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Constitutional Provisions for Electoral Disputes

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Constitutional Provisions for Electoral Disputes

By: Michael L. Collins

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Part One: Introduction – The 2000 U.S. Presidential Election Recount

As Americans woke up the day after the 2000 U.S. Presidential Election, it quickly became evident that Florida's 25 electoral votes would prove decisive in deciding who would serve as the next President of the United States. And in the Sunshine State, the race was too close to call. On the morning after the election, the Florida Division of Elections reported in its initial count that Governor George W. Bush led Vice President Al Gore by 2,909,135 to 2,907,351, a margin of only 1,784 votes.¹ At this point, it became evident that roughly hundreds of votes would decide the leader of a nation of 300 million people.² Given the narrow vote margin, Florida law mandated an automatic machine recount.³ But, what did this recount mean? And, how did Vice President Gore go about challenging the results? The answer is a litany of jurisprudence related to the judicial review of electoral results, which this paper is focused on improving.

In the 2000 case, Florida law afforded candidates two methods to challenge election results. First, before a canvassing board declares a winner, a candidate may file a protest and request a manual recount.⁴ Second, after certification, a candidate may file an election contest in circuit court.⁵ Gore used both these methods to challenge the results. After appealing to the canvassing boards, he filed in Florida Circuit Court to compel the Secretary of State to accept amended returns.⁶ But as history shows, the legal challenges followed a long path from the trial level court.

¹ Jonathan K. Van Patten, *Making Sense of Bush v. Gore*, 47 S.D. L. REV. 32, 34 (2002).

² The U.S. population on April 1, 2000 was 281,421,906, according to the U.S. Census Bureau. United States Census 2000, *available at* <http://www.census.gov/main/www/cen2000.html> (last accessed November 12, 2012.)

³ *Id.* at 34.

⁴ *Id.* at 35.

⁵ *Id.*

⁶ *Id.* at 39.

Immediately after losing at trial, Bush appealed the trial ruling to the state Court of Appeals, and this intermediate court passed the matter up to the Florida Supreme Court.⁷ How does this appeal work? Do voters and candidates know that election recounts can follow this course? The Florida Supreme Court then accepted jurisdiction, set up an expedited briefing schedule, and ultimately held against the Secretary of State by “[r]elying primarily on the Florida Constitution.”⁸

And this was far from the end to the legal wrangling. After losing at the Florida Supreme Court, Governor Bush appealed to the Supreme Court of the United States. Who knew that the nation’s high court could become involved in a state electoral dispute? Sure enough, in a per curiam opinion, all nine justices agreed that the Florida Supreme Court decision violated the federal constitution.⁹ Specifically, the Court found it had federal question jurisdiction to interpret Article II, Section 1, Clause 2 of the federal constitution, which governs the selection of presidential electors: “Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”¹⁰ And based on this clause, the Court found that the Florida legislature had direct authority to pass election laws related to the presidential election, which were superior to the interpretation of the Florida Constitution which the Florida Supreme Court relied on in its decision making.¹¹ Highlighting the intricacy of this ruling, Article II, Section 1, Clause 2 of the federal constitution had not been interpreted by the U.S.

⁷ Palm Beach County Canvassing Board v. Harris, 772 So.2d 1220, 1227, n.7 (Fla. 2000).

⁸ *Id.* at 1227; Van Patten, *supra* note 1, at 40.

⁹ Van Patten, *supra* note 1, at 43; Bush v. Palm Beach County Canvassing Board, 531 U.S. 70 (2000).

¹⁰ Bush, 531 U.S. at 76 (*citing* U.S. CONST. art. II, § 1, cl. 2).

¹¹ Van Patten, *supra* note 1, at 43.

Supreme Court for over 100 years prior.¹² Based on this decision, the matter was essentially remanded to the Florida courts to make a ruling pursuant to Florida law, “on which the Florida Supreme Court would have the last word.”¹³

Before the U.S. Supreme Court rendered its decision, the state canvassing board processed amended returns, and ultimately on November 26, 2000 certified Bush the winner of the election by 537 votes.¹⁴ The next day, Gore filed another suit in Florida Circuit Court, arguing that certain legal votes were excluded and certain illegal votes were included.¹⁵ This suit, effectively commencing a Round 2 of litigation from the state trial level, came pursuant to the previously discussed ability for unsuccessful candidates or qualified voters to contest certification in circuit court.¹⁶ After a two day trial, Judge N. Sanders Sauls rejected Gore’s argument, saying that in order to successfully challenge the election, he must show that “but for irregularity or inaccuracies, ‘the result of the election would have been different.’”¹⁷

Once again, the Florida Supreme Court took an appeal from the trial level pursuant to the pass-up jurisdiction clause in the state constitution.¹⁸ In its opinion, the court sought to avoid another reversal by the U.S. Supreme Court on Article II, Section 1 grounds, so it explicitly stated “[t]his case today is controlled by the language set forth by the Legislature in section 102.168, Florida Statutes (2000).”¹⁹ Based on evidence presented at trial, the Florida Supreme Court ruled that “Gore had established to the satisfaction of the Florida Supreme Court that there

¹² Bush, 531 U.S. at 76 (*citing* *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)) (“Although we did not address the same question petitioner raises here, in *McPherson* . . .”).

¹³ Van Patter, *supra* note 1, at 44.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; Fla. Stat. § 102.168 (1999) (“The certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.”)

¹⁷ Van Patter, *supra* note 1, at 45-46.

¹⁸ *Gore v. Harris*, 772 So.2d 1243, 1246 (Fla. 2000) (“We have jurisdiction. See art. V., § 3(b)(5), Fla. Const.”)

