

BACK TO BASICS: HOW INTERNATIONAL ELECTION  
OBSERVATION STANDARDS CAN STRENGTHEN  
DEMOCRACY IN THE UNITED STATES

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## I. INTRODUCTION

Democracy is facing a legitimacy crisis. In 2010, “the number of . . . ‘electoral democracies’ dropped to 115—[the] lowest level since 1995.”<sup>1</sup> Democracies consistently perform better than other types of government in providing health, education, and food to their people,<sup>2</sup> and yet dissatisfaction with democracy rose “by around +10% points, from 47.9 to 57.5%” from 1990 to 2020.<sup>3</sup> This increase in dissatisfaction has been seen worldwide, but is driven by larger, more developed democracies.<sup>4</sup>

This trend is concerning for those who believe democracy is “the worst form of government, except for all those other forms that have been tried.”<sup>5</sup> It is especially concerning in the United States, where dissatisfaction with democracy has increased by around one-third of the population in just one generation.<sup>6</sup> When considered within the context of the events of the past three decades, that increase in dissatisfaction may not be as surprising as it initially appears.<sup>7</sup> In that time, two U.S. presidents have won the electoral college but lost the popular vote;<sup>8</sup> Russia attempted to (and to some extent successfully did) interfere with an election;<sup>9</sup> the former U.S. president and many of his supporters alleged massive fraud in the most recent presidential election;<sup>10</sup> and polarization, disenfranchisement, and resentment have

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<sup>1</sup> See JUDITH G. KELLEY, *MONITORING DEMOCRACY: WHEN INTERNATIONAL OBSERVATION WORKS, AND WHY IT OFTEN FAILS* 4 (2012) (discussing the global retrenchment of democracy).

<sup>2</sup> MORTON H. HALPERIN ET AL., *THE DEMOCRACY ADVANTAGE: HOW DEMOCRACIES PROMOTE PROSPERITY AND PEACE* 12 (2005) (explaining that democracies typically achieve standards of living much higher than countries with other forms of governments).

<sup>3</sup> R. S. FOA ET AL., *THE GLOBAL SATISFACTION WITH DEMOCRACY REPORT 2020 2* (2020).

<sup>4</sup> See *id.* at 2 (summarizing the global trend towards increased dissatisfaction with democracy).

<sup>5</sup> *THE QUOTABLE WINSTON CHURCHILL* 41 (Richard J. Mahoney & Shera Dalin eds., 2005).

<sup>6</sup> FOA ET AL., *supra* note 3, at 2.

<sup>7</sup> See FOA ET AL., *supra* note 3, at 2 (“[C]itizens’ levels of dissatisfaction with democracy are largely responsive to objective circumstances and events[.]”).

<sup>8</sup> See Tara Law, *These Presidents Won the Electoral College — But Not the Popular Vote*, TIME (May 15, 2019, 4:58 PM), <https://time.com/5579161/presidents-elected-electoral-college/> (listing the presidents that have won the Electoral College but lost the popular vote).

<sup>9</sup> See S. REP. NO. 116-20 (2019) (outlining the actions Russia took to affect the 2016 Presidential Election).

<sup>10</sup> See Clare Hymes, *Barr Authorizes U.S. Attorneys to “Pursue Substantial Allegations” of Voter Fraud*, CBS NEWS (Nov. 10, 2020, 11:43 AM), <https://www.cbsnews.com/news/barr-attorney-general-authorizes-attorneys-pursue-allegations-voter-fraud-election/> (discussing a memo in which the Attorney General authorized government attorneys to pursue “‘substantial allegations’ of voting irregularities” in the 2020 election).

continued to grow.<sup>11</sup> Though some may say democracy's popularity is plummeting because it is unable to respond to today's problems, history has shown us that democracy is the best form of government—both for a country's people and the world at large.<sup>12</sup> Therefore, it is in our individual and collective interests to promote democracy both domestically and internationally. One way to promote democracy at home and abroad is through election monitoring.

This paper will argue that the United States should pass legislation applying international election observation<sup>13</sup> standards in all federal elections.<sup>14</sup> While election observation may seem mundane and irrelevant, the prolonged declarations of fraud after the 2020 election—as well as the January 6, 2021 riot at the Capitol which was largely fueled by those declarations—show otherwise.<sup>15</sup> Part I discusses the evolution of the international election

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<sup>11</sup> See *The Carter Center Launches Initiative to Strengthen Transparency and Trust in U.S. Elections*, THE CARTER CTR. (Aug. 28, 2020), <https://www.cartercenter.org/news/pr/2020/us-elections-082820.html> (discussing some of the various issues facing democracy in the United States).

<sup>12</sup> See HALPERIN, *supra* note 2, at 12, 35, 41 (“Democracies rarely, if ever, go to war with each other. Indeed, as the number of democracies has been increasing, major conflicts around the world (including civil wars) have declined sharply. Since 1992, they have fallen by two thirds . . . .” “Citizens of democracies live longer, healthier, and more productive lives, on average, than those in autocracies,” and have done so for “the past four decades.” Also, democracies “score consistently higher on UNDP’s Human Development Index . . . .”).

<sup>13</sup> Election observation is a subset of election monitoring; election observation usually “suggests a briefer involvement than does monitoring[.]” but “there can be considerable ambiguity and overlap between these terms” and the “distinction is not rigorous.” ERIC C. BJORNLUND, *BEYOND FREE AND FAIR: MONITORING ELECTIONS AND BUILDING DEMOCRACY* 41-42 (2004). Therefore, this paper will use both terms interchangeably.

<sup>14</sup> “International election observation standards” sounds too vague to be useful. Practically, however, though international organizations may use different verbiage to articulate their standards, the standards themselves are largely identical. See *International Election Observation, Approaches to Observation: Methodology & Tools*, ACE PROJECT (<https://aceproject.org/ace-en/focus/international-election-observation/iv.-approaches-to-observation-methodology-and>) (explaining that NGOs’ assessments of elections “differ primarily in their structure, not in their criteria”) (last visited Feb. 22, 2022). Therefore, for simplicity’s sake, this paper will refer to the guidelines set forth by the International Institute for Democracy and Electoral Assistance (International IDEA), which were created in consultation with the election monitoring arm of the Organization for Security and Co-Operation in Europe (OSCE), the Office for Democratic Institutions and Human Rights (ODIHR). See INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE (INTERNATIONAL IDEA), *INTERNATIONAL ELECTORAL STANDARDS: GUIDELINES FOR REVIEWING THE LEGAL FRAMEWORK OF ELECTIONS IV* (2002) [hereinafter *INTERNATIONAL ELECTORAL STANDARDS*].

<sup>15</sup> See Shan Li & Corinne Ramey, *What Are Election Observers? Role at Crux of Trump Lawsuits in Pennsylvania*, WALL ST. J. (Nov. 10, 2020, 10:14 PM), <https://www.wsj.com/articles/what-are-election-observers-the-role-at-the-crux-of-trump-lawsuits-in-pennsylvania-11605053759>; see also Ted Mann & Andrew Restuccia, *At the*

observation scheme and highlights instances where domestic and international election observation has improved democracy worldwide, using Nepal and Tunisia as case studies. Part II explains the election administration system in the United States, the current status of election observation within the United States, and discusses some contested federal elections in the country's history whose controversies could have been mitigated by robust election monitoring. Part III outlines how election observation might be statutorily implemented in the United States, and addresses counterarguments against doing so.

Election observation could be especially useful in the United States, which “has long fallen short of international election standards in several key areas[.]”<sup>16</sup> Fiascos such as the 2000 election have shown that the United States' current election system is flawed.<sup>17</sup> In addition to polarization, foreign interference, and disenfranchisement, COVID-19 threatened to overwhelm the already strained electoral apparatus.<sup>18</sup> These threats not only show just how vulnerable democracy in the United States is, but call for action to buttress our democracy. Enacting federal legislation implementing international election observation standards nationwide—which would permit domestic observers to oversee every facet of all federal elections—would be a relatively simple, yet effective, way to accomplish this.

In today's political climate, discussion often focuses on reforming campaign finance laws, or ending the war on drugs, or fighting systemic racism, or any number of issues that (while important) seem almost too overwhelming for our society to address quickly. Election administration (which election observation is a facet of) seems far less interesting—almost too basic to be important. However, mastery of the basic fundamentals is vital to success in any endeavor.<sup>19</sup> Furthermore, the 2020 election has shown just how impactful election administration can be.<sup>20</sup> Genuine, legitimate, trustworthy elections participated in by an engaged public are fundamental to

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*U.S. Capitol, Milling Crowd Sparked Riot in a Few Crucial Minutes*, WALL ST. J., <https://www.wsj.com/articles/at-the-u-s-capitol-a-milling-crowd-sparked-a-riot-in-a-few-crucial-minutes-11610067766> (last updated Jan. 8, 2020, 1:12 PM) (explaining that the riot was largely instigated by President Trump's refusal to accept defeat in the 2020 election).

<sup>16</sup> *Carter Center Launches Initiative to Strengthen Transparency and Trust in U.S. Elections*, *supra* note 11.

<sup>17</sup> BJORN LUND, *supra* note 13, at 6 (“[T]here is nothing inherently superior about the American political system. . .”).

<sup>18</sup> Org. for Sec. and Co-operation in Eur., OSCE Office for Democratic Insts. & Human Rights, *United States of America General Elections 3 Nov. 2020 ODIHR Needs Assessment Mission Report*, (Feb. 9, 2021).

<sup>19</sup> Dennis M. Docheff, *Learning from the Legends: Leadership Tips for Coaches*, STRATEGIES: J. FOR PHYSICAL & SPORT EDUCATORS at 30-31 (Nov. 8, 2013), [https://cdn3.sportngin.com/attachments/document/0052/6886/Learning\\_from\\_Legends.pdf](https://cdn3.sportngin.com/attachments/document/0052/6886/Learning_from_Legends.pdf) (discussing the philosophy of famous coaches such as Vince Lombardi and John Wooden).

a healthy democracy,<sup>21</sup> and election observation is a proven way to ensure elections meet those standards.<sup>22</sup> It is time for the United States to use election observation to remaster the most fundamental aspect of democratic governance: elections.

## II. ELECTION OBSERVATION WORLDWIDE

Election observation, which started as far back as 1857,<sup>23</sup> is the “primary tool the international community uses to assess the legitimacy of governments”<sup>24</sup> and is one of the most visible forms of democracy promotion worldwide.<sup>25</sup> Observers can be either citizens of the country holding the elections or foreign observers from the international community.<sup>26</sup> As election observation has become more common, it has also become more influential and is now sought after by governments who want to be seen as legitimate (either because they actually are, or because they want to be perceived as such).<sup>27</sup> The international election observation system, which includes

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<sup>20</sup> See *2020 Election Litigation Tracker*, SCOTUSBLOG, <https://www.scotusblog.com/election-litigation/> (last visited Feb. 22, 2022) (tracking all the suits filed regarding the 2020 election, almost all of which regard a dispute over how States administered their respective elections).

