever body is empowered to do so. For instance, as the 2000 OSCE report also observed:

The resolution of election disputes is not specifically addressed in international legal instruments and there is no clearly established consensus in the international community on *common standards* for a “fair, effective, impartial and timely” resolution of election disputes. Nevertheless, drawing on existing rules and the requirements of international law, it is possible to identify the acceptable range of variation and deviation in the systems used to resolve election disputes.⁸⁶

The report then goes on to address a variety of important standards and principles of fair dispute resolution, without regard to the possible institutions of election dispute resolution.

Often, this effort to develop international standards proceeds with a presumption that the regular judiciary is the obvious tribunal for resolving election disputes, even though some democracies have chosen not to give their ordinary courts any role,⁸⁷ and even though the question of which institutional forum in fact is best deserves direct and focused attention. But, precisely because of this presumption, international attention to election dispute resolution processes instead occurs without much comparative assessment of the relative impartiality and neutrality of the several alternative *institutional* structures.⁸⁸ In Part

85. “Failure at this final stage may ruin any advances made at prior stages.” Shaheen Mozaffar & Andreas Schedler, *The Comparative Study of Electoral Governance—Introduction*, 23 INT’L POL. SCI. REV. 5, 12 (2002).

86. *Resolving Election Disputes*, *supra* note 14, at 6 (emphasis added). Indeed, there seems to have developed a whole cottage industry of drafting and implementing democratic election standards. See, e.g., *Recommendations on Legal Remedies in the Electoral Process*, ASSOCIATION OF EUROPEAN ELECTION OFFICIALS (Sept. 17, 2005), <http://www.aceeeo.org/index.php/en/regular-events/annual-conferences/2005-conference-of-global-election-organizations-geo-and-aceeeo-general-assembly-meeting-siofok-hungary/recommendations-on-legal-remedies>. Meanwhile, the International Institute for Democracy and Electoral Assistance (IDEA) is producing a Handbook on Electoral Dispute Resolution. *Electoral Dispute Resolution*, IDEA, <http://www.idea.int/elections/edr.cfm> (last visited Sept. 30, 2010).

87. See *infra* Part II.B.3.

88. For instance, in a 2005 symposium, one of five principles of election dispute resolution identified was that the tribunal “must be legitimate, credible, neutral, and independent. In other words, it must be immune from political interference and able to

III, this paper turns to an assessment of the relative strengths of alternative institutional structures, after providing more details about which countries are presently using which type of dispute resolution institution.

B. Choices and Patterns in Election Dispute Institutions Abroad

Historically, the dominant models among democratic nations for resolving election disputes have been either to give the regular courts dispute resolution authority,⁸⁹ as suggested above, or to leave the final resolution of election outcomes to the legislative branch.⁹⁰ There are a number of exceptions, however, in which some form of special electoral tribunal fulfills this role. Furthermore, in new democracies, the recent trend is less in keeping with the historically dominant models.

1. Courts of General Jurisdiction.

Regular courts have been the favored institution for resolving election disputes because of an understandable expectation that they will be the most neutral or unbiased forum for such issues.⁹¹ Some commentators therefore describe the assignment of election disputes to regular courts rather than election administrators as serving both “symbolic and practical” purposes, in that it moves the issues to a body that has not only greater prestige but also an ability to look at the matter with a fresh eye.⁹² The expectation is that the judicial branch can best resolve a dispute over the outcome of *the* fundamental democratic process because the judiciary “operates independently and transparently.”⁹³ However, the judicial branch may not always be either neutral or transparent, either generally or with respect to a particular election controversy. “If the judicial system is biased and ineffective, [using it to resolve election disputes] may actually subvert progress achieved in the impartial and professional administration of elections.”⁹⁴ It is important, therefore, to consider carefully the extent to which ordinary courts in fact provide sufficient neutrality and independence.

issue impartial rulings.” *AU Symposium*, *supra* note 13, at 833. Yet how to structure such a tribunal received little attention.

89. See Mozaffar & Schedler, *supra* note 85, at 16.

90. See Fabrice E. Lehoucq, *Can Parties Police Themselves? Electoral Governance and Democratization*, 23 INT’L POL. SCI. REV. 29, 30 (2002).