¹⁹ *Id.* at 1248.

were a sufficient number of potential ‘legal votes’ as to place in doubt the certified result of the election.”²⁰

With this finding, the court was left to fashion a remedy. Gore had petitioned for a recount in Miami-Dade County, but the court gave him even more than he bid for. It instead ordered a statewide recount: “In addition to the relief requested by appellants to count the Miami-Dade undervote, claims have been made by the various appellees and intervenors that because this is a statewide election, statewide remedies would be called for. As we discussed in this opinion, we agree.”²¹ As such, the Florida Supreme Court hastily set forth recount procedures, advising canvassers that a vote shall be counted “if there is ‘clear intent of the voter.’”²²

Immediately after this decision, Governor Bush made an application for a stay with the U.S. Supreme Court.²³ To obtain a stay request, petitioners are required to “make[] a substantial showing of a likelihood of irreparable harm.”²⁴ The Court granted the stay request, with a majority of the court finding that Bush’s petition met this heightened burden of proof. Elucidating this view in his concurrence, Justice Scalia wrote, “[c]ount first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires.”²⁵ Pursuant to the stay, the U.S. Supreme Court treated the petition as a granted writ of certiorari, and set oral arguments for two days later on December 11, 2000.²⁶

In the eventual landmark *Bush v. Gore* decision, the U.S. Supreme Court decision effectively determined that Florida’s electoral votes would go to Governor Bush, cementing him

²⁰ Van Patter, *supra* note 1, at 47.

²¹ Gore, 772 So.2d at 1261.

²² *Id.* at 1262.

²³ *Bush v. Gore*, 531 U.S. 1046 (2000).

²⁴ *Id.* at 1047 (Scalia, J., concurring).

²⁵ *Id.*

²⁶ *Id.* at 1046.

as the President-elect of the United States. But most relevant to this paper, the Court reached its conclusion on two arcane areas of federal question jurisdiction. The Court clearly listed these areas in its certified questions: “[W]hether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2 of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses.”²⁷

Without delving into the specifics of the complex *Bush v. Gore* decision, it suffices to note that the Court held 7-2 that the Florida Supreme Court recount order violated the Equal Protection Clause of the federal constitution.²⁸ The controversial question involved interpretation of the safe harbor deadline. The *Bush v. Gore* decision came down on December 11, 2000, the day before 3 U.S.C. § 5 mandates a state certify its vote in order to keep its results unchallenged in the electoral college – this is the so-called safe harbor provision.²⁹ The five-justice majority decided that, given the timing, there was no manner in which the Florida Supreme Court could effectuate a recount that would pass federal constitutional muster.³⁰ As such, the U.S. Supreme Court held that the Florida Supreme Court could not order a recount and upheld the certified results with Bush leading, all based on its power to adjudicate the federal questions arising under Article II, Section 1, Clause 2 of the federal constitution, the Fourteenth Amendment Equal Protection clause to the federal constitution, and the safe-harbor statute of 3 U.S.C. § 5.

With the *Bush v. Gore* jurisprudence as a backdrop, this paper looks at elections in the United States, and the manner in which electoral disputes are adjudicated. In the 2000 Presidential Election, Vice President Gore began his two key lawsuits in the Florida Circuit

²⁷ *Bush v. Gore*, 531 U.S. 98, 103 (2000).

²⁸ Van Patter, *supra* note 1, at 57.

²⁹ *Id.*

³⁰ *Id.*

Court. After these trial level cases, the decisions were appealed. They each bypassed the Florida Courts of Appeal, and instead went straight to the Florida Supreme Court. After the Florida Supreme Court ruled, both key cases were then appealed to the U.S. Supreme Court on federal question jurisdiction.

In all likelihood, the 2000 presidential outcome was an anomaly that we will not see again in America. The odds are slim that a presidential election will again turn on the electoral votes of one state, and that the vote in that specific state is so narrow as to require recounts and challenges. But while a repeat of 2000 is unlikely, it does not make it impossible. As such, this paper will review the current legal framework in the United States, and discuss how future presidential candidates would challenge electoral results under current law. Next, this paper will review systems that are used in comparative democracies. Then, this paper will use the systems in these comparative nations as context to recommend possible changes that could be made to improve the U.S. system and prevent another *Bush v. Gore* outcome, while at the same time taking into account institutional restrictions that make such changes difficult. These proposed changes include a new federal recount law, as well as recount reform laws passed one-by-one at the state level.

Part Two: Electoral Procedures in the United States

A: Electoral College

Under the current electoral system, the President of the United States is selected by electors who are designated by each State. Each state is afforded a slate of electors equal to the

number of Representatives and Senators they have seated in Congress.³¹ It is then up to the legislature of each state to decide how these electoral votes shall be apportioned.³²

Currently, forty-eight states provide for a winner-takes-all popular vote election for presidential electors.³³ Under this approach, the states “maximize their influence” by affording all of its presidential electors to the presidential candidate that wins the most popular votes statewide.³⁴ Two states, Maine and Nebraska, use an alternative system that allocates one presidential elector for the presidential candidate that wins each Congressional district, and then allocates the two remaining electors (that represent the state’s U.S. Senators) on an at-large basis.³⁵

Despite the uniform notion that citizens vote for their presidential electors, the federal constitution does not require states to hold this form of a popular election. In fact, the U.S. Supreme Court explicitly stated this in the per curiam portion of *Bush v. Gore*: “The individual citizen has no federal constitutional right to vote for electors for the President of the United States.”³⁶ But, as the court thereafter notes, “history has now favored the voter, and in each of the several states the citizens themselves vote for Presidential electors.”³⁷ Importantly, this technicality highlights how the allocation of presidential electors is a state responsibility, as are the elections for electors that the states have all chosen to sanction.

³¹ “Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.” U.S. CONST. art. II, § 1, cl. 2.

³² *Id.*

³³ Electoral Topics, N.Y. TIMES (Online) Nov. 19, 2012, *available at* http://topics.nytimes.com/top/reference/timestopics/subjects/e/electoral_college/index.html

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Bush*, 531 U.S. at 104.

³⁷ *Id.*

B: State Court Role in Electoral Disputes

With elections and the allocation of electors being a state responsibility, as the *Bush v. Gore* case highlighted, the primary tribunals for challenging presidential electoral results are in the state courts of the subject state. Each state has a statutory scheme of its own for the administration of elections. These statutes include provisions for automatic recounts, methods of requesting recounts, and other associated items. As evidenced by the Florida statutory scheme in 2000, a candidate or individual citizen could file an electoral challenge at the trial level in Florida Circuit Court. Following Florida's constitutionally established rules of civil procedure, the trial court's decision then became reviewable by the Florida Supreme Court pursuant to pass-through jurisdiction.