<sup>21</sup> BJORN LUND, *supra* note 13, at 7.

<sup>22</sup> See PATRICK MERLOE, NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS (NDI), THE CARTER CENTER, UNITED NATIONS ELECTORAL ASSISTANCE DIVISION (UNEAD), DECLARATION OF PRINCIPLES FOR INTERNATIONAL ELECTION OBSERVATION 2 (2005) [hereinafter DECLARATION OF PRINCIPLES] (Election observation can “enhance the integrity of election processes” by “detering and exposing irregularities and fraud[,] . . . providing recommendations for improving electoral processes[,] . . . promot[ing] public confidence[,] . . . promot[ing] electoral participation[,] and mitigat[ing] the potential for election-related conflict.”); SANJAY GATHIA, ASEAN WORKSHOP ON ELECTION OBSERVATION: INCREMENTAL STEPS TOWARDS THE ESTABLISHMENT OF AN ASEAN ELECTION OBSERVATION MECHANISM 16 (Andrew Ellis & Adhy Aman eds., 2015) (Election observers can “rais[e] voter confidence, [give] reassurance, [and] provid[e] credible and essential feedbacks before [the elections], during the elections, and after the elections are over.”); BJORN LUND, *supra* note 13, at 9 (explaining that election observation spurs democracy by “energizing civic organizations and drawing people into public affairs”).

<sup>23</sup> KELLEY, *supra* note 1, at 16.

<sup>24</sup> KELLEY, *supra* note 1, at 7.

<sup>25</sup> See BJORN LUND, *supra* note 13, at 9 (contextualizing the development of international and domestic election monitoring).

<sup>26</sup> See BJORN LUND, *supra* note 13, at 9 (outlining the various types of election observation, and discussing the strengths of domestic observation as opposed to international observation).

<sup>27</sup> See BJORN LUND, *supra* note 13, at 8-9 (discussing several factors that have contributed to the growth of election observation, including increased focus on human rights after the

observation by both foreign nations and domestic observers, has evolved over time from an ad hoc activity of Western academics to a powerful force in the international sphere.<sup>28</sup>

A. *The Development of Global Election Observation Norms*

i. *The History of International and Domestic Election Observation*

The first election observation mission was sent in 1857 by a European Commission established by the Treaty of Paris to observe the second election concerning the unification of Moldavia and Wallachia following the Crimean War, after the Ottoman Empire attempted to manipulate the first one.<sup>29</sup> While election observation as a way to ensure the legitimacy of other countries' elections may have started then, it did not come into its own until after the creation of the United Nations (UN).<sup>30</sup> Democracy promotion in general has been a goal of Western governments since the UN was created.<sup>31</sup> The *UN Declaration of Human Rights* (UDHR) and *International Covenant on Civil and Political Rights* (ICCPR) fueled independence movements in formerly colonial states, and some of the first observation missions the UN undertook were small missions to oversee referenda on independence for countries under UN trusteeship.<sup>32</sup> Some of the earliest election missions were sent to Korea in 1948, British Togoland in 1956, and French Togoland in 1958.<sup>33</sup> These missions, though small, gave international legitimacy to the states and reinforced the outcome of the elections.<sup>34</sup>

By the early 1960s, other organizations began observing elections as well: the Organization of American States (OAS)—which pioneered

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Cold War, the end of colonialism and the concomitant need for legitimate governments in formerly colonial states, and others).

<sup>28</sup> See BJORN LUND, *supra* note 13, at 8 (discussing the spread of election observation into a powerful international norm).

<sup>29</sup> See KELLEY, *supra* note 1, at 16 (tracing the beginnings of election observation).

<sup>30</sup> KELLEY, *supra* note 1, at 16.

<sup>31</sup> See *International Election Observation, Origins & Evolution of Election Observation*, ACE PROJECT, <https://aceproject.org/ace-en/focus/international-election-observation/iii.-origins-and-evolution-of-international> (last visited Feb. 15, 2022) (analyzing the reasons why election observation became so popular).

<sup>32</sup> See *id.* (discussing the development of election observation).

<sup>33</sup> See *id.* (discussing the early UN election observation missions).

<sup>34</sup> See *id.* (quoting YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA, & NATIONAL ELECTIONS 133 (1994)) (quoting the UN Commissioner, who said that “the outcome of the elections faithfully reflects the wishes of the people of Togoland.”).

monitoring in sovereign states<sup>35</sup>—sent its first election observation mission to Costa Rica in 1962,<sup>36</sup> and the Commonwealth Secretariat (CS) began observing elections in British-controlled regions during that time.<sup>37</sup> Election observation remained a constant, albeit fairly infrequent, phenomenon until the mid-to-late 1980s.<sup>38</sup> The Carter Center (CC) began observing elections around that time, and what would become the Organization for Security and Co-operation in Europe (OSCE)—which currently observes elections through its Office of Democratic Institutions and Human Rights (ODIHR)<sup>39</sup>—decided to send out election monitors in 1990.<sup>40</sup> The number of election monitoring organizations, as well as the number of observed elections, exploded around the turn of the century; less than 10% of elections in non-established democracies were observed in 1986, while around 85% were observed in 2004.<sup>41</sup>

Three norms were particularly important in creating and shaping the concept of election monitoring: self-determination, free expression, and genuine and periodic elections.<sup>42</sup> These norms developed and evolved during the period after World War II through the UN's *Universal Declaration of Human Rights*, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, and the CS's *Declaration of Commonwealth Principles*.<sup>43</sup> These democratic norms could not be fully realized worldwide, however, as long as “longstanding norms of sovereignty and noninterference” dissuaded states from engaging with the internal elections of other states.<sup>44</sup>

As time went on, global human rights issues such as apartheid in South Africa and the harsh rule of dictators (such as Saddam Hussein in Iraq) began to convince the international community that states could legitimately

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<sup>35</sup> See KELLEY, *supra* note 1, at 19 (discussing the evolution of international election observation).

<sup>36</sup> See *International Election Observation, Origins & Evolution of Election Observation*, *supra* note 31 (discussing election observation by organizations other than the UN).

<sup>37</sup> See KELLEY, *supra* note 1, at 16 (explaining how election observation increased in popularity).

<sup>38</sup> See KELLEY, *supra* note 1, at 16 (discussing the increase in election observation over the twentieth century); see also KELLEY, *supra* note 1, at 17 fig. 2.1 (showing the increasing commonality of election monitoring from 1976-2004).

<sup>39</sup> See *OSCE Office for Democratic Institutions and Human Rights*, OSCE, <https://www.osce.org/odihr> (last visited Feb. 15, 2022) (discussing the origins of the OSCE).

<sup>40</sup> See KELLEY, *supra* note 1, at 16 (showing how election observation became increasingly popular over time).

<sup>41</sup> KELLEY, *supra* note 1, at 16 (illustrating the global explosion of election observation).

<sup>42</sup> KELLEY, *supra* note 1, at 21 (outlining the global norms that fueled the growth of election observation).

<sup>43</sup> See KELLEY, *supra* note 1, at 21-22 (tracking the development of democratic norms in the period after World War II, and how various regional agreements, international agreements, and international organizations informed and precipitated that development).

<sup>44</sup> KELLEY, *supra* note 1, at 22.

intervene in other states' domestic affairs to promote human rights and democracy.<sup>45</sup> Thus, by the late 1980s and early 1990s, the norms that fueled election observation (self-determination, freedom of expression, and participatory rights) had grown in strength, while the norms that served as barriers to election observation (sovereignty and noninterference) had weakened, creating a perfect environment for election monitoring to expand.<sup>46</sup>

The end of the Cold War provided the crucial spark needed for these three norms to explode across the world, and election observation exploded with them.<sup>47</sup> Western countries, who prioritized security interests during the Cold War, began to prioritize global democratic changes instead.<sup>48</sup> Furthermore, the focus of election observation shifted from ensuring self-determination to advancing democracy in formerly authoritarian countries.<sup>49</sup> Western actors largely spearheaded the election observation movement, with the United States specifically supporting and staffing the majority of the missions, as well as creating many of the guidelines for the burgeoning international election observation apparatus.<sup>50</sup> This movement helped fuel the worldwide explosion of democracy that occurred at the end of the Cold War, when over eighty-one countries took significant steps toward democracy.<sup>51</sup>

The end of the Cold War also boosted the demand for election monitoring because many countries were in times of governmental transition, and looked to international election observation as a way to provide legitimacy to their governments.<sup>52</sup> While the initial demand for outside observers was driven largely by governments honestly seeking legitimacy, eventually even dishonest governments embraced election observation because "the wave of invitations extended by honest governments made monitoring sufficiently prevalent to stigmatize governments that refused to invite monitors."<sup>53</sup> Demand for election monitoring also rose as foreign aid

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<sup>45</sup> See KELLEY, *supra* note 1, at 22-23 (showing how the normative environment shifted during the 1900s).

<sup>46</sup> KELLEY, *supra* note 1, at 22-23 (detailing the weakening of norms of sovereignty and nonintervention, fueled in large part by human rights treaties which could be enforced against states by international bodies such as the International Court of Justice).

<sup>47</sup> KELLEY, *supra* note 1, at 26 (discussing how the Cold War provided a "crucial opening" for democratic norms and election observation).

<sup>48</sup> KELLEY, *supra* note 1, at 26 (explaining why election observation grew in popularity after the Cold War).

<sup>49</sup> See *International Election Observation, Origins & Evolution of Election Observation*, *supra* note 31 (discussing how opportunities to observe elections, especially in Eastern Europe and Latin America, shifted election observers' priorities).

<sup>50</sup> See KELLEY, *supra* note 1, at 26-27 (discussing the role Western states had in developing the norms and procedures of election observation).

<sup>51</sup> See BJORN LUND, *supra* note 13, at 6-7 (discussing the increase in democratic countries after 1980).

<sup>52</sup> See KELLEY, *supra* note 1; see also BJORN LUND, *supra* note 13, at 27 (highlighting specifically election observation missions in Mexico, Mozambique, Guyana, and Zambia).