91. See *Resolving Election Disputes*, *supra* note 14, at 10.

92. MASSICOTTE ET AL., *supra* note 3, at 154.

93. *Id.*

94. Mozaffar & Schedler, *supra* note 85, at 16.

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According to a 2004 study of sixty-three democratic nations, forty-five of these nations grant ordinary courts the final authority to resolve at least some election disputes.⁹⁵ These countries include an overwhelming number of former British colonies, as well as many Western European and former Soviet states, among them Ukraine, discussed in Part I above. Typically, the court involved is the country's high court, although in some countries, including Austria, France, Germany, and Spain, a separate constitutional court may adjudicate at least some election contests.⁹⁶

2. Legislatures.

An earlier model that pre-dates modern democracy, yet still persists in many countries, gives the legislative branch the power to resolve election disputes. "Like any club, Parliament had the privilege of determining whether its members had been lawfully admitted."⁹⁷ But concerns about the fairness of legislative resolutions of election disputes have increasingly brought this model into disfavor.⁹⁸

Nevertheless, a number of democracies continue to rely on their legislatures to resolve some contested elections.⁹⁹ These countries include the European nations of Belgium, Denmark, Germany, Italy, Latvia, Luxembourg, the Netherlands, and Slovenia, as well as Israel, Micronesia, Mongolia, and the Philippines. This is also the case both for federal elections in the United States as well as for certain state elections in many of the fifty states.¹⁰⁰ By contrast, Great Britain and most former British colonies do not allow their legislative institutions to play a role in resolving election disputes.¹⁰¹

In some nations, ordinary courts and legislative institutions share responsibility for adjudicating election disputes. For example, decisions of Germany's Bundestag may be appealed to the country's Federal Constitutional Court.¹⁰² In the United States, contested congressional elections often involve judicial determinations of various issues, even though Congress itself retains the ultimate authority to determine

95. See MASSICOTTE ET AL., *supra* note 3, at 152–53, 156.

96. See Jesus Orozco Henriquez, *The Mexican System of Electoral Conflict Resolution in Comparative Perspective*, 2 TAIWAN J. OF DEMOCRACY 51, 53 (2006).

97. MASSICOTTE ET AL., *supra* note 3, at 154.

98. See *id.* at 154–55.

99. See *id.* at 156.

100. See Huefner, *supra* note 12, at 320–21.

101. See MASSICOTTE ET AL., *supra* note 3, at 153, 155.

102. See *id.* at 155.

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the validity of its members' elections.¹⁰³ Furthermore, on occasion, the respective jurisdictional authority of these two separate institutions is ambiguous. For instance, it is unclear what role the U.S. Supreme Court should play in the event that, in a close presidential election, an issue arose about the authority of the Senate President to unilaterally determine which electors' certificates to open and count.¹⁰⁴

3. *Special Electoral Tribunals.*

Notwithstanding the dominance of the judicial and legislative models, a subset of the world's democracies, predominantly but not exclusively in Latin America, has created some form of special electoral tribunal to adjudicate election contests. This model can be traced to the early twentieth century, when something like it was first adopted in Uruguay and Chile, in 1924 and 1925, respectively.¹⁰⁵ This model remains attractive for new democracies today, especially if the tradition or promise of an independent judiciary is more remote.

Today, countries that employ a specialized electoral tribunal include Argentina (although its legislature retains authority over its own members' elections), Bolivia, Brazil, Costa Rica, Ecuador, Mexico, Panama, Romania, Sweden, Uruguay, and Venezuela.¹⁰⁶ The Palestinian government also has an Elections Cases Court,¹⁰⁷ and Afghanistan's Electoral Complaints Commission, discussed in Part I above, plays a similar role.¹⁰⁸ In some cases, such as in Costa Rica, the adjudicative function and the administrative aspects of conducting an election are merged in a single specialized electoral commission or institution.¹⁰⁹ Similarly, Iraq's Independent Electoral Commission, which was tasked with both administering elections and resolving

103. *E.g.*, *Roudebush v. Hartke*, 405 U.S. 15, 19 & n.6 (1972); *In re Contest of Gen. Election*, 767 N.W. 2d 453, 458 n.5 (Minn. 2009).

104. *See* Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 526 (2010).