This procedure of fielding electoral challenges at the trial level, which are then directly reviewed by the state court of last resort, is not unique to Florida. For example, in New Jersey, there was a 2002 pre-election challenge regarding the ability of the state's Democratic Party to switch its nominee for United States Senate after the statutory timeframe to make such changes.³⁸ In this case, the Democratic Party filed its motion for prerogative writ at the trial level in the Superior Court, Law Division.³⁹ At the same time, the Democratic Party filed a successful motion for direct certification, pursuant to New Jersey court rules, which allows "the Supreme Court, on its own motion, to certify any action or class of actions for direct appeal."⁴⁰

Some states have a different system that allows for direct appeal of electoral challenges to the state court of last resort. This was illustrated in 2008, when Minnesota had the nation's most recent disputed statewide election. Here, incumbent United States Senator Norm Coleman sought

³⁸ New Jersey Democratic Party v. Samson, 175 N.J. 178 (2002).

³⁹ *Id.* at 184.

⁴⁰ *Id.* (citing New Jersey R. 2:12-1) ("The Supreme Court may on its own motion certify any action or class of action for appeal."); *See also* New Jersey R. 2:12-4 ("Certification will be granted . . . if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court . . .").

re-election against Al Franken. After the state canvassing board certified the election for Franken, Coleman then challenged the results in state court.⁴¹ Pursuant to Minnesota law, Coleman was able to directly challenge the electoral results to the Minnesota Supreme Court.⁴² Under this system, the challenge is submitted to the Chief Justice of the Minnesota Supreme Court. The case is then heard by three trial level judges assigned by the Chief Justice, with the trial judges' findings directly appealable to the Minnesota Supreme Court.⁴³ In the Coleman case, the Minnesota Supreme Court reviewed the three-judge panels findings of fact and affirmed, making Franken the winner of the disputed election.⁴⁴

C: Federal Role in Electoral Disputes

As discussed in the context of the electoral college, *supra*, states are responsible for determining the method of allocating its presidential electors and for administering elections. At the same time, however, there is an amalgam of federal constitutional jurisprudence in the field of election law. The U.S. Supreme Court discussed this reality in *Bush v. Gore*, where it explained that “[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.”⁴⁵ Pursuant to the Court’s Fourteenth Amendment voting jurisprudence, “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”⁴⁶ Besides these equal protection claims that arise out of elections, however, there is little federal case law that applies to state results. As such, there are

⁴¹ *In re Contest of General Election Held on November 4, 2008 For the Purpose of Electing a United States Senator From the State of Minnesota*, 767 N.W.2d 453, 456 (Minn. 2006).

⁴² *Id.*

⁴³ MINN. STAT. 209.045 (1986).

⁴⁴ *In re Contest*, 767 N.W.2d at 456.

⁴⁵ *Bush*, 531 U.S. at 103.

⁴⁶ *Id.* (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966)).

few grounds for candidates to get electoral challenges removed into the federal system, for a typical lack of subject matter jurisdiction.

Part Three: Comparative Constitutions

In order to review potential alternatives for the review of presidential election recounts in the United States, it is beneficial to study the systems used in other democracies. First, this paper will review the election review procedure in France, established under the 1958 French Fifth Republic Constitution. This comparison is enlightening, as France is one of the few western European democracies to adopt a nationwide presidential election system, similar to that in the United States. Then, this paper will review the election review procedures used in the new democracies of Afghanistan and Iraq. Considering the United States helped form these electoral systems over the past decade, it is helpful to review the more modern electoral systems that are readily implemented at constitutional moments today.

A: France

In the wake of World War II, France established the French Fifth Republic constitution in 1958. In a dramatic move away from the traditional parliamentary systems that still to this day comprise most European democracies, France established by referendum a directly elected president and universal suffrage.⁴⁷ This development is often attributed to both influences of the American presidential system and the reality that a direct election system proved self serving for then-President Charles de Gaulle, France's revered World War II general who led the nation for years on an unelected basis with wide popular support.⁴⁸

⁴⁷ Noelle Lenoir, *Constitutional Council Review of Presidential Elections in France and a French Judicial Perspective on Bush v. Gore*, in *THE LONGEST NIGHT: PROLEMS AND PERSPECTIVES ON ELECTION 2000* (Jacobson and Rosenfeld, eds.) (University of California Press, 2002), 299.

⁴⁸ *Id.*

Under the direct election reform, which passed with nearly two-thirds of the public's support, voters cast a ballot directly for president.⁴⁹ If a candidate receives an absolute majority of votes, he or she is elected president.⁵⁰ However, if no candidate wins a majority of votes, a second round election is held between the two candidates receiving the highest number of votes. The two round system is designed to provide legitimacy in that "the winning candidate gets an overall majority of votes."⁵¹

Most relevant to this paper, the Constitutional Council established under the French Fifth Republic Constitution is entrusted with adjudicating disputes arising out of all elections.⁵² As such, it sits as the only court in France with jurisdiction over presidential elections.⁵³ Article 58 specifically enumerates powers the court as the overseer of presidential elections: "The Constitutional Council shall ensure the proper conduct of the election of the President of the Republic. It shall examine complaints and shall proclaim the results of the vote."⁵⁴ The constitution also contains analogous clauses establishing Constitutional Council review for the election of legislators and referendum proceedings.⁵⁵

The Constitutional Council is comprised of nine appointed members, three of whom are appointed every three years to staggered nine-year terms with a one-term limit.⁵⁶ The President of the Republic, the President of the National Assembly, and the President of the Senate each

⁴⁹ *Id.*

⁵⁰ Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, available at <http://www.hks.harvard.edu/fs/pnorris/Acrobat/Choosing%20Electoral%20Systems.pdf> (last visited Nov. 25, 2012).