<sup>53</sup> BJORN LUND, *supra* note 13, at 29.

from Western governments increasingly came to be seen as tied to democratic governance.<sup>54</sup>

Domestic election observation also expanded during this time.<sup>55</sup> Domestic election observation differs from international election observation in that the people watching the polls are citizens of the country holding the election.<sup>56</sup> Domestic observation first began in the Philippines in 1983 in response to the assassination of popular Filipino opposition leader Benigno Aquino under Ferdinand Marcos' dictatorial government.<sup>57</sup> Concerned citizens gathered together and formed the National Citizens' Movement for Free Elections (NAMFREL), which was dedicated to promoting election observation by Filipino citizens.<sup>58</sup> NAMFREL mobilized hundreds of thousands of volunteer poll watchers to observe the 1984 congressional election and 1986 presidential election.<sup>59</sup> In both elections, NAMFREL was able to tabulate votes well before the ruling party could announce the results, which underscored the illegitimacy of the respective elections and led to Marcos' resignation shortly after the 1986 election.<sup>60</sup>

NAMFREL's stunning success inspired domestic observation organizations around the globe.<sup>61</sup> The United States-based National Democratic Institute for International Affairs (NDI) sent a mission to learn from NAMFREL's work in the 1986 election, and the two organizations cooperated to spread their experience throughout the world, sending missions and supporting domestic observation operations in Bangladesh, Zambia, Nicaragua in the 1990s.<sup>62</sup> In that same decade, domestic observation and voter

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<sup>54</sup> See BJORN LUND, *supra* note 13, at 29; see also *International Election Observation, Origins & Evolution of Election Observation*, *supra* note 31; KELLEY, *supra* note 1, at 26, 29 (discussing specifically elections in Indonesia in 1999, Kenya in 1992, Zimbabwe in 2002, and Uganda in 1996 as times when "donor countries pressur[ed] governments to invite monitors").

<sup>55</sup> See BJORN LUND, *supra* note 13, at 210 (explaining that domestic election-monitoring organizations have expanded since the 1980s).

<sup>56</sup> See BJORN LUND, *supra* note 13, at 9 ("National civic organizations and citizen networks across the globe have mobilized to monitor watershed elections in their own countries.").

<sup>57</sup> See BJORN LUND, *supra* note 13, at 211 (outlining Marcos' rise to power and the creation of NAMFREL).

<sup>58</sup> See BJORN LUND, *supra* note 13, at 211-12 (discussing the creation and early development of NAMFREL).

<sup>59</sup> See BJORN LUND, *supra* note 13, at 213-15 (discussing NAMFREL's activities in the 1984 election and 1986 "snap" presidential election, which Marcos unexpectedly announced live on American television four months before it was to be held).

<sup>60</sup> See BJORN LUND, *supra* note 13, at 215 (discussing how Marcos was pushed out by a combination of popular protests, opposition by the military, and eventual abandonment by the Reagan administration).

<sup>61</sup> See BJORN LUND, *supra* note 13, at 217-18 (discussing the global proliferation of NAMFREL's model of domestic election observation).

<sup>62</sup> See BJORN LUND, *supra* note 13, at 218 (discussing the partnership between NDI and NAMFREL).

education organizations sprung up in Chile, Panama, Paraguay, the Dominican Republic, Haiti, Mexico, Bulgaria, Romania, Albania, Namibia, Thailand, Pakistan, Nepal, Sri Lanka, and Yemen.<sup>63</sup> Domestic election observers can be nonpartisan or partisan, but governments have felt “increasingly threatened by the potential power of nonpartisan monitoring groups. . . .”<sup>64</sup> These domestic election observation groups, especially when working in concert with international election observers, can significantly improve democratic outcomes in their countries.<sup>65</sup>

ii. *The Methodology of Election Observation*

Although election observation became entrenched as an international political norm over the course of the twentieth century, observers needed to find a way to translate the democratic ideals that fueled their observation into concrete methodology that could be used to evaluate elections.

The most difficult challenge [of election observation] is to evaluate the extent and significance of observed problems during various stages of the election, and to assess the degree to which they fundamentally undermine the integrity of the entire election and the final results. Such analysis raises the core question of how much weight or value to give to various parts of the electoral process and the relevant obligations.<sup>66</sup>

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<sup>63</sup> See BJORN LUND, *supra* note 13, at 219-21 (showing the rapid spread of domestic election observation organizations and discussing the positive effects they had on their respective countries' elections).

<sup>64</sup> BJORN LUND, *supra* note 13, at 227; see also THE CARTER CTR. & THE NAT'L CONFERENCE OF STATE LEGISLATURES, A GUIDE TO ELECTION OBSERVER POLICIES IN THE UNITED STATES 1 (2016) [hereinafter GUIDE TO ELECTION OBSERVER POLICIES IN THE US] (explaining that domestic election observers can be sent by parties, candidates, nonpartisan citizen groups or independent organizations).

<sup>65</sup> See BJORN LUND, *supra* note 13, at 245, 255 (“[I]nternational observers and the international community provide moral, political, technical, and financial support to help create political space for domestic monitoring and improve the effectiveness and professionalism of that monitoring.” Meanwhile, domestic observation is recognized internationally as an effective means to “deter fraud, improve confidence, and increase transparency” in elections.).

<sup>66</sup> *International Election Observation, Approaches to Observation: Methodology & Tools*, *supra* note 14 (footnote omitted) (quoting David J. Carroll and Avery Davis-Roberts, *The Carter Center and Election Observation: An Obligations-Based Approach for Assessing Elections*, 12 ELECTION L. J. 87, 93 (2013)).

Although election observation exploded from the 1980's to early 2000's, election observation organizations were unorganized in their approach.<sup>67</sup> Public international law (comprised of treaties, judicial decisions, political commitments, and other sources of best practice) undergirded observation practices, but organizations had not determined how to translate countries' obligations under public international law into effective assessment frameworks for their elections.<sup>68</sup>

In an attempt to standardize worldwide election observation, twenty-two election observation organizations gathered at the UN in 2005 to sign the *Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers*.<sup>69</sup> The *Declaration of Principles* lists twenty-four principles for observers to use to evaluate a country's electoral process, and twelve standards of conduct for observers to abide by as they oversee elections.<sup>70</sup> In addition, treaties such as the *International Covenant on Civil and Political Rights*, the African Union's *Charter on Human and People's Rights*, and the European Council's *Convention for the Protection of Human Rights and Fundamental Freedoms* impose obligations on their signatory states that election observation organizations can use to compel states to change their behavior.<sup>71</sup> The Carter Center and International IDEA have enumerated twenty-one obligations countries have pertaining to elections—each one of them drawn from an international treaty, and thus having the force of international law.<sup>72</sup> Other organizations may use different terminology to evaluate elections, but all election observation organizations share (functionally) the same criteria for evaluating the legitimacy of elections.<sup>73</sup>

Election observation organizations could not be satisfied, however, with merely enumerating high-minded principles; they needed to create a system for translating those principles into quantifiable metrics to evaluate

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<sup>67</sup> See BJORN LUND, *supra* note 13, at 8 (explaining that the approach to election observation at this time could best be described as “ad hoc”).

<sup>68</sup> See *International Election Observation, Approaches to Observation: Methodology & Tools*, *supra* note 14 (discussing the development of election observation norms).

<sup>69</sup> See *International Election Observation, Origins & Evolution of Election Observation*, *supra* note 31; DECLARATION OF PRINCIPLES, *supra* note 22; PATRICK MERLOE, NDI, THE CARTER CTR., UNEAD, CODE OF CONDUCT FOR INTERNATIONAL ELECTION OBSERVERS 1-3 (2005) [hereinafter CODE OF CONDUCT] (explaining the genesis of the *Declaration of Principles*).

<sup>70</sup> See DECLARATION OF PRINCIPLES, *supra* note 22, at 1-8 (asserting principles which effective election observation organizations should adhere to).

<sup>71</sup> See ACE PROJECT, *supra* note 14 (discussing how election observation organizations use international law to affect states' behavior).

<sup>72</sup> See ACE PROJECT, *supra* note 14 (discussing the synergy between international law and international election observation organizations).

<sup>73</sup> See ACE PROJECT, *supra* note 14 (explaining the similarities and differences of various election monitoring organizations' criteria for evaluating elections).

elections. One way observation organizations do this is by election-day checklists.<sup>74</sup> Election observation missions are usually divided between short-term observers (who are mostly focused on the election itself) and long-term observers (who assess the entire election process).<sup>75</sup> These checklists allow short-term observers to quantitatively evaluate election procedures and report their findings to the long-term observers.<sup>76</sup> Many organizations have mobile technology that allows short-term observers to report their findings back to the long-term observers rapidly; such technology was used successfully in Liberia, Egypt, Kenya, Libya, and Nepal.<sup>77</sup> Ideally, international election observation missions would partner with domestic election observation organizations to improve the efficacy of their observation mission.<sup>78</sup>

As the previous section discussed in relation to the Philippines in 1986, the ability to quickly tabulate votes and disseminate the tallies to the public is a powerful tool for election observation organizations. Given that manipulation of the election results is a common concern in elections, it is vitally important for observers to independently verify the results “on the basis of a comprehensive assessment or by analyzing random samples of observed ballot counts.”<sup>79</sup> One way to independently analyze election results is by a “quick count,” also called a “parallel vote tabulation” (PVT).<sup>80</sup> PVTs use “statistical sampling to project results or to assess the accuracy of reported results, within statistically significant margins of error.”<sup>81</sup> They do not involve a parallel tabulation of every vote because doing so would be too expensive, time consuming, and inaccurate.<sup>82</sup> PVTs “deter or detect ballot count fraud . .

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<sup>74</sup> See ACE PROJECT, *supra* note 14 (outlining the use of checklists by election observation organizations, as well as the difficulties of making accurate (yet concise) quantitative checklists for elections).

<sup>75</sup> See ACE PROJECT, *supra* note 14 (comparing the roles of short-term and long-term election observers).

<sup>76</sup> See ACE PROJECT, *supra* note 14 (explaining the importance of quickly and accurately reporting information).

<sup>77</sup> See ACE PROJECT, *supra* note 14 (highlighting specifically the use of the Carter Center’s ELMO (Election Monitoring) system); see also INTERNATIONAL ELECTORAL STANDARDS, *supra* note 14 (listing the criteria by which observers should evaluate a state’s election apparatus).

<sup>78</sup> See BJORN LUND, *supra* note 13, at 243 (“[I]nternational observers can draw directly on information from the much broader, more geographically disbursed network of domestic monitors.”).

<sup>79</sup> BJORN LUND, *supra* note 13, at 279.

<sup>80</sup> See BJORN LUND, *supra* note 13, at 280 (discussing the importance of PVTs).

<sup>81</sup> BJORN LUND, *supra* note 13, at 280.