105. *See* Henriquez, *supra* note 96; Jesus Orozco Henriquez & Raul Avila, *Electoral Dispute Resolution Systems: Towards a Handbook and Related Material* 4 (2004), http://www.idea.int/news/newsletters/upload/concept_paper_EDR.pdf. At about the same time, election disputes also were being entrusted to the specialized jurisdictions of the Constitutional Courts of Austria and of Czechoslovakia. *See* Henriquez, *supra*; Phillip B. Taylor, *The Electoral System In Uruguay*, 17 J. POLITICS 19, 23 n.20 (1955); Henriquez & Avila, *supra*. The special tribunal model was widely embraced throughout Latin America in the later 20th Century. *See* Henriquez & Avila, *supra*.

106. *See* Henriquez, *supra* note 96, at 52–53; MASSICOTTE ET AL., *supra* note 3, at 152–55; *supra* notes 44–50 and accompanying text.

107. *See Elections Appeals Court*, CENTRAL ELECTIONS COMMISSION—PALESTINE, <http://www.elections.ps/template.aspx?id=6> (last visited Sept. 30, 2010).

108. *See supra* notes 26–30 and accompanying text.

109. Mozaffar & Schedler, *supra* note 85, at 16.

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election-related disputes until a permanent Iraqi government had been constitutionally established,¹¹⁰ continues to function in the same capacity today, although its independence has come under fire.¹¹¹

The use of special electoral tribunals to resolve election contests is driven by the same motive that has caused many nations to favor ordinary courts, and still others to turn away from legislative solutions. In structuring electoral processes, democracies understandably want—and need—to place the responsibility for resolving election contests in an independent institution.¹¹² Accordingly, the crucial question is which institutional structure will in fact best produce a neutral dispute resolution process.

III.

ELECTION DISPUTE RESOLUTION INSTITUTIONS COMPARED

As democracy has expanded around the globe, at least one commentator has asserted that the United States has “fallen behind” in reforming its election systems, and that “provisions for resolving post-electoral disputes have been largely ignored” here, because “reforms are viewed as unnecessary given the stability of U.S. democracy.”¹¹³ Indeed, in previous comparative evaluations of election dispute resolution systems, the focus has almost always been on identifying standards and practices for use in new and emerging democracies.¹¹⁴ In contrast, this paper asks how the United States might more self-consciously reshape its own long-standing election dispute resolution processes in light of lessons from elsewhere.

Several fundamental features directly affect the strength of various election dispute resolution processes. These include: (1) who may challenge an election outcome, (2) on what basis the official outcome may be challenged, (3) what forum will adjudicate the challenge, (4) what timetable will apply to the adjudication process, and (5) what evidentiary requirements will govern this process, including how evidence is obtained and what burden of proof is required. For purposes of analyzing how other countries’ processes might help improve election dispute resolution in the United States, this part of the paper focuses on the question of the best dispute resolution forum: regular

110. See THE INDEPENDENT ELECTORAL COMMISSION OF IRAQ, COALITION PROVISIONAL AUTHORITY ORDER NUMBER 92 at 1–3 (2004), available at http://aceproject.org/ero-en/regions/mideast/IQ/CPA_Order_92.pdf/view (follow “CPA Order 92 pdf” hyperlink).

111. Editorial, *The Days After*, N.Y. TIMES, Mar. 16, 2010, at A22.

112. See *Resolving Election Disputes*, *supra* note 14, at 6.

113. Eisenstadt, *supra* note 17, at 534.

114. See *supra* notes 85–88 and accompanying text.

courts, the legislature, special electoral courts, or some other institution.

A. *Explaining the Primacy of Regular Courts as Election Dispute Resolution Tribunals*

Identifying the best forum for resolving election disputes requires confronting the inertia that favors a judicial forum, with a country's highest court having the final say, as the ideal election dispute mechanism. Both in the United States and in many other countries, this is a common response to the question of who should hear an election challenge.¹¹⁵ Indeed, as suggested above, a survey of the many approaches in use around the world can understandably lead to the conclusion that "a country's highest court is the most logical independent body for the resolution of election disputes."¹¹⁶ As one prominent online resource about global democratic election processes put it, "the judicial resolution of electoral disputes has become a fundamental feature of any electoral democracy."¹¹⁷

The belief that a nation's regular court system is the best forum for resolving election disputes is undoubtedly animated by the notion that the judiciary, in addition to being the government institution charged with dispute resolution generally, is also the most independent branch of government. But something else—namely, the exportation of American-style democracy—may contribute to the favored position that regular courts have among the set of possible election dispute institutions.¹¹⁸ In particular, many nations' reliance on their regular courts to resolve election disputes likely results in part from their borrowing of an institutional structure and distribution of government responsibilities that is based heavily on the U.S. model.