⁵¹ *Id.*

⁵² Kieran Williams, *Judging Disputed Elections in Europe*, 8 ELECTION L.J. 277, 278 (2009).

⁵³ Lenoir, *supra* note 47, at 301.

⁵⁴ French Fifth Republic [Constitution] Oct. 4, 1958, art. 58.

⁵⁵ *See* French Fifth Republic [Constitution] Oct. 4, 1958, art. 59 ("The Constitutional Council shall rule on the proper conduct of the election of Members of the National Assembly and Senators in disputed cases"); French Fifth Republic [Constitution] Oct. 4, 1958, art. 59 ("The Constitutional Council shall ensure the proper conduct of referendum proceedings as provided for in articles 11 and 89 and in Title XV and shall proclaim the results of the referendum.")

⁵⁶ Lenoir, *supra* note 47, at 301.

receive three appointments to the Constitutional Council.⁵⁷ Former Presidents also serve on the court as ex-officio life members.⁵⁸ Finally, the council is led by a member who serves as president.⁵⁹ The president of the Council must be appointed by the President of the Republic, and he or she has a casting vote in the event of the tie.⁶⁰ While the council is structured to sit as an independent judiciary, the appointment structure has led it to be “composed as much of onetime politicians . . . and civil servants as of career judges.”⁶¹

Reviewing past actions by the Constitutional Council, there is no doubt that the court exercises its role of judicial review seriously. For example, the Council regularly takes field reports of incidents at polling stations “seriously,” and the council will then “subsequently hear and determine litigation relating to the poll.”⁶² Further, if the council investigates and finds irregularities, it can annul the votes cast at the relevant precinct.⁶³ However, practically speaking, annulment has been reserved for rare cases, typically “involving suspicion of tampering or duress.”⁶⁴ As past has proven, the council may “forgive a host of slip-ups and breakdowns,” when looking at past disputes over legislative races, “reserving their firepower for egregious cases.”⁶⁵

B: Afghanistan

1. Constitutional System and First Election

After the United States and coalition partners overthrew the Taliban, the international community set out to establish a democratic system in Afghanistan. In July 2003, the Afghans

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Williams, *supra* note 52, at 278.

⁶² Lenoir, *supra* note 47, at 306.

⁶³ *Id.*

⁶⁴ Williams, *supra* note 52, at 280.

⁶⁵ *Id.*

joined with the United Nations to establish the Joint Election Management Body (JEMB), which was tasked with organizing democratic elections for Afghanistan.⁶⁶

The October 2004 election was governed by the Afghanistan Constitution, which was established just months prior by the Afghan Constitution Commission.⁶⁷ Article 61 of the Afghanistan Constitution provides that the President “shall be elected by receiving more than fifty percent of votes cast by voters through free, general, secret and direct voting.”⁶⁸ The Afghani system also contains a two-round vote similar to that in France, requiring a run-off election if a presidential candidate fails to garner more than fifty percent of votes.⁶⁹

In the lead up to the first election, Hamid Karzai signed Afghanistan’s election law into effect in his capacity as interim President.⁷⁰ Relevant to this article, the law established the Independent Electoral Commission (IEC) as the “body responsible for administering the elections.”⁷¹ The commission is comprised of seven members, all appointed by the president.⁷² While the JEMB administered the 2004 elections, it thereafter dissolved and ceded responsibility to the IEC.⁷³ The Law also established the Electoral Complaints Commission (ECC), which is tasked with “investigating complaints regarding voting procedures raised at polling stations.”⁷⁴ This commission consists of five members, with one member appointed by the Supreme Court, another appointed by the Afghanistan Human Rights Commission, and the remaining three

⁶⁶ Jenna Kessler, *Monitoring Afghanistan’s 2009 Presidential Election: How the Withdrawal of International Aid Impeded Democratic Process*, 43 GEO. WASH. INT’L L. REV. 175, 180 (2011)

⁶⁷ *Id.* at 181.

⁶⁸ Afghanistan Constitution, art. 61.

⁶⁹ *See id.* (“If in the first round none of the candidates gets more than fifty percent of the votes, elections for the second round shall be held . . . and, in this round, only two candidates who have received the highest number of votes in the first round shall participate.”)

⁷⁰ Kessler, *supra* note 66, at 182.

⁷¹ *Id.* (citing Decree of the President of the Transitional Islamic State of Afghanistan on [] The Adoption of Electoral Law, chapter 2 (May 27, 2004)).

⁷² *Id.*

⁷³ *Id.* at 183.

⁷⁴ *Id.*

members appointed by the Special Representative of the U.N. Secretary General in Afghanistan.⁷⁵

To provide security for the October 9, 2004 election, North Atlantic Treaty Organization (NATO), United States, Afghan National Army, and Afghan National Police troops were organized and dispatched.⁷⁶ Attributed in large part to this international support, a consensus of independent electoral observers held the 2004 election “largely fair” and “produced a democratic result.”⁷⁷ Karzai won with 55.4% of the total votes cast in an election with nearly 80% voter turnout.⁷⁸ As a result, Karzai was elected to a five-year term in office on the first ballot, pursuant to the new Afghanistan Constitution.⁷⁹

2. Testing the Framework

Afghanistan held its second presidential election on August 20, 2009, when President Hamid Karzai sought re-election against principal challenger Abdullah Abdullah, Karzai’s former Minister of Foreign Affairs.⁸⁰ With voting turnout of 35%, in sharp contrast to the 2004 election, the 2009 election was “marred by fraud, coercion, and intimidation,” causing the outcome to be disputed for two months.⁸¹ Independent election monitors found that voter fraud pervaded the election, including underage voting and voter coercion.⁸² Most significant, these same independent observers found improper interference by staff of the Independent Election Commission (IEC), the membership of which was entirely appointed by Karzai.⁸³ During the

⁷⁵ Steven F. Huefner, *What Can the United States Learn from Abroad About Resolving Disputed Elections*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 523, 530 (2010).

⁷⁶ Kessler, *supra* note 66.

⁷⁷ *Id.*

⁷⁸ *Id.* at 181.