<sup>82</sup> See BJORN LUND, *supra* note 13, at 284 (explaining that “monitors can never collect results from all the polling stations in a country, even under the best circumstances” and “civic groups . . . generally cannot process and interpret such an enormous amount of data in a reasonable time.”).

. by independently collecting election results to compare them with official results.”<sup>83</sup>

PVTs have been wildly successful in exposing vote-count fraud, “convincing authoritarian incumbents to accept electoral defeats[,]” and legitimizing electoral victories in “polarized political environments[.]”<sup>84</sup> Domestic and international observation organizations have greatly reduced the problem of vote count fraud worldwide through the use of PVTs.<sup>85</sup> As long as effective observation is permitted, observers will almost certainly be able to deter or detect vote count fraud using PVTs.<sup>86</sup>

One way that election observation organizations are beginning to consider how to effectively strengthen democracies is by combating “infodemics,” the massive spread of disinformation online.<sup>87</sup> False information, spread by foreign or domestic actors, can undermine credible elections by eroding public trust in democratic norms and practices.<sup>88</sup> While it is sometimes difficult to determine what is fact and what is fiction, election observation organizations are uniquely suited to spread accurate information concerning elections (which is the most effective way to fight disinformation)<sup>89</sup> because they are in a position to know more about a particular election than almost any other group. Disinformation, however, has several advantages over accurate information, and election observation organizations are just starting to grapple with what the best practices should be to combat disinformation.<sup>90</sup> Though this is an emerging facet of election observation, election observation organizations worldwide are taking concrete

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<sup>83</sup>BJORNLUND, *supra* note 13, at 281.

<sup>84</sup> BJORNLUND, *supra* note 13, at 281-282. Elections positively impacted by PVTs include Chile in 1988 and 1990, Panama and Paraguay in 1989, Bulgaria in 1990, Zambia in 1991, and Serbia in 2000.

<sup>85</sup> See BJORNLUND, *supra* note 13, at 282 (This is true “even in countries with regimes willing to do almost anything to remain in power.”).

<sup>86</sup> See BJORNLUND, *supra* note 13, at 282 (emphasizing the effectiveness of PVTs in combating electoral fraud).

<sup>87</sup> The Forum on Human Rights, *Risks To Human Rights And Credible Elections During An Online ‘Infodemic’*, YOUTUBE (Oct. 7, 2020), <https://www.youtube.com/watch?v=pKgqw6GU4b8&feature=youtu.be>.

<sup>88</sup> See *id.* (discussing the harm disinformation can have on the democratic process).

<sup>89</sup> See *id.* (discussing the best way to combat disinformation).

<sup>90</sup> See RAFAEL SCHMUZIGER GOLDZWEIG ET AL., OPEN SOCIETY FOUNDS, SOCIAL MEDIA MONITORING DURING ELECTIONS: CASES AND BEST PRACTICE TO INFORM ELECTORAL OBSERVATION MISSIONS, 5-6 (2019) (discussing the difficulties of combating disinformation, such as disinformation’s head-start against the truth; the fact that election monitoring organizations (EMOs) must be reactive in responding to disinformation; and the ability of disinformation to change forms and platforms, while EMOs must adhere to particular methodologies).

steps to create and implement strategies to counteract disinformation, especially on social media.<sup>91</sup>

*B. Election Observation in Action—Nepal and Tunisia*

Election observation has been used successfully in many countries worldwide. Here, this Note will highlight two countries where election observation has been particularly noteworthy: Nepal and Tunisia. These countries have different histories, but both of them overcame a tumultuous past twenty years (or more) to establish themselves as burgeoning democracies, and have been trending increasingly more democratic over the past several years.<sup>92</sup>

*i. Nepal*

Nepal's history as a state stretches back to 1768, when Prithvi Rarayan Shah conquered the city of Kathmandu and declared it and the surrounding territory to be one state.<sup>93</sup> The Shah's ruled as monarchs until the mid-1800's, when the Rana family took power and pushed the Shah family into a merely ceremonial role.<sup>94</sup> This role continued until the Nepali Congress party (backed by the Shah monarch) overthrew the government in 1950, which instituted a time of political unrest culminating in a coup by the Shah monarch in 1960.<sup>95</sup> The Shah monarchs instituted a system of government called the *Panchayat*, which was a system of direct rule by the monarch and various advisory councils.<sup>96</sup> This system continued until the "People's Movement" (*Jana Andolan*) in 1990 forced the monarchy to agree to a constitutional monarchy, though the country remained defined in the

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<sup>91</sup> See *id.* Annex 1 at 34-35 (showing the steps various election observation organizations have taken, and plan to take, to combat disinformation).

<sup>92</sup> See Freedom House, *Explore the Map*, FREEDOM HOUSE, <https://freedomhouse.org/country/nepal/freedom-world/2021> (last visited Feb. 21, 2022) (scoring Nepal with a "Freedom Score" based on political rights and civil liberties); Freedom House, *Explore the Map*, FREEDOM HOUSE, <https://freedomhouse.org/country/tunisia/freedom-world/2021> (last visited Feb. 21, 2022) (scoring Tunisia with a "Freedom Score" based on political rights and civil liberties).

<sup>93</sup> See THE CARTER CTR., OBSERVING THE 2008 NEPAL CONSTITUENT ASSEMBLY ELECTION, APRIL 2008, at 16 (2008) [hereinafter OBSERVING NEPAL'S 2008 ELECTION] (tracing the development of Nepal as a state).

<sup>94</sup> See *id.* at 16, 21 (discussing the history of the Nepalese government).

<sup>95</sup> See *id.* (explaining the history of Nepal); see also Encyclopedia Britannica, *Nepal*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Nepal/History> (last visited March 7, 2022) (discussing the rise and fall of the Shah monarchy).

<sup>96</sup> See *id.* (same).

constitution as a “Hindu monarchical kingdom.”<sup>97</sup> The primary political parties through the 1990’s were the Nepali Congress and the Communist Party of Nepal, but several small political parties grew disillusioned with the new government, with one small leftist party (the Communist Party of Nepal-Maoist) beginning an armed rebellion against the government in 1996.<sup>98</sup>

In 2001, the King’s brother took over the monarchy after multiple members of the royal family were killed (ostensibly by the Crown Prince, though the Nepalese people were skeptical of that account).<sup>99</sup> The new King centralized authority by ousting the elected Prime Minister in 2002, and staged a coup in 2005—claiming it was necessary to address the Maoist rebellion.<sup>100</sup> After the coup, several political parties (including the Maoists) agreed to join together to oppose the King, and to draft a new constitution.<sup>101</sup> This movement led to the *Jana Andolan II* in 2006, which forced the King to cede power and began the country’s transition to a secular, federal democratic republic.<sup>102</sup> The political parties intended to hold elections for a constituent assembly and draft a constitution within two years but tensions between the parties, strikes and demonstrations by marginalized groups, and various degrees of communal tensions within the country delayed the process.<sup>103</sup> Elections for constituent assemblies were held in 2008 and 2013, but the new constitution was not adopted until 2015, after which elections were held for the legislature in 2017.<sup>104</sup> Elections continued to be held after, though the country is presently in some turmoil after the dissolution of Parliament by the Prime Minister, then again by the President.<sup>105</sup>

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<sup>97</sup> See *id.* at 16-17; THE CARTER CTR., OBSERVING NEPAL’S 2013 CONSTITUENT ASSEMBLY ELECTION FINAL REPORT 19 (2014) [hereinafter OBSERVING NEPAL’S 2013 ELECTION] (same).

<sup>98</sup> See OBSERVING NEPAL’S 2008 ELECTION, *supra* note 93, at 17 (explaining the history of Nepal).

<sup>99</sup> See OBSERVING NEPAL’S 2013 ELECTION, *supra* note 97, at 20.

<sup>100</sup> See OBSERVING NEPAL’S 2013 ELECTION, *supra* note 97, at 20.

<sup>101</sup> See OBSERVING NEPAL’S 2013 ELECTION, *supra* note 97, at 20.

<sup>102</sup> See OBSERVING NEPAL’S 2013 ELECTION, *supra* note 97, at 20.

<sup>103</sup> See OBSERVING NEPAL’S 2013 ELECTION, *supra* note 97, at 20-24 (discussing the difficulties surrounding the adoption of a new constitution); see generally Charles Haviland, *Why is Nepal’s new constitution controversial?*, BBC NEWS (Sept. 19, 2015), <https://www.bbc.com/news/world-asia-34280015> (explaining that at least forty people had died in clashes connected to the new constitution).

<sup>104</sup> See OBSERVING NEPAL’S 2013 ELECTION, *supra* note 97, at 21; Haviland, *Why is Nepal’s new constitution controversial?*; THE CARTER CTR., ELECTION OBSERVATION MISSION NEPAL, FEDERAL AND PROVINCIAL ELECTIONS, 2017 PRELIMINARY STATEMENT 2 (2017) [hereinafter OBSERVING NEPAL’S 2017 ELECTION] (discussing the 2015 constitution and subsequent elections).

<sup>105</sup> Gopal Sharma, *Nepal president dissolves parliament, new election in November*, REUTERS (May 21, 2021, 8:46 PM), <https://www.reuters.com/world/asia-pacific/nepal->

Election observation was utilized throughout the past decade to assist the Nepalese people in their goal of transitioning to a democratic government. The Carter Center first operated in Nepal in 2003 and observed the 2008, 2013, and 2017 elections.<sup>106</sup> The Asian Network for Free Elections (ANFREL) and the European Union Election Observation Mission (EU EOM) observed the 2008, 2013, and 2017 elections as well.<sup>107</sup> Many international observation groups directly assisted domestic observation groups: International IDEA provided its Electoral Risk Management Tool (ERMTool) to the Election Observation Committee of Nepal (EOC) to use while monitoring the 2017 election,<sup>108</sup> and ANFREL facilitated discussions among domestic groups to help them cooperate more effectively.<sup>109</sup> In addition to evaluating the election, international observers played an important role by further legitimizing the domestic election observation groups in Nepal.<sup>110</sup> Nepal's elections were generally regarded as imperfect, but successful overall, and as important steps toward realizing genuine democracy in the country.<sup>111</sup>

Domestic observation groups have been an integral part of the democratic transition in Nepal. In the 2008 election, Domestic election observation groups (including Democracy Election Alliance Nepal ("DEAN"), the National Election Observation Committee ("NEOC"), the General Election Observation Committee ("GEOC"), the National Election Monitoring Alliance ("NEMA"), and others) were just beginning to organize themselves, yet the Carter Center reported that the various observation groups fielded over 61,000 observers, and domestic observers appeared in 86 percent

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president-dissolves-parliament-new-election-november-2021-05-22/ (discussing recent developments in Nepalese politics).