What this approach overlooks, however, is the reality of imperfect judicial independence. Imperfect judicial independence is much more than just the corruption problem that one international election observer captured in this way:

It may look good to spell out a procedure that has an ending up in the supreme court of some country, but if you find out the supreme

115. See *AU Symposium*, *supra* note 13, at 879 (panel statement of Patrick Merloe, Nat'l Democratic Inst.) (noting that "[j]udicial review is required").

116. *Id.* at 834.

117. *Electoral Dispute Resolution*, ACE PROJECT, *supra* note 3.

118. See *AU Symposium*, *supra* note 13, at 897.

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court is probably the most corrupt part of the government, you have set up a great process that has a terrible end result.¹¹⁹

Beyond that concern, even in stable democracies in which the judiciary is the most virtuous branch of government, regular courts are rarely completely independent of political influence, or the appearance thereof. This lack of independence poses special problems in an election contest, the quintessential dispute for which a neutral, independent resolution is critical to democracy.¹²⁰ As the 2000 U.S. presidential election proved, even an otherwise trusted judicial institution may come under suspicion when the election of the head of state is at issue.¹²¹

Unquestionably, the particular structural characteristics of a given country's judicial system will greatly affect the political independence of its regular courts, and in particular of its highest court. Whether the jurists are elected or appointed, by whom, for how long, with what security, and with which prerequisites, are factors that vary widely from country to country and dramatically shape the impartiality of a country's court system. But it may be a mistake to assume that even a well-structured and otherwise generally neutral and impartial judiciary is sufficiently politically independent to resolve a dispute over the election of the head of state.¹²²

Courts nonetheless remain favored in part because this weakness of the regular courts may not yet be widely acknowledged. Indeed, in structuring the American system of government, the framers of the U.S. Constitution themselves apparently failed to recognize the problems that imperfect judicial independence would pose to using regular courts to resolve election disputes. As Professor Ned Foley has observed, because the framers did not anticipate the role that political parties would play in American politics, they also did not anticipate the way in which jurists' political ties could become problematic in election contests, in which the issue is as much a dispute between political parties as between individual candidates.¹²³ Those countries

119. See *id.* (quoting David Cardwell); see also Mozaffar & Schedler, *supra* note 85, at 16 (discussing effect of a "biased and ineffective" court). R

120. See Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350, 376–78 (2007).

121. See, e.g., John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 66 (2002).

122. The more prominent the election, the greater the risk that the judiciary will not be sufficiently independent. See Foley, *supra* note 120, at 377. R

123. See Edward B. Foley, Director, *Election Law @ Moritz*, & Robert M. Duncan/Jones Day Designated Professor of Law, The Ohio State University Moritz College of Law, Ohio State University Distinguished Lecture Series: The Original *Bush v. Gore*: A Historical Perspective on Disputed Elections (Oct. 14, 2008),

that choose to rely on their regular courts to handle election disputes therefore may be perpetuating a design flaw of American democracy.

*B. Acknowledging the Waning of Legislatures as an Election
Dispute Resolution Tribunal*

It is not enough to draw attention to the problem of imperfect judicial independence, unless an alternative can be identified that is preferable to relying on regular courts to resolve election disputes. Indeed, the sense that the courts are preferable to two other alternatives, namely, leaving the resolution of election disputes either to the election administrators themselves or to the legislature, may explain why courts have become the favored institution. In an earlier era, it was common in some countries (and U.S. states¹²⁴) to grant legislatures the authority to resolve disputed elections not only of their own members, but also of other elected government officials. This legislative model likely reflected both a reluctance to embroil the judicial branch in the rough and tumble of politics—indeed, in some times and places, courts have treated election contests as non-justiciable political questions¹²⁵—and a sense that the legislature, as a politically accountable body, was as well positioned as any institution to resolve the quintessential political contest.¹²⁶ But today, although the legislative resolution of election disputes persists in many places, as noted above, it is understandably viewed with disfavor among electoral reformers.¹²⁷