⁷⁹ See Afghanistan Constitution, art. 61 (“The presidential term shall expire on the 1st of the Jawza of the fifth year after elections.”)

⁸⁰ Huefner, *supra* note 75, at 528.

⁸¹ *Id.* at 529.

⁸² *Id.*

⁸³ *Id.*

election returns, incumbent President Karzai's vote total "slowly climbed from around 40% in the first returns, to above 54% by the final complete count."⁸⁴ At the same time, votes were returned from several polling places that were closed on Election Day.⁸⁵

Given the "suspicion about the election's legitimacy," the Electoral Complaints Commission (ECC) then became involved.⁸⁶ The commission, which contains a majority of foreign U.N. appointees, performed a review of 2,600 complaints filed at polling places and conducted an audit.⁸⁷ In the end, the ECC found "clear and convincing evidence of voting fraud."⁸⁸ As a remedy, the ECC ordered the IEC to reduce each candidate's vote total by a "coefficient of fraud" it found to exist at each of the 3,376 voting stations.⁸⁹ This directive caused Karzai's vote total to fall below the required 50% threshold to avoid a run-off. After Karzai reluctantly acceded to a run-off, though, challenger Abdullah withdrew from the presidential race, citing the inability to have a transparent election run by the IEC.⁹⁰

While establishing the IEC as an independent electoral commission appeared a "virtue" of the Afghanistan Constitution in 2004,⁹¹ five years later it "lack[ed] credibility" in the disputed 2009 election because all its members were selected by President Karzai without congressional oversight.⁹² In contrast, many believe the ECC addressed the 2009 Afghani election "with credibility . . . by resolving complaints in an objective and impartial manner."⁹³ As such, many

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 530.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Kessler, *supra* note 66, at 197.

⁹² *Id.*

⁹³ *Id.* at 198.

have argued the ECC carries a “perceived legitimacy” because it has a majority of U.N. appointed membership.⁹⁴

B. Iraq

1. Constitutional System

After the overthrow of Saddam Hussein in 2003, the Coalition Provision Authority (CPA) was established in Iraq as the governing authority.⁹⁵ Headed by L. Paul Bremer, the CPA then formed a group comprised of prominent Iraqis named the Iraqi Governing Council (IGC), which was tasked with advising the CPA and drafting an interim constitution.⁹⁶ During this period, the CPA established the Independent Electoral Commission of Iraq (IECI) pursuant to Order 92, in anticipation of nationwide elections.⁹⁷

The IECI is tasked with administering Iraqi elections, which includes promulgating election regulations, determining candidate eligibility, and managing logistics such as printing ballots.⁹⁸ It is headed by the IECI Board of Commissioners, which includes seven voting Iraqi members, a non-voting Chief Electoral Officer who handles administrative matters, and a non-voting U.N. international expert.⁹⁹ As such, the commission is comprised entirely of Iraqi citizens, with the exception of the United Nations representative.¹⁰⁰

In the transitional period, the TAL drafted an interim constitution that took effect on June 28, 2004.¹⁰¹ While relevant parties continued to draft the final constitution, elections to a

⁹⁴ *Id.*

⁹⁵ Charles P. Trumbull & Julie B. Martin, *Elections and Government Formation in Iraq: An Analysis of the Judiciary's Role*, 44 VAND. J. TRANSNAT'L L. 331, 336 (2011).

⁹⁶ *Id.*

⁹⁷ Kristina Arvanitis, *Lessons from Iraq: Electoral Legitimacy in the Shadow of Ethnoreligious Conflict*, 20 TEMP. INT'L & COMP. L.J. 529, 532, 540 (2006).

⁹⁸ *Id.* at 532.

⁹⁹ *Id.* at 541.

¹⁰⁰ *Id.* at 532.

¹⁰¹ Trumbull, *supra* note 95, at 335-36.

Transitional National Assembly were held in January 2005.¹⁰² Then, after months of “heated negotiation,” the new constitution was approved on October 15, 2005 by national referendum.¹⁰³

Relevant to this paper, the constitution granted the Iraqi high court jurisdiction over parliamentary elections.¹⁰⁴ To this end, Article 93 provides that “the Federal Supreme Court shall have jurisdiction over . . . [r]atifying the final results of the general elections for membership in the Council of Representatives.”¹⁰⁵ Moreover, Article 94 states that decisions of the court “are final and binding for all authorities.”¹⁰⁶ Since the Iraqi Constitution was enacted, the Federal Supreme Court generally reviews election results pursuant to its Article 93 powers if petitioned in the form of a “letter submitted by an interested party.”¹⁰⁷

2. Testing the Framework

In the years prior to the 2010 national election, there were intense negotiations in the Council of Representatives (CoR) on passing an election law that would govern apportionment in the legislature.¹⁰⁸ The Iraqi Federal Supreme Court held that the 2005 election law was unconstitutional because of malapportionment, so it became incumbent on the CoR to pass an amended law.¹⁰⁹ While the high court ruled on the matter in 2007, Parliament did not propose rectifying legislation until 2009.¹¹⁰ Notably, during the legislative negotiations, the high court was asked to interpret the apportionment clauses in the constitution. While the court capably provided an opinion addressing “the most general reading of the question posed to it,” it did

¹⁰² *Id.* at 336.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ IRAQI CONSTITUTION, art. 93.

¹⁰⁶ IRAQI CONSTITUTION, art. 94.

¹⁰⁷ Trumbull, *supra* note 95, at n.30.

¹⁰⁸ *See generally id.* at 342-51.

¹⁰⁹ *Id.* at 342.