<sup>106</sup> See OBSERVING NEPAL'S 2013 ELECTION, *supra* note 97, at 21; OBSERVING NEPAL'S 2017 ELECTION, *supra* note 104, at 1 (outlining the Carter Center's involvement in Nepal).

<sup>107</sup> *Mission Reports*, ASIAN NETWORK FOR FREE ELECTIONS (last visited Feb. 22, 2022), <https://anfrel.org/category/mission-reports/>; European Parliament Global Democracy Support [hereinafter ANFREL]; *Election Observation*, EUROPEAN PARLIAMENT <https://www.europarl.europa.eu/globaldemocracysupport/en/elections/election-observation> (last visited Feb. 22, 2022).

<sup>108</sup> Diwas Pant, *Election Observers Make Use of the ERM Tool in Nepal* (Mar. 9, 2018), <https://www.idea.int/news-media/news/election-observers-make-use-erm-tool-nepal>.

<sup>109</sup> ANFREL, THE INTERNATIONAL ELECTION OBSERVATION MISSION OF THE ASIAN NETWORK FOR FREE ELECTIONS TO THE FEDERAL REPUBLIC OF NEPAL'S 2017 PROVINCIAL AND NATIONAL ASSEMBLY ELECTIONS 3 (2018) [hereinafter ANFREL OBSERVING NEPAL'S 2017 ELECTION].

<sup>110</sup> See OBSERVING NEPAL'S 2013 ELECTION, *supra* note 97, at 14 (discussing the Carter Center's goals in their election observation mission).

<sup>111</sup> See OBSERVING NEPAL'S 2008 ELECTION, *supra* note 93, at 11; OBSERVING NEPAL'S 2013 ELECTION, *supra* note 97, at 4; OBSERVING NEPAL'S 2017 ELECTION, *supra* note 104, at 1-2.

of the polling locations visited by Carter Center observers.<sup>112</sup> Domestic observers took a primarily passive role in the 2008 election, but were more organized for the 2013 election, where over 31,000 observers were accredited from 46 organizations, and were in 74 percent of polling locations visited by Carter Center observers.<sup>113</sup> By the 2017 election, while observers were only present in 32 percent of polling locations visited by Carter Center observers—due to financial concerns and an abbreviated election season—<sup>114</sup> they (and the domestic observer groups they represented) had formed a vibrant, sophisticated observational network which allowed them to “comprehensively monitor the electoral and the electoral environment”<sup>115</sup> and “greatly contribut[e] to the transparency of the process.”<sup>116</sup>

ii. *Tunisia*

Tunisia has been in an ongoing state of democratic transition since the Jasmine Revolution in 2011.<sup>117</sup> Between Tunisia’s independence and the Jasmine Revolution, only two presidents served: Habib Bourguiba, who was instrumental in Tunisia’s independence, and Zine El Abidine Ben Ali, who removed the former president via a “medical coup” in 1987.<sup>118</sup> Ben Ali’s rule as president was “characterized by authoritarian control and political repression.”<sup>119</sup> Ben Ali’s rule was upended, however, by the Jasmine Revolution.<sup>120</sup> While Tunisians had chafed for years under Bourguiba’s rule, popular opposition to the government intensified after a man named Mohamed Bouazizi set himself ablaze to protest the government’s repression.<sup>121</sup> Ben Ali’s promises of democratic reform were not accepted by the populace, who had overwhelmingly turned against him; he fled the country less than a month after Bouazizi’s act of protest.<sup>122</sup>

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<sup>112</sup> See OBSERVING NEPAL’S 2008 ELECTION, *supra* note 93, at 9, 37, 47, 95 (discussing the presence and impact of domestic election observers in the 2008 election).

<sup>113</sup> See OBSERVING NEPAL’S 2013 ELECTION, *supra* note 97, at 46, 53.

<sup>114</sup> OBSERVING NEPAL’S 2017 ELECTION, *supra* note 104, at 12.

<sup>115</sup> OBSERVING NEPAL’S 2017 ELECTION, *supra* note 104, at 17-18.

<sup>116</sup> OBSERVING NEPAL’S 2017 ELECTION, *supra* note 104, at 12.

<sup>117</sup> THE CARTER CTR., 2019 PRESIDENTIAL AND PARLIAMENTARY ELECTIONS IN TUNISIA FINAL REPORT (2020) 20 [hereinafter OBSERVING TUNISIA’S 2019 ELECTION].

<sup>118</sup> THE CARTER CTR., NATIONAL CONSTITUENT ASSEMBLY ELECTIONS IN TUNISIA OCTOBER 23, 2011 FINAL REPORT (2012) [hereinafter OBSERVING TUNISIA’S 2011 ELECTION].

<sup>119</sup> OBSERVING TUNISIA’S 2011 ELECTION, *supra* note 118, at 13.

<sup>120</sup> OBSERVING TUNISIA’S 2011 ELECTION, *supra* note 118, at 14; *see also* Encyclopedia Britannica, *Jasmine Revolution*, ENCYCLOPEDIA BRITANNICA <https://www.britannica.com/event/Jasmine-Revolution> (last visited March 7, 2022) (discussing the Jasmine Revolution) [hereinafter *Jasmine Revolution*].

<sup>121</sup> OBSERVING TUNISIA’S 2011 ELECTION, *supra* note 118, at 14.; *see also* *Jasmine Revolution* (discussing the aftermath of Bouazizi’s act).

<sup>122</sup> OBSERVING TUNISIA’S 2011 ELECTION, *supra* note 118, at 14.

The Jasmine Revolution and subsequent democratic transition was remarkable both in its effect in the region (instigating a wave of popular uprisings known as the “Arab Spring”) and its largely bloodless nature.<sup>123</sup> The government initially sought to continue under the 1959 Constitution, but demand for a new constitution was relentless, and an election for a Constituent Assembly to draft a new constitution was set for July 2011.<sup>124</sup> The debate over the Constitution lasted several years, and was prolonged by instances of political violence, violent uprisings, and tensions between Islamist and secular parties.<sup>125</sup> Despite setbacks, a new constitution was adopted in 2014, and elections (the first democratic and transparent elections in the country’s history) were held later that year.<sup>126</sup> Democratic reforms and national development stagnated in the years after 2014, which caused many people to become disillusioned with the new government, and the country has yet to establish a court to resolve constitutional disputes.<sup>127</sup> Nonetheless, the 2019 elections were successful, and represented the first transfer of power from one democratically elected president to another in the nation’s history.<sup>128</sup> Tunisia thus serves as an impressive example of democratic governance in the wake of longstanding authoritarian rule.<sup>129</sup>

Election observation served an important role in Tunisia’s transition to a democracy. The Tunisian government accredited 661 international observers during the 2011 election,<sup>130</sup> 496 international observers during the 2014 election,<sup>131</sup> and 700 observers for the 2019 election.<sup>132</sup> The Carter Center, the National Democracy Institute (NDI), and the EU EOM observed the 2011, 2014, and 2019 elections, while the Electoral Institute for Sustainable Democracy in Africa (EISA) joined with the Carter Center to observe the 2011 and 2019 elections.<sup>133</sup> EISA also sent technical assessment

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<sup>123</sup> OBSERVING TUNISIA’S 2011 ELECTION, *supra* note 118, at 14.

<sup>124</sup> OBSERVING TUNISIA’S 2011 ELECTION, *supra* note 118, at 15.

<sup>125</sup> THE CARTER CTR., LEGISLATIVE AND PRESIDENTIAL ELECTIONS IN TUNISIA: OCTOBER, NOVEMBER, AND DECEMBER 2014 FINAL REPORT 18-20 (2015) [hereinafter OBSERVING TUNISIA’S 2014 ELECTIONS].

<sup>126</sup> *Id.* at 18, 21.

<sup>127</sup> OBSERVING TUNISIA’S 2019 ELECTION, *supra* note 117, at 5-6; Reuters, *Tunisian President Resists Parliament’s Bid to Create Constitutional Court*, REUTERS (Apr. 6, 2021, 9:43 AM), <https://www.reuters.com/article/uk-tunisia-politics/tunisian-president-resists-parliaments-bid-to-create-constitutional-court-idUSKBN2BT1PF>.

<sup>128</sup> OBSERVING TUNISIA’S 2019 ELECTION, *supra* note 117, at 20.

<sup>129</sup> OBSERVING TUNISIA’S 2019 ELECTION, *supra* note 117, at 6.

<sup>130</sup> OBSERVING TUNISIA’S 2011 ELECTION, *supra* note 118, at 40.

<sup>131</sup> OBSERVING TUNISIA’S 2014 ELECTION, *supra* note 125, at 96.

<sup>132</sup> OBSERVING TUNISIA’S 2019 ELECTION, *supra* note 117, at 121.

<sup>133</sup> *Election Observation*, EUROPEAN PARLIAMENT, <https://www.europarl.europa.eu/globaldemocracysupport/en/elections/election-observation> (last visited Feb. 15, 2022); *Election Reports*, THE CARTER CENTER, [https://www.cartercenter.org/news/publications/election\\_reports.html#tunisia](https://www.cartercenter.org/news/publications/election_reports.html#tunisia) (last visited Feb. 15, 2022); *EISA’s Election Observation Missions*, EISA, <https://www.eisa.org/epp->

missions to Tunisia for the 2014 and 2019 elections, and has included members of domestic Tunisian election observation groups on EISA missions to train them.<sup>134</sup> International IDEA partnered with Tunisia's electoral management body and the Organization of Arab Electoral Management Bodies (ARAB EMBs) to provide training, risk management, organizational development, and capacity-building to Tunisia's electoral management body.<sup>135</sup> Tunisia joined International IDEA as its thirty-third member state in December 2019, which will strengthen its ties to the international community and help buttress its democratic government.<sup>136</sup>

As in Nepal, the international observation organizations worked alongside domestic observation organizations, providing technical assistance, training, and legitimacy to the domestic organizations.<sup>137</sup> They also recommended steps the Tunisian government could take to improve democracy in Tunisia, such as granting the franchise to members of the military and amending candidate nomination laws to promote gender equality, which were adopted by the government after the 2014 election.<sup>138</sup> International groups also supported programs to improve political involvement, especially by young people.<sup>139</sup>

Domestic observation groups established themselves quickly in the leadup to the 2011 election, undertaking voter education efforts when possible, but focusing primarily on election observation.<sup>140</sup> Several domestic groups participated in observation efforts during the elections over the past decade, with some of the largest being Mourakiboun, the Association for Transparency and Integrity in Elections (ATIDE), and the Chahed Observatory.<sup>141</sup> An impressive number of Tunisians participated in election observation efforts during the elections: 13,392 domestic observers were accredited in 2011, over 29,000 were accredited in 2014, and 17,500 were

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com.php; NDI, "Publications," <https://www.ndi.org/publications?country=1132> (last visited Feb. 15, 2022).