This disfavor reflects concern about both the self-interest of the adjudicating legislators (and the accompanying self-dealing that often occurs) and the fact that this approach simply lets the legislative majority pick the winners, perhaps out of a desire to strengthen its political power, rather than to reach a fair or neutral outcome.¹²⁸ Furthermore, turning the ultimate resolution of an election over to a raw political process may have become less palatable, in part because of the successes of efforts to make the elections themselves cleaner, fairer, and less politically raw. As other aspects of democratic elections have improved, the impetus to resort to regular courts to resolve post-election controversies is understandable, much as a more general

ing.osu.edu/knowledgebank/101408/index.html; *see also* Nathan L. Colvin & Edward B. Foley, *supra* note 104, at 479–83 (2010); LeHoucq, *supra* note 90, at 41–42.

124. Indeed, this practice persists today in some U.S. states. *See* Huefner, *supra* note 12, at 321 & nn.290–91.

125. *See id.* at 270 & n.26.

126. Here too, the rise of quasi-permanent political parties may have altered the dynamic.

127. *See* MASSICOTTE ET AL., *supra* note 3, at 154–55.

128. *See id.*

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“judicialization” of politics also may have resulted from other democratic election reforms.¹²⁹ In any event, other countries that still use a legislative tribunal to resolve election disputes do not seem to have improved on the ways in which the legislature already plays a crude and imperfect role in resolving some contested elections in the United States. Legislative tribunals therefore are unlikely to provide a preferable alternative to the problem of imperfect judicial independence.

C. Exploring the Promise of Special Electoral Tribunals

While legislative tribunals offer little reason to prefer them over regular courts, the inertial preference for regular courts may reflect a failure to consider another alternative: the independent electoral tribunal. As noted above, the independent electoral tribunal is a model widely embraced in some regions of the world, especially Latin America. It is also the model that Mexico successfully used to resolve its close presidential election in 2004, as discussed in Part I above. In contrast to the legislative model, the independent electoral tribunal continues to attract new adherents: Afghanistan’s Electoral Complaints Commission, also discussed in Part I above, is an example of this model’s use in a new democracy.

Most new democracies have tended to use some form of an independent election commission to administer elections, often because these nations lack a tradition of a trustworthy executive branch.¹³⁰ In some countries, an independent election body also has the responsibility of adjudicating electoral outcomes. Political scientist Fabrice LeHoucq has argued that, in Latin America, the development of the independent electoral commission, a body tasked with both administering elections and adjudicating their outcome, reflected dissatisfaction with the “chronic instability” that resulted from a reliance on the executive branch to conduct, and the legislative branch to certify, elections.¹³¹ As a historical matter, he argues that “three of the most stable presidential systems [Chile, Uruguay, and Costa Rica] also have the oldest electoral commissions,”¹³² while Latin American countries that resisted the move to electoral commissions, and instead retained traditional electoral structures, “spent decades competing in fraud-tainted elections . . . military coups, insurrections, and popular pro-

129. See Russell A. Miller, *Lords of Democracy: The Judicialization of “Pure Politics” in the United States and Germany*, 61 WASH. & LEE L. REV. 587, 599 (2004); cf. Ferejohn, *supra* note 121, at 45–46, 61–62.

130. See Mozaffar & Schedler, *supra* note 85, at 15.

131. See LeHoucq, *supra* note 90, at 36.

132. *Id.*

tests.”¹³³ LeHoucq suggests that the stability of a democracy will depend at least in part on how well it conducts its elections, the central experience of democracy.