¹¹⁰ *Id.*

make clear that it was not in charge of elections.¹¹¹ The court wrote “the election system is the responsibility of the Independent High Commission for Elections.”¹¹²

In the eventual election on March 7, 2012, roughly 62 percent of Iraqis cast a ballot, despite al-Qaeda attempts to intimidate voters with rockets and mortar fire.¹¹³ The preliminary results showed incumbent al-Maliki’s coalition in a neck-and-neck race with the opposition parties headed by Allawi, with subsequent reports showing Allawi’s groups holding a two-seat lead.¹¹⁴ In response to this news, incumbent al-Maliki “took to the offensive” and said that his party uncovered “widespread fraud in several provinces,” demanding a nationwide recount.¹¹⁵ Allawi’s party dismissed this demand, and highlighted how international observers did not find evidence of widespread fraud.¹¹⁶ Days later, the IHEC Board of Commissioners rejected the recount request for “lack of ‘justifying reasons,’”¹¹⁷ with the Commissioner of the IHEC openly criticizing al-Maliki’s demands: “To come out now and make allegations against the IHEC, I don’t think this serves the interests of that person, or the elections process, or even political progress by its entirety.”¹¹⁸ The IHEC official results had the opposition leading with a two-set advantage, giving it a parliamentary plurality.¹¹⁹

Al-Maliki appealed the IHEC findings to the Electoral Judicial Panel (EJC), a three-judge panel “established to rule on appeals of IHEC decisions.”¹²⁰ In a partial victory, the EJC ordered the IHEC to conduct a partial recount, but this did not result in a change in seat allocation.¹²¹ Al-

¹¹¹ *Id.* at 346-47.

¹¹² *Id.* at 347 (citation omitted).

¹¹³ Trumbull, *supra* note 95, at 366.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Trumbull, *supra* note 95, at 366.

¹²⁰ *Id.* at 362, 368.

¹²¹ *Id.* at 367-68.

Maliki then ended his challenges to the results and focused on building a parliamentary majority.¹²² The IHEC forwarded the electoral results to the Iraqi Federal Supreme Court, and the court certified the results pursuant to its Article 93 powers two weeks later.¹²³

Part Four: Improving the American System

A. Models of Election Dispute Resolution

As Part Three demonstrates, there are several structures that countries use to resolve electoral disputes. One method is to rely upon “regular courts,” or courts that are already established and adjudicate other matters.¹²⁴ This includes the aforementioned system used in France, where the Constitutional Council is constitutionally enumerated with the power to proclaim election results and resolve disputes.¹²⁵ The regular court model also reflects the Iraqi system to some extent, where the Iraqi Federal Supreme Court is constitutionally entrusted with ratifying the election results.¹²⁶

The other common option is for a country to establish an independent election commission.¹²⁷ While many established democracies are unfamiliar with this system, nearly two-thirds of the world’s democratic nations use the model, including most new democracies that typically lack a trustworthy executive branch.¹²⁸ As a whole, independent election commissions are reflected by diverse representation and political independence.¹²⁹ Thus, the Iraqi IHEC, comprised of independent Iraqi citizens and a non-voting UN member,¹³⁰ constitutes an effective

¹²² *Id.* at 368.

¹²³ *Id.*

¹²⁴ Huefner, *supra* note 75, at 536.

¹²⁵ *See supra* note 54.

¹²⁶ *See supra* note 105

¹²⁷ Huefner, *supra* note 75, at 536.

¹²⁸ *Id.* at 536, 540.

¹²⁹ *Id.*

¹³⁰ *See supra* note 99.

independent election commission. In contrast, Afghanistan created an ineffective independent election commission when it formed the IEC.¹³¹ With the entire IEC membership appointed by the sitting president, the commission lacked any legitimacy when it adjudged the results of the 2010 election, which had their appointer, incumbent President Karzai, on the ballot for re-election.

With independent commissions and regular courts as the backdrop of electoral dispute review structures, one may ask which system the United States currently has in place for administering its presidential elections. And, for the most part, the United States uses its regular courts for the review of electoral disputes. As discussed, *supra*, this typically takes the form of a trial level review with some form of direct certification to the state court of last resort.

In this context, reformers are left with a decision on who is best served to review a disputed election in the United States. While state courts are rightfully the final arbiters on state law matters, there are often allegations that state courts of last resort are highly politically motivated. These allegations are abound in the *Bush v. Gore* context, and they are made against both the Florida Supreme Court and the Supreme Court of the United States.¹³²

This issue is even further conflated as it relates to presidential elections. Undoubtedly, there is a substantial national interest in the outcome of a presidential election. Under the electoral college system, as demonstrated in the 2000 presidential election, the decision of one state could prove decisive in deciding who will lead the nation. Based on this reality, should the states retain their power as sovereigns to adjudge their own elections, or would the nation as a whole be better off if the disputes over presidential electors landed in federal court? This section

¹³¹ See *supra* note 70.

¹³² Huefner, *supra* note 75, at 547 (“Suspensions about the neutrality of both the Florida and the U.S. Supreme Courts in 2000 . . . are recent reminders that regular courts in the United States . . . are not necessarily above the political fray.”)

of the paper will discuss possible changes to the review of electoral disputes in the United States, while taking into account the challenges of making such changes.

B: Potential for Reform

In *Bush v. Gore*, seven justices of the U.S. Supreme Court held that the statewide recount ordered by the Florida Supreme Court violated the Equal Protection Clause to the federal constitution.¹³³ If there is federal jurisprudence explaining the constitutionality of state-level election recounts, it must be asked why the federal courts are not permitted to involve themselves more readily in electoral disputes. And while there is significant federal jurisprudence on election law, the federal constitution still affords states wide latitude in the area of elections.¹³⁴

The main area for current federal constitutional involvement comes in the form of anti-discrimination decisions rooted in the Fourteenth and Fifteenth Amendments. For example, as discussed earlier, the U.S. Supreme Court has made clear that once a state grants the right to vote on equal terms, “the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”¹³⁵ Further, the Court has held that vote dilution violates equal protection. Citing case law to this effect in *Bush v. Gore*, the Court urged “[i]t must be remembered ‘that the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.’”¹³⁶

¹³³ Bush, 531 U.S. at 111 (“Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy.”)

¹³⁴ See generally U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .” (emphasis added))

¹³⁵ Bush, 531 U.S. at 104 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)).