<sup>134</sup> EISA's *Election Observation Missions*, *supra* note 133.

<sup>135</sup> Emna Zghonda, *Exploratory Mission to Tunisian Municipal Elections 2018 Organized in Partnership with the Arab EMBs*, INTERNATIONAL IDEA (Mar. 18, 2015), <https://www.idea.int/news-media/news/exploratory-mission-tunisian-municipal-elections-2018-organized-partnership-arab>; *IDEA Signs MoU with Tunisia EMB*, INTERNATIONAL IDEA (Nov. 16, 2015), <https://www.idea.int/news-media/news/idea-signs-mou-tunisia-emb%C2%A0>.

<sup>136</sup> *Tunisia Joins International IDEA as the 33rd Member State*, INTERNATIONAL IDEA (Dec. 2, 2019), <https://www.idea.int/news-media/news/tunisia-joins-international-idea-33rd-member-state>.

<sup>137</sup> OBSERVING TUNISIA'S 2019 ELECTION, *supra* note 117, at 15, 55.

<sup>138</sup> OBSERVING TUNISIA'S 2019 ELECTION, *supra* note 117, at 15.

<sup>139</sup> OBSERVING TUNISIA'S 2019 ELECTION, *supra* note 117, at 16.

<sup>140</sup> OBSERVING TUNISIA'S 2011 ELECTION, *supra* note 118, at 40-41.

<sup>141</sup> OBSERVING TUNISIA'S 2019 ELECTION, *supra* note 117, at 56.

accredited in 2019 (the decrease from 2014 to 2019 was due primarily to a lack of funding caused by the unexpectedly short election season in 2019).<sup>142</sup>

Domestic election observation organizations have grown in Tunisia from small (but enthusiastic and professional) groups in the 2011 election to large, sophisticated organizations in the 2019 elections.<sup>143</sup> In the 2019 election, many organizations cooperated to maximize their limited resources; individual groups focused on specific aspects of observation (such as PVT's, voter registration, direct observation, etc.) and, once the election was complete, published their joint findings and recommendations.<sup>144</sup> Domestic observer groups were able to both attest to the validity of the election and improve the election itself, as their many of their recommendations were implemented by the government as the rounds of voting progressed.<sup>145</sup>

The extreme nature of the social and political situations in Nepal and Tunisia could call into question any attempt to analogize experiences there to other countries, much less an attempt to prescribe solutions for other countries based on effective solutions there. It is because of these extremes, however, that they serve as a worthy case study for the effectiveness of election monitoring. Context is important, and a country's political environment (and therefore the proper remedies for issues within that country's political environment) can be shaped by numerous factors. The principles of election observation used in Nepal and Tunisia, however, are not unique; as has been shown, they have developed over roughly seventy years. Nepal and Tunisia show that election observation, if done according to international standards, can meaningfully strengthen democracy in a country by fostering popular confidence in elections, raising social trust through encouraging collective action, increasing voter turnout, and spurring popular engagement with the political process.

### III. THE UNITED STATES' ELECTION ADMINISTRATION AND OBSERVATION APPARATUS

This Part first discusses the election administration apparatus (or lack thereof) in the United States, both on the state and federal levels. It then examines a series of contested elections in U.S. history and discuss how some of the problems in those elections could have been mitigated if a robust system of election observation was in place. Since the modern election observation system began after the creation of the UN, this Part only addresses U.S. elections after the creation of the UN. In addition, because this paper is arguing for a change in federal elections, this Part only examines federal

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<sup>142</sup> OBSERVING TUNISIA'S 2019 ELECTION, *supra* note 117, at 55, n.136, 57; OBSERVING TUNISIA'S 2011 ELECTION, *supra* note 118, at 40.

<sup>143</sup> OBSERVING TUNISIA'S 2019 ELECTION, *supra* note 117, at 55.

<sup>144</sup> OBSERVING TUNISIA'S 2019 ELECTION, *supra* note 117, at 55-56.

<sup>145</sup> OBSERVING TUNISIA'S 2019 ELECTION, *supra* note 117, at 57.

elections, though several state elections could have been improved if they were monitored (the 2018 Georgia gubernatorial election being one example).<sup>146</sup>

A. *Election Monitoring in the United States*

“Conventional wisdom holds that the federal government plays relatively little role in U.S. campaigns and elections.”<sup>147</sup> That conventional wisdom, however, is no longer wholly accurate. The federal government has “steadily increased its presence in campaigns and elections in the past 50 years[,]” but the process has been neither simple nor organized.<sup>148</sup> The Election Assistance Commission (EAC), the Federal Election Commission (FEC), the Department of Justice (DOJ), the Department of Defense (DOD), and “component organizations comprising the Intelligence Community” are all involved in campaigns and elections policy to some degree.<sup>149</sup> Meanwhile, “U.S. election administration occurs largely at the county level[,]” which means that “regulations . . . vary widely across the [fifty] states and even across counties within a single state.”<sup>150</sup> This section first outlines the federal elements of the United States’ election system and monitoring apparatus, then it outlines the states’ election system and monitoring apparatus.

i. *The Federal Election System and Observation Apparatus*

According to the Congressional Research Office’s report on the federal government’s involvement in elections, “at least [twenty-two] congressional committees; [seventeen] federal departments or independent agencies (plus the Intelligence Community and the federal judiciary); [nine] federal statutes; and several constitutional provisions can affect the federal role in campaigns and elections.”<sup>151</sup> While the federal government has a broad role in ensuring voting rights, its primary roles in election administration are to support the states and regulate campaign finance.<sup>152</sup> The only two federal

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<sup>146</sup> See Jessica Taylor, *Georgia’s Stacey Abrams Admits Defeat, Says Kemp Used ‘Deliberate’ Suppression to Win*, NPR (Nov. 16, 2018, 5:15 PM), <https://www.npr.org/2018/11/16/668753230/democrat-stacey-abrams-ends-bid-for-georgia-governor-decrying-suppression> (discussing allegations of fraud surrounding the 2018 Georgia gubernatorial election).

<sup>147</sup> R. SAM GARRETT, CONG. RSCH. SERV., R45302, FEDERAL ROLE IN U.S. CAMPAIGNS AND ELECTIONS: AN OVERVIEW, summary (2018).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> GUIDE TO ELECTION OBSERVER POLICIES IN THE US, *supra* note 64, at 1.

<sup>151</sup> GARRETT, *supra* note 147, at 1.

<sup>152</sup> See GARRETT, *supra* note 147, at 1, 3 (discussing the federal government’s role in elections).

agencies devoted solely to elections are the FEC and the EAC—the FEC handles campaigns, while the EAC handles election administration.<sup>153</sup>

The federal government’s role in elections stems both from the Constitution and various statutes such as the Federal Election Campaign Act, the Help America Vote Act, the National Voter Registration Act, the Voting Rights Act, and others.<sup>154</sup> While numerous statutes are important, some of them have particular importance regarding election monitoring. The Help America Vote Act (HAVA), for example, was passed in the aftermath of the 2000 election and is the primary federal statute dealing with election administration.<sup>155</sup> HAVA directed federal dollars to be given to the states to improve their election systems, took the election administration functions out of the FEC and created a new independent agency (the EAC) to perform those functions, and charged the EAC to create voluntary election administration standards for states to implement.<sup>156</sup> HAVA also, however, barred the EAC from making any rules, and tasked the DOJ with all enforcement authority under the act, which kept the EAC from having any real power.<sup>157</sup> Despite their lack of teeth, the EAC and the FEC are the two federal agencies with the most power over the elections process in the United States, though several other agencies have subsidiary, context-specific roles in the election process.<sup>158</sup>

With regards to election observation specifically, the Civil Rights Division of the DOJ is currently allowed to send federal election observers to oversee elections “by order of a federal court pursuant to Section 3(a)” of the Voting Rights Act (VRA).<sup>159</sup> Before the *Shelby County* decision, federal observers were authorized in “153 counties and parishes in 11 states” that were covered under the preclearance formula.<sup>160</sup> Since the Court overturned the preclearance formula in *Shelby County*, federal observation is presently

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<sup>153</sup> See GARRETT, *supra* note 147, at 19-20 (discussing the different roles of the FEC and EAC).

<sup>154</sup> See GARRETT, *supra* note 147, at 7-14 (explaining the statutory and constitutional sources of the federal government’s power over elections).

<sup>155</sup> See GARRETT, *supra* note 147, at 8 (discussing the provisions of HAVA).

<sup>156</sup> See GARRETT, *supra* note 147, at 8 (outlining the provisions of HAVA).

<sup>157</sup> See GARRETT, *supra* note 147, at 9 (explaining the limits HAVA put on federal power).

<sup>158</sup> See GARRETT, *supra* note 147, at 19-26 (discussing agencies with roles in the election process, such as the Department of Commerce, Department of Defense, Department of Health and Human Services, Department of Homeland Security, Department of Justice, Department of State, Department of Labor, Department of Treasury, Federal Communications Commission, National Archives and Records Administration, Office of Personnel Management, U.S. Access Board, U.S. Commission on Civil Rights, U.S. Postal Service, and various agencies within the intelligence community).

<sup>159</sup> *About Federal Observers and Election Monitoring*, DEP’T OF JUST., <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring> (last visited Feb. 22, 2022).

<sup>160</sup> *Id.*

allowed only in six counties.<sup>161</sup> These observers serve as “neutral and impartial observers of election-day procedures” who verify “compliance with the federal voting rights laws[.]”<sup>162</sup> While they have a “unique ability to help deter wrongdoing, defuse tension, promote compliance with the law and bolster public confidence in the electoral process[.]” their reach (and therefore effect) has been greatly lessened since *Shelby County*.<sup>163</sup> Though formal federal observation has been limited, the Civil Rights Division does send attorneys and staff members to monitor elections in a more informal fashion.<sup>164</sup>

The federal election administration system is complicated, simultaneously monstrously large and woefully underpowered, and almost comically inefficient and ineffective. Election observation is a good example of the system’s problems: the VRA was passed by Congress, gave observation authority to the DOJ (who outsources observer training to the OPM), was limited in its application by the Supreme Court in *Shelby County*, and makes no mention of the EAC—whose role is as the federal agency overseeing election administration, which is the very thing election observers seek to observe. The flaws of the system stem largely from the federal system of government that the United States has and the decentralized nature of our election system. To examine that decentralized system, one must study the states’ election systems.

ii. *The State Election System and Observation Apparatus*

There are “more than 10,000 [different election] administration jurisdictions” in the United States, mostly because Article 1, Section 4 of the Constitution says that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]”<sup>165</sup> Laws governing elections can vary “depending on state election codes and county regulations” while the “entities that do the rubber-meets-the-road functions of running an election are typically on the county or city/town level.”<sup>166</sup> This extreme decentralization can have both

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<sup>161</sup> *Id.*; *Shelby County v. Holder*, 570 U.S. 529 (2013).