The United States has avoided the more extreme problems (coups and insurrections) that LeHoucq associated with the “classical model” of electoral governance, which relies on the traditional separation of powers to keep elections fair (although he also attributes other electoral failures within the United States to our reliance on a traditional model).¹³⁴ But the question remains, would an independent electoral tribunal, as compared to a regular judicial forum, increase the fairness and legitimacy with which election disputes are resolved? Suspicions about the neutrality of both the Florida and the U.S. Supreme Courts in 2000, and the Washington state courts in its 2004 gubernatorial race, are recent reminders that regular courts in the United States also are not necessarily above the political fray.¹³⁵

The potential for both impartiality and independence is what makes special electoral tribunals most attractive, especially for new democracies writing their election law on a blank slate. But impartiality and independence are not the only virtues of independent electoral tribunals, and their combined virtues ought to make them attractive even to established democracies. Beyond their impartiality and independence, specialized tribunals “offer many benefits, including the possibility of more timely resolution of [electoral] disputes, and adjudicators with strong experience and familiarity with the issues and the law.”¹³⁶ The development of specialized electoral tribunals also could permit the use of rules of evidence and burdens of proof tailored specifically to the unique nature of election contests.¹³⁷

Admittedly, specific matters of institutional design, primarily concerning how a special tribunal is constituted, could dramatically affect its strength. It would do little good to assign election disputes to a special elections court if that court consisted of political cronies. But any number of structural options is available to constitute a tribunal

133. *Id.* at 37.

134. *See id.*

135. That the Minnesota Supreme Court, in the resolution of the 2008 U.S. Senate contest between Al Franken and Norm Coleman, seems to have escaped more serious criticisms only shows that some courts adjudicating election disputes may be able to preserve a respected degree of neutrality. But this may depend on a variety of factors external to the court, including the behavior of the candidates and their attorneys, the nature of the particular substantive claims at issue, and the political culture and tradition of the jurisdiction in which the election dispute arises.

136. Davis-Roberts, *supra* note 11, at 13.

137. *See* Huefner, *supra* note 12, at 313–14.

consisting of publicly acceptable individuals with relevant expertise, political independence, personal integrity, and trusted judgment. Some of these options include: appointment by a legislative supermajority of individuals meeting certain eligibility standards; joint appointments by executive and legislative officials; empaneling through a process akin to jury selection, with dominant political party leaders allowed to exercise some amount of peremptory challenges; or ad hoc appointments of a subset of the tribunal by the principal candidates, with the remainder of the tribunal to be constituted through the unanimous agreement of those already appointed.

In addition to their strength in resolving election contests, special electoral tribunals spare regular courts from the problems attendant to the judicialization of politics,¹³⁸ as well as the taint or impairment that may result from involvement in a bitter partisan feud. Admittedly, some fledgling or emerging democracy may actually *strengthen* its judiciary's reputation for independence when its high court intervenes successfully in an election dispute, as was the experience of the Ukrainian Supreme Court, discussed in Part I above. But it is not at all clear—indeed, it is doubtful—that this effect will occur predictably.¹³⁹ Rather, the kind of negative institutional impact that the U.S. Supreme Court experienced after resolving the 2000 presidential election seems to be the more likely result of judicial resolution of high-profile election contests.¹⁴⁰

D. Fostering a Better Election Dispute Resolution Process in the United States Generally

The idea of establishing independent electoral tribunals merits serious consideration in the United States, but it is not the only reform measure that could improve how election disputes are resolved here. Although international election observers and organizations are reluctant to promote any one election dispute resolution system (noting, for instance, that “[e]ach country chooses the system best suited to its

138. See Ferejohn, *supra* note 121, at 66; Richard L. Hasen, Judges as Political Regulators: Evidence and Options for Institutional Change (Mar. 23, 2010) (unpublished manuscript at 1–2) (available at <http://ssrn.com/abstract=1577268>); Miller, *supra* note 129, at 597–99.

139. Moreover, it could also predispose a developing judiciary against the party in power precisely to help establish the judiciary's institutional presence, thereby creating a new kind of institutional bias.