¹³⁶ Bush, 531 U.S. at 105 (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

Further, federal laws such as the Voting Rights Act have allowed the federal government to intervene in state election laws on the basis of remedying discrimination.¹³⁷ And notably, to date, the U.S. Supreme Court has upheld the Voting Rights Act as a constitutional enactment by Congress to remedy discrimination: “As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”¹³⁸ But beyond rulings and federal laws to remediate discrimination, there is no ordinary path for parties to access federal court on the issue of electoral disputes.

In order to drastically change this framework, there would likely need to be a constitutional amendment to the federal constitution. As established in Article V, however, this would require a proposed amendment to receive a two-thirds vote in both chambers of Congress, followed by ratification by three-fourths of the states.¹³⁹ Cynically, it is unlikely that 38 states would assent to a federal constitutional amendment that would usurp the state’s power to adjudge its election results and thrust them into federal court. As a result, this paper believes that a federal overhaul solution is politically impermissible, and instead looks to an alternative that would establish reforms under the current constitutional framework.

C: Proposal for Federal Recount Law

The federal constitution’s Fourteenth Amendment Equal Protection and Due Process clauses impose “minimum requirement[s]” on the states as it pertains to “recount mechanisms.”¹⁴⁰ To this end, the Court in *Bush v. Gore* stated that “[t]he recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental

¹³⁷ *State of South Carolina v. Katzenbach*, 383 U.S. 301

¹³⁸ *State of South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

¹³⁹ U.S. CONST. art. V.

¹⁴⁰ *Bush*, 531 U.S. at 105.

right [to vote].”¹⁴¹ Specifically, the Court held that ordering a recount “for the count of legally cast votes” with a standard of the “intent of the voter” fails because of the “absence of specific standards to ensure its equal application.”¹⁴²

Based on this reality, this paper proposes that Congress pass a law that would outline specific standards for the recount process in elections. The law, which would amount to a federal establishment of uniform recount standards, would be passed pursuant to Congress’ enforcement power under the Fourteenth Amendment.¹⁴³ While the law can address numerous concerns with elections, there are a few items that are important to have included.

First, the law should require that all states implement a statewide recount system for all statewide elections in dispute. This would ensure that if a recount is ordered, the recount occurs across the entire state. In the 2000 presidential election, for example, Gore only requested recounts in four Florida counties that were Democratic strongholds, where it was thought that “additional [Gore] votes would be found through manual recounts.”¹⁴⁴ Under the notion of equal protection, each county should be recounted, so that the votes cast in each county are afforded equal consideration.

Second, the law should set forth the proper standard for reviewing election results. This could include an explanation and statutory procedure for reviewing paper ballots, electronic ballots, and other means of vote casting. Since the Florida Supreme Court’s decision ordering a recount with the guidance of determining the “intent of the voter” failed to pass federal

¹⁴¹ *Id.*

¹⁴² *Id.* at 105-06.

¹⁴³ See U.S. CONST. amend XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”)

¹⁴⁴ Van Patten, *supra* note 1, at 36 (“On November 9, Gore sought manual recounts in Broward, Miami-Dade, Palm Beach, and Volusia counties. These counties had gone heavily for Gore and it was thought that additional votes would be found through manual recounts.”)

constitutional muster,¹⁴⁵ it is incumbent on the federal government to provide the states with minimum procedures on how to satisfy equal protection and due process. This proposed federal law would be the first opportunity to address this open question.

Finally, the law should provide a specific path for federal court jurisdiction as it pertains to federal election law claims made under the new law or the Fourteenth and Fifteenth Amendments. There is precedent for specific federal court jurisdiction in the area of election law. For example, under Section 5 of the Voting Rights Act, covered jurisdictions must obtain federal “preclearance” before making any changes to “voting qualification, prerequisite, standard, practice, or procedure.”¹⁴⁶ To obtain preclearance through the courts (and not from the Attorney General of the United States), the Voting Rights Act provides that a state must file for a declaratory judgment in Washington, D.C. and be heard by a special three-judge panel of the United States District Court for the District of Columbia.¹⁴⁷ Any appeals from the three-judge panel go straight to the Supreme Court of the United States.¹⁴⁸ Based on this precedent, the recount reform law could similarly establish trial level jurisdiction with the United States District Court for the District of Columbia, with a direct appeal to the U.S. Supreme Court, creating predictability and expediency for those looking to have elections resolved more effectively.

D: Potential Challenges in Enacting a Federal Recount Law

In order for Congress to pass a federal recount law, it must have the constitutional authority to legislate in this area of election law. As discussed, *supra*, elections are in the domain of the states and are only subject to federal laws in a specific, narrow areas. While Congress

¹⁴⁵ Bush, 531 U.S. at 106.

¹⁴⁶ Alaina C. Beverly, *Lowering the Preclearance Hurdle: Reno v. Bossier Parish School Board*, 120 S.Ct. 866 (2000), 5 MICH. J. RACE & L. 695, 695 (2000).

¹⁴⁷ 42 U.S.C.A. §1973c(a) (2006) (“[S]uch State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment...”)

¹⁴⁸ *Id.* “[A]ny appeal shall lie to the Supreme Court.”

lacks the authority to establish recount standards in Article I of the federal constitution, this paper believes that Congress has such power under the Fourteenth Amendment enforcement clause. To this point, the U.S. Supreme Court has made clear that the Fourteenth Amendment's due process and equal protection clauses impose minimum standards on the state recount procedures.¹⁴⁹ To better clarify the requirements imposed by the Equal Protection Clause, Congress can argue it must use its Fourteenth Amendment enforcement power to elucidate to the states the minimum standards for recounts to pass federal constitutional muster.

Admittedly, it is unclear whether the courts would allow Congress to assume this authority under the Fourteenth Amendment enforcement power. In the seminal case discussing this power, *City of Boerne v. Flores*, the Court held that “[v]alid § 5 legislation must exhibit ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’”¹⁵⁰ Further explaining the power, the Court said that “Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional.”¹⁵¹ To this end, “Congress’ power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct.”¹⁵²

In the context of election law, to date the Court has consistently upheld the Voting Rights Act as a valid exercise of federal enforcement power, admittedly pursuant to the Fifteenth Amendment. The Court first upheld the Act in the landmark case of *Katzenbach v. South*

¹⁴⁹ See *Bush*, 531 U.S. at 105.