<sup>162</sup> *About Federal Observers and Election Monitoring*, *supra* note 159.

<sup>163</sup> DEP’T OF JUSTICE, FACT SHEET ON JUSTICE DEPARTMENT’S ENFORCEMENT EFFORTS FOLLOWING *SHELBY COUNTY* DECISION 1, <https://www.justice.gov/crt/file/876246/download> (last visited Feb. 21, 2022).

<sup>164</sup> *See About Federal Observers and Election Monitoring*, *supra* note 159 (explaining the various types and roles of federal election observers).

<sup>165</sup> U.S. CONST. art. I, § 4, cl. 1; *Election Administration at State and Local Levels*, NSCL (Feb. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx>.

<sup>166</sup> GUIDE TO ELECTION OBSERVER POLICIES IN THE US, *supra* note 64, at 1; *Election Administration at State and Local Levels*, *supra* note 165.

positives and negatives for the country's elections as a whole.<sup>167</sup> Statutes such as HAVA and the National Voter Registration Act (NVRA) of 1993 have standardized states' election administration laws relative to a century ago, but there is still a great deal of variation.<sup>168</sup>

Voting evolved into an increasingly complex act over time, which led states to create increasingly complex procedures and use increasingly complex technologies to standardize their election procedures, all of which required increasingly complex bureaucratic apparatuses to oversee.<sup>169</sup> Each state has a chief election official with ultimate authority over the state's elections, but (unsurprisingly) the identity of that official varies from state to state—some states have the Secretary of State act as the chief election official, some states have an appointed board act as the chief election official, and some states split responsibilities between the Secretary of State and an appointed board.<sup>170</sup> A state's chief election official works with the state's election office and the legislature to set election policy in the state, as well as handle compliance with Federal law (especially HAVA), certify candidates, provide voting machines to local election officials, troubleshoot issues on election day, and tabulate statewide results.<sup>171</sup>

Local election officials—usually at the county level, but sometimes at the city or town level—actually administer the elections.<sup>172</sup> As at the state level, local elections are administered either by an elected official, a board of

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<sup>167</sup> See *Election Administration at State and Local Levels*, *supra* note 165 (“Critics say the level of local control can lead to mismanagement and inconsistent application of the law,” however, “this decentralization allows individual jurisdictions to experiment and innovate. . . . The dispersed responsibility for running elections also makes it extremely difficult, if not impossible, to rig U.S. elections at the national level, . . . [and it enables people to hold] authorities in local jurisdictions accountable for the management of their own elections.”).

<sup>168</sup> See *Election Administration at State and Local Levels*, *supra* note 165 (discussing the variation between States' election systems).

<sup>169</sup> See *Election Administration at State and Local Levels*, *supra* note 165 (Initially, voting was a simple act where “[o]fficials would announce an election and voters would come and vote.” Beginning in the late 1800s, innovations such as the secret ballot (as opposed to the previous practice of parties giving ballots to voters), voter registration, and early voting machines made voting more secure. These innovations, however, required increasingly complex legal and administrative structures to facilitate them.).

<sup>170</sup> See *Election Administration at State and Local Levels*, *supra* note 165 (discussing the various ways states administer their elections).

<sup>171</sup> See *Election Administration at State and Local Levels*, *supra* note 165 (discussing the role of state election officials); see also KAREN L. SHANTON, CONG. RSCH. SERV., R45549 THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES 3 (2019) (discussing the state government's policymaking role).

<sup>172</sup> See *Election Administration at State and Local Levels*, *supra* note 165 (discussing the local government's role in elections).

officials, or by a combination of the two.<sup>173</sup> These officials handle the day-to-day implementation of election policy: they “add eligible voters to the voter rolls; design and print ballots; recruit and train poll workers; select and prepare polling places; store and transport voting equipment; and count, canvass, and report election results.”<sup>174</sup>

Since there are thousands of independent electoral jurisdictions within the fifty states, it should come as no surprise that the laws concerning who can observe elections, and what elements of the elections they are allowed to observe, vary.<sup>175</sup> Almost all states allow partisan citizen observers and academic observers to be present at elections, while more than thirty states allow international nonpartisan observers and domestic nonpartisan observers to be present at elections.<sup>176</sup> Though the accreditation process is not uniform among the states, and in fact most states do not require formal accreditation for nonpartisan observers, “40 states and [DC] have a formal accreditation/appointments process for partisan citizen observers. . . .”<sup>177</sup> States that do have formal accreditation procedures for nonpartisan or partisan observers normally do not have robust qualifications or guidelines for the accreditation process.<sup>178</sup> Observers’ rights vary between states; different states give observers access to various combinations of pre-election, election day, and post-election procedures.<sup>179</sup>

### C. *Applying International Election Observation Standards to Elections in the United States*

This section discusses how the decentralized nature of the United States’ election system has led to issues in past elections, and shows that a more robust system of election observer rights could have mitigated some of those issues. That is not to say that a more robust system of election monitoring would have changed the outcome of any of these elections; election monitoring is, after all, “process oriented, not concerned with any particular electoral result, and is concerned with results only to the degree that

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<sup>173</sup> See *Election Administration at State and Local Levels*, *supra* note 165 (comparing local and state election administration apparatuses).

<sup>174</sup> SHANTON, *supra* note 171, at 7.

<sup>175</sup> See GUIDE TO ELECTION OBSERVER POLICIES IN THE US, *supra* note 64, at 2-3 (providing a summary of the various state laws governing election observation, as well as an explanation of the different types of election observation: partisan, nonpartisan, international, and academic).

<sup>176</sup> See GUIDE TO ELECTION OBSERVER POLICIES IN THE US, *supra* note 64, at 2-3 (explaining the legal rights various observers have in the United States).

<sup>177</sup> GUIDE TO ELECTION OBSERVER POLICIES IN THE US, *supra* note 64, at 6.

<sup>178</sup> See GUIDE TO ELECTION OBSERVER POLICIES IN THE US, *supra* note 64, at 6 (Most states do not have a “code of conduct, special training, or identification for observers.”).

<sup>179</sup> See GUIDE TO ELECTION OBSERVER POLICIES IN THE US, *supra* note 64, at 7 (discussing the variability in observational rights between states).

they are reported honestly and accurately in a transparent and timely manner.”<sup>180</sup> The goal of this section is only to note ways that a robust election monitoring apparatus could have improved these elections in a similar manner that the election monitors in Nepal and Tunisia improved elections there.

*i. The 1948 Texas Senate Election*

In 1948, Lyndon Johnson won an “87-vote landslide” against Coke Stevenson in the Texas Senatorial Democratic primary runoff election.<sup>181</sup> The election was incredibly close, with initial results the morning after the runoff indicating that Stevenson led Johnson by 854 votes.<sup>182</sup> During the vote recount, Stevenson’s lead narrowed to roughly 150 votes, when 202 votes for Johnson were miraculously found in Alice, Texas—deep in the heart of the territory controlled by political boss George Parr, a Johnson supporter.<sup>183</sup> When Stevenson went to Alice to investigate, he found some interesting irregularities: “[t]he last 202 names on the rolls . . . were written in a different color ink; the new names were listed in alphabetical order; the handwriting was identical; some of the new voters claim they never voted.”<sup>184</sup> Johnson’s victory was secured by a Supreme Court’s denial of certiorari on the 5th Circuit’s ruling that a federal court of equity could not interfere in a state’s election processes.<sup>185</sup>

If international election observation standards were applied to this election, this fraud could have been prevented, deterred, or conclusively proven. Taking International IDEA’s standards for election observation as a metric, there should have been a law that enabled “representatives of parties and candidates and election observers [to be present] during the counting, tabulation and consolidation of votes.”<sup>186</sup> Furthermore, international standards hold that party representatives and election observers should be present<sup>187</sup> while ballots are being counted, and that all ballots should be securely stored “until either the deadline for making legal challenges to the certified results

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<sup>180</sup> DECLARATION OF PRINCIPLES, *supra* note 22, at 3.

<sup>181</sup> Dale Baum & James L. Hailey, *Lyndon Johnson's Victory in the 1948 Texas Senate Race: A Reappraisal*, 109 POL. SCI. Q. 595, 595 (1994).

<sup>182</sup> See Dan Balz, *The Mystery of Ballot Box 13*, THE WASH. POST (Mar. 4, 1990), <https://www.washingtonpost.com/archive/entertainment/books/1990/03/04/the-mystery-of-ballot-box-13/70206359-8543-48e3-9ce2-f3c4fdf6da3d/> (explaining the controversy surrounding the election).

<sup>183</sup> See Baum & Hailey, *supra* note 181, at 595-96, 1-2 n.1; Balz, *supra* note 182 (noting the fortuitousness of finding missing ballots during the recount).

<sup>184</sup> Balz, *supra* note 182.

<sup>185</sup> *Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948), *cert. denied*, *Johnson v. Stevenson*, 335 U.S. 801 (1948).

<sup>186</sup> INTERNATIONAL ELECTORAL STANDARDS, *supra* note 14, at 77.

<sup>187</sup> See INTERNATIONAL ELECTORAL STANDARDS, *supra* note 14, at 78 (discussing the rights of election observers).

has passed or, in case a legal challenge is made, the final adjudication of such a challenge is pronounced.”<sup>188</sup>

If a robust system of election observation was in place to oversee the election, it would have made it much less likely that the election could have been successfully influenced. Some could say that the mere presence of observers, who often cannot do anything about the violations they see, would not incentivize any change in behavior. However, that is not always true. Legitimacy is important to governments and politicians, as evidenced by the fact that many governmental systems that “fully intend to cheat nevertheless invite scrutiny by monitors” because they want to avoid the stigmatization that comes from not having monitors.<sup>189</sup> If election observers can tabulate votes in parallel with the official government tabulation, they can disseminate results on their own, making it difficult for those who seek to manipulate those results to do so effectively (as exemplified by NAMFREL in the Filipino elections of 1984 and 1986).<sup>190</sup> This is akin to the concept of “soft power” in international relations;<sup>191</sup> election monitors may not be able to enforce election rules, but they can create an environment where politicians are incentivized to play by the rules. In this case, while observation could not have forced Johnson to play by the rules, it is likely that stricter oversight would have made cheating much more difficult, and therefore much less likely.<sup>192</sup>

ii. *The 2000 Presidential Election*

The infamous events of November 2000 have been written about voluminously, and for good reason. The Presidential election that year was “the closest [one] in American history, with only several hundred votes in Florida determining the winner out of more than 100 million ballots cast nationwide.”<sup>193</sup> George W. Bush defeated Al Gore in the election—with the help of the Supreme Court—and became only the fourth president (and the first since 1888) to win the electoral college but lose the popular vote.<sup>194</sup> Florida, where the bulk of the drama played out, was originally called for Gore, and Gore was even declared the presumptive winner by some

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<sup>188</sup> INTERNATIONAL ELECTORAL STANDARDS, *supra* note 14, at 80.