140. See Edward B. Foley, *The McCain v. Obama Simulation*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 471, 502–505 (2010).

circumstances”¹⁴¹), several criteria are clearly important to any system. The ACE Project’s list, which is representative of similar lists promulgated by organizations like NDI, International IDEA, the Association of Central and Eastern European Election Officials, the OSCE, and the United Nations, includes: independence and impartiality of tribunal; accountability and transparency of process; integrity and professionalism of personnel; clarity and enforceability of rules and sanctions; and swiftness of disposition, including possibility of appeal.¹⁴² Through greater attentiveness to some of these same criteria, the United States also could improve its handling of election disputes, whether or not it adopted a different institutional model.¹⁴³

Of fundamental importance is the independence and impartiality of the tribunal. Internationally, this principle impels new democracies towards independent electoral tribunals, and this criterion of election dispute resolution is often directly linked to the Universal Declaration of Human Rights’ more general guarantee of impartial tribunals.¹⁴⁴ In the United States, this neutrality principle could be further promoted by refining the way in which regular state court judges gain office, so as to render them less beholden to a particular party or appointing politician. Additionally, state legislatures could clarify the standards under which election contests are adjudicated, in order to reduce the discretion reposed in the tribunal, thereby promoting neutrality from another direction. In particular, the existing electoral law of most U.S. jurisdictions lacks sufficient clarity about the appropriate sanction or remedy for failings in the electoral process.¹⁴⁵

The regular courts in the United States are already a model to the world in terms of accountability and transparency, and the same can be said about the integrity and professionalism of most U.S. courts. In undertaking any effort to develop an independent electoral court as an alternative mechanism, it is critical to ensure that it, too, replicates the openness and integrity of regular U.S. court systems. Thus, as a matter of institutional design, an independent electoral court must consist of individuals with sterling credentials and experience, insulated from

141. *United Nations Holds Electoral Dispute Resolution Workshop in Vienna*, ACE PROJECT, <http://aceproject.org/today/feature-articles/united-nations-holds-electoral-dispute-resolution-workshop-in-vienna/?searchterm=vienna%20workshop> (last visited Sept. 30, 2010).

142. *See id.*

143. For instance, wide variation exists across the fifty states in the clarity of the rules for resolving election disputes, and most states are not well prepared to adjudicate election contests as quickly as is desirable. *See* Huefner, *supra* note 12, at 310–20.

144. *See Resolving Election Disputes*, *supra* note 14, at 39–40.

145. *See* Huefner, *supra* note 12, at 306–10.

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improper influence, while functioning under close public scrutiny. Its proceedings must be transparent, and its rules must be clear.¹⁴⁶

Finally, the resolution of election disputes must occur rapidly.¹⁴⁷ On this point, the United States' existing dispute resolution mechanisms have sometimes struggled. Although the Florida and U.S. Supreme Courts handled the 2000 presidential race on a greatly expedited basis, the time pressures still arguably compromised their work. Minnesota's resolution of its 2008 U.S. Senate race lasted six months into the term in question—eight months beyond the date of the election—and the resolution of Washington's 2004 gubernatorial race was similarly delayed. In contrast, the inquiry into irregularities in Afghanistan's 2004 presidential election was accepted not only because it was neutral, but also because it was fast.¹⁴⁸ In order to both enhance the legitimacy of the successful candidate and allow that person to enter into service in a timely manner, election disputes need to be expedited as much as possible.

CONCLUSION

In designing processes for resolving election disputes, it has been commonplace for other countries to look to the United States for guidance. For instance, in the past decade, the International Foundation for Electoral Studies has published both a first and then a second edition of *The Resolution of Election Disputes: Legal Principles that Control Election Challenges*, a collection of court cases and principles drawn entirely from U.S. election disputes, with the purpose of influencing the development of democratic institutions abroad.¹⁴⁹ But rarely on the table has been the question of whether the predominant institution for resolving election disputes both in the United States and elsewhere, namely the regular courts, remains best suited to the task. Furthermore, little effort has occurred to inform this question by exploring what other institutions are successfully used elsewhere. This paper has argued that independent electoral courts, which have become a mainstay of free and fair elections in Latin America, among other places, have much to commend them. Any serious effort to reform the election dispute resolution mechanisms of the United States must consider alternatives to existing judicial options and should devote substantial attention to the prospects for using these specialized electoral tribunals.

146. See *AU Symposium*, *supra* note 13, at 880.

147. See Huefner, *supra* note 12, at 292–93.

148. See *AU Symposium*, *supra* note 13, at 847.

149. Barry Weinberg, *THE RESOLUTION OF ELECTION DISPUTES: LEGAL PRINCIPLES THAT CONTROL ELECTION CHALLENGES* (2d ed. 2008).