¹⁵⁰ *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728 (2003) (citing *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

¹⁵¹ *Id.* at 727.

¹⁵² *Id.* (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80 (2000)).

Carolina,¹⁵³ and it upheld reauthorizations in 1970, 1975, and 1982, “finding that circumstances continued to justify the provisions.”¹⁵⁴ However, in a recent challenge to the constitutionality of the Voting Rights Act in 2009, the Court did not affirm the constitutionality of the act.¹⁵⁵ Instead, the court resolved the case on a narrower ground, pursuant to the Court’s “usual practice . . . to avoid the unnecessary resolution of constitutional questions.”¹⁵⁶

As case law makes clear, the Fourteenth Amendment enforcement power allows Congress to remedy and deter equal protection and due process violations. In the context of election law, this should include federal laws meant to prevent the recurrence of unconstitutional state recounts in elections for federal office. Considering the Florida Supreme Court-ordered recount in 2000 governed an election that would decide a U.S. Presidential Election, it would seem that legislatively establishing the minimum standards for recounts would be an action “congruent and proportional” to the problem it would seek to resolve. Based on this reality, Congress should pass a federal recount law, and hope the courts find this is a valid exercise of the Fourteenth Amendment Enforcement Power, as they should.

E: Proposal for State Recount Reform Law

Besides a proposed federal law, this paper believes that the states should similarly institute reforms to better execute recounts, considering any state’s electoral dispute could prove pivotal in deciding a U.S. Presidential Election. Drawing upon the comparative systems in the democracies of France, Afghanistan, and Iraq, this paper believes that state level reforms should contain two key elements: states should vest their highest court with original jurisdiction to

¹⁵³ *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) (citing *Katzenbach v. South Carolina*, 383 U.S. 301, 310 (1966)).

¹⁵⁴ *Id.* at 199 (citing *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterey County*, 525 U.S. 266 (1999)).

¹⁵⁵ *Id.* at 197.

¹⁵⁶ *Id.*

decide electoral matters, and states should establish nonpartisan commissions to resolve electoral disputes before they reach court.

On the first issue, this paper believes that the states should afford the state court of last resort with original jurisdiction over disputes in statewide elections. As discussed earlier, France uses this model, with the nation's Constitutional Council deciding all electoral issues in presidential, legislative, and referendum elections. Similarly, Iraq follows this approach with the Federal Supreme Court certifying election results. With such original jurisdiction, the public gains confidence from knowing it can immediately look to the state's highest court to resolve the dispute. This creates both consistency and expediency, as it curtails the appeals process which can create unnecessary and unwarranted drama, demonstrated by the three-day Circuit Court trial in the 2000 Florida presidential dispute.¹⁵⁷ To enact this reform, states can adopt an electoral law similar to that in Minnesota, where a statewide candidate files a challenge directly with the state Supreme Court.¹⁵⁸

Second, this paper believes that states should establish commissions that are able to help address electoral dispute issues before they reach court. Under the current U.S. system, most states have "an elected Secretary of State [as] the state's chief election officer, with primary and extensive responsibilities for the administration of elections."¹⁵⁹ This structure has proved controversial. For example in the 2000 presidential election, Gore supporters were very critical of Florida Secretary of State Katherine Harris, a Republican, who certified election returns in direct contradiction of Gore's continued recount requests.¹⁶⁰ As evidenced by the system in Iraq, independent commissions are capable of developing rules and administering elections. Even

¹⁵⁷ Van Patten, *supra* note 1, at 45-46.

¹⁵⁸ See generally *supra* notes 42-44.

¹⁵⁹ Huefner, *supra* note 75, at 536.

¹⁶⁰ See generally Van Patten, *supra* note 1.

more importantly, a commission is more likely to generate greater public confidence in the decision making related to elections than with a partisan elected official making final determinations.

To effectively create such commissions, states must ensure that the commission membership is bipartisan and independent. As demonstrated by Afghanistan's IEHC model, electoral fraud can easily occur when the commission's membership is solely comprised of appointees of the sitting president. In the Afghanistan case, the commission lost significant credibility based on its membership, not to mention its decision making. Also, the commission should place an emphasis on having independent members, in comparison to the political appointees and former presidents that comprise the French Constitutional Council. Ideally, state electoral commissions should be made up of equal members of both political parties, as well as independent or nonpartisan members, and should require bipartisan consensus to resolve electoral issues. If the commissions are well-structured and gain legitimacy, they could help keep many electoral disputes from requiring regular court adjudication.

Part Five: Conclusion

While our nation was able to resolve the 2000 U.S. presidential election under the current U.S. Constitution, it did so in a manner that was unwieldy, unpredictable, and divisive. Now, over a decade after a nearly catastrophic presidential election, it is time for the nation to make some meaningful reforms to prevent a recurrence of a nationwide election in dispute.

Accepting the political reality that it would be impossible to pass a constitutional amendment to address electoral reform, the United States should legislatively push for election reform at both the federal and state level. First, at the federal level, Congress should pass a

recount standards law that would make clear the minimum standards that states must meet to ensure that its recounts satisfy due process and equal protection. Then, at the state level, states should pass recount reform laws that provide for an efficient judicial review of statewide elections by the state court of last resort, as well as forming nonpartisan electoral commissions that can more amicably resolve disputes than can a partisan elected statewide official like a Secretary of State.

In reaching these conclusions, this paper has looked to other nations such as France, Afghanistan, and Iraq. While America remains the world's oldest democracy, our nation can benefit from looking to other nations who have followed our model and adopted their reformed electoral systems more recently. By taking such electoral reforms successfully used by other nations into account, and retrofitting them to reflect the intricacies of our federal constitutional republic, we would measurably and meaningfully improve our presidential election system. While the reforms discussed in this paper may not be *perfect*, they would certainly be improvements in our ongoing goal stated in our Constitution's preamble "to form a *more perfect* Union."¹⁶¹

¹⁶¹ U.S. CONST. preamble (emphasis added).