<sup>189</sup> KELLEY, *supra* note 1, at 29.

<sup>190</sup> BJORN LUND, *supra* note 13, at 212-15.

<sup>191</sup> *See generally*, Joseph S. Nye, Jr., *Soft Power*, 80 FOREIGN POL’Y 153 (1990) (coining the term “soft power” as the means by which countries can convince—instead of coerce—other countries to take certain actions).

<sup>192</sup> *See* KELLEY, *supra* note 1, at 130 (using data to show that “the presence of . . . monitors is associated with improved election quality”).

<sup>193</sup> Thomas E. Mann, *Reflections on the 2000 U.S. Presidential Election*, BROOKINGS (Jan. 1, 2001), <https://www.brookings.edu/articles/reflections-on-the-2000-u-s-presidential-election/>.

<sup>194</sup> *See id.* (contextualizing the 2000 election within the history of presidential elections).

networks.<sup>195</sup> As time went on though, Bush pulled ahead, and the Florida Secretary of State declared Bush the winner.<sup>196</sup> In response, Democrats pushed for a recount of the votes, which Bush sued to stop.<sup>197</sup> A recount was no easy task; some ballots were “marked for third-party candidate Patrick Buchanan in heavily Democratic precincts, suggesting they were cast by voters who had thought they were voting for Gore,” while others were unclear because “voters’ attempt to make their choice had only succeeded in detaching a portion of the perforated paper (“hanging chads”) or merely denting – rather than removing – the punch-out (“dimpled chads”).”<sup>198</sup> Eventually the Supreme Court in *Bush v. Gore* stopped the recount, giving the election to Bush.<sup>199</sup>

Although people accepted the result, in deciding the election the Court “damaged . . . [its] preferred image of itself as an institution far removed from everyday partisan politics.”<sup>200</sup> If the United States had implemented international election standards, the Court may not have had to get involved at all. If observers were there to oversee vote tabulation, they could have identified issues on election day, and the state may have been able to resolve those issues on its own. At the very least, if people knew there were issues with the ballots (instead of merely confusion over who had won a tight race), news organizations may not have called the state for Gore so early, which would have precluded the narrative that Florida was “stolen” from Gore. If observers had caught the “hanging chads” and other issues early enough, they could have even pressured the polling stations to provide alternative means for people to cast their votes, avoiding the issue altogether.

iii. *The 2008 Minnesota Senate Election*

The 2008 Minnesota Senate Election was not resolved until June of 2009, when incumbent Norm Coleman conceded defeat to Al Franken, who was declared the winner by “312 votes out of 2.9 million cast.”<sup>201</sup> Coleman had a 215-vote lead in the initial count, which was close enough to trigger a

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<sup>195</sup> See Ron Elving, *The Florida Recount Of 2000: A Nightmare That Goes on Haunting*, NPR (Nov. 12, 2008, 5:00 AM), <https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting> (explaining the 2000 election’s tortured history of calls and recalls, concessions and retractions).

<sup>196</sup> See *id.* (discussing the timeline of the controversial 2000 election).

<sup>197</sup> See *Election 2000 Timeline*, PITTSBURGH POST-GAZETTE (Dec. 17, 2000), <http://old.post-gazette.com/election/20001217pztimeline.asp> (listing important dates in the 2000 presidential election saga).

<sup>198</sup> Elving, *supra* note 195.

<sup>199</sup> Elving, *supra* note 195 (discussing the resolution to the 2000 election in Florida); see also *Bush v. Gore*, 531 U.S. 98 (2000) (holding that the recount could not continue).

<sup>200</sup> Elving, *supra* note 195.

<sup>201</sup> Josh Kraushaar & Manu Raju, *Coleman Concedes Race to Franken*, POLITICO (June 30, 2008, 2:14 PM), <https://www.politico.com/story/2009/06/coleman-concedes-race-to-franken-024383>.

mandatory hand-recount under Minnesota law.<sup>202</sup> There were no guidelines about how votes should be recounted, if improperly rejected absentee ballots should be included, what constituted an improper rejection of a ballot, and what to do about 133 votes that were lost at some point on election night.<sup>203</sup> The Minnesota canvassing board had to rule on those questions as they arose. Once the state finally completed its recount and the canvassing board certified that Franken was the winner by 225 votes, Coleman sued, which blocked Franken from being able to be seated in the Senate.<sup>204</sup> Coleman argued that numerous ballots were wrongfully rejected and that the recount process violated the Constitution's equal protection clause because election officials used different standards for counting various absentee ballots, and called for the case to be "remanded to lower court so that more ballots could be opened."<sup>205</sup> His arguments were rejected by the Minnesota Supreme Court, however, which declared Franken the winner by 312 votes—Coleman conceded shortly thereafter.<sup>206</sup>

Unsurprisingly, the results of the election were not well received by the Minnesota Republican Party. In 2010, the Republican governor of Minnesota alleged that roughly 1,000 felons may have illegally voted.<sup>207</sup> Attorneys for Coleman also alleged that the Minneapolis director for elections found several ballots in her car that were wrongfully included in the tally.<sup>208</sup>

<sup>202</sup> See Rachel E. Stassen-Berger & David Orrick, *Recount Begins in U.S. Senate Race; Ritchie Hit With 'Blizzard' of Filings*, TWINCITIES.COM (Nov. 18, 2008, 11:01 PM), <https://www.twincities.com/2008/11/18/recount-begins-in-u-s-senate-race-ritchie-hit-with-blizzard-of-filings/> (discussing Minnesota recount procedures).

<sup>203</sup> See Kevin Duschere & Mark Brunswick, *Senate Recount: 133 + 5 ÷ 87 = 1 Big Muddle*, STARTRIBUNE (Dec. 12, 2008), [https://web.archive.org/web/20090324191758/http://www.startribune.com/politics/national/senate/36043514.html?elr=KarksLckD8EQDUoaEyqyP4O%3ADW3ckUiD3aPc%3A\\_Yyc%3AaULPQL7PQLanchO7DiUs; Minnesota U.S. Senate Election Recount \(C-Span television broadcast Dec. 13, 2008\), https://www.c-span.org/video/?282885-1/minnesota-us-senate-election-recount&playEvent](https://web.archive.org/web/20090324191758/http://www.startribune.com/politics/national/senate/36043514.html?elr=KarksLckD8EQDUoaEyqyP4O%3ADW3ckUiD3aPc%3A_Yyc%3AaULPQL7PQLanchO7DiUs; Minnesota U.S. Senate Election Recount (C-Span television broadcast Dec. 13, 2008), https://www.c-span.org/video/?282885-1/minnesota-us-senate-election-recount&playEvent) (explaining Minnesota's lack of recount procedures).

<sup>204</sup> See Dawn Villella, *Minn. Senate Race End Pushed Even Further Out*, NBC NEWS (Jan. 4, 2009, 5:49 PM), <https://www.nbcnews.com/id/wbna28495674> (Minnesota "state law prevents officials from issuing an election certificate until legal matters are resolved.").

<sup>205</sup> *In re Contest of General Election Held on Nov. 4, 2008*, 767 N.W.2d 453 (2009); see also Kraushaar & Raju, *supra* note 201 (discussing Coleman's arguments).

<sup>206</sup> See Kraushaar & Raju, *supra* note 201 (explaining the Minnesota Supreme Court's decision).

<sup>207</sup> Ken Rudin, *Minnesota Gov. Pawlenty Suggests Fraud in Franken-Coleman Election Result*, NPR (July 14, 2010, 4:38 PM), <https://www.npr.org/sections/politicaljunkie/2010/07/14/128519720/pawlenty-suggests-fraud-in-franken-coleman-election-result> (discussing how the governor believed those votes "flipped the election").

<sup>208</sup> See Opinion, *Mischief in Minnesota? Al Franken's Recount Isn't Funny*, WALL ST. J. (Nov. 12, 2008, 12:01 PM), <https://www.wsj.com/articles/SB122644940271419147> (outlining various allegations of voter fraud in the election).

Others pointed out that many of the recount votes that were found, most of which favored Franken, were from “liberal outposts” in Minnesota.<sup>209</sup> Republicans also called into question the ability of Secretary of State Mark Ritchie, a Democrat, to be unbiased in a recount where “miraculous discoveries” of new votes continuously favored Franken over Coleman.<sup>210</sup> While none of these allegations of fraud were necessarily true (the court did not find any of the evidence Coleman offered to be compelling),<sup>211</sup> the lack of comprehensive recount standards and procedures—and the various court cases needed to resolve those questions—made Republicans feel that the state was “changing the rules after the election [was] over.”<sup>212</sup>

This election, much like the 2000 Florida recount, shows how important it is for there to be comprehensive, accepted recount procedures in place before controversies happen. A more robust system of election monitoring could have alleviated concerns about “miraculous” ballot discoveries by enabling observers to confirm that ballots were indeed legitimate, and that the laws were followed. The lack of preexisting standards, both for observers and recounts, led to court cases and delays of over two months before the recount was even certified and the results challenged in the State Supreme Court.<sup>213</sup> This delay could have been avoided (or at least shortened), and voter confidence in the election could have been enhanced, if standards for election observation (and recounts, for that matter) were in place before the election happened.

*iv. The 2020 Presidential Election*

The 2020 election was unique for several reasons, not the least of which being that it took place during a pandemic.<sup>214</sup> Election day itself was generally successful; while there were hiccups, there were less problems than in the primaries earlier in the year.<sup>215</sup> International election observers from the

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> See *In re Sheehan v. Franken*, No. 62-CV-09-56, 2009 WL 981934, ¶¶ 69-70, 119, 125, 156 (Minn. D. Ct. Apr. 13, 2009); *In re Contest of General Election Held on Nov. 4, 2008*, 767 N.W.2d 453, 470-71 (2009).

<sup>212</sup> Opinion, *supra* note 208.

<sup>213</sup> Pat Doyle & Kevin Duchscherer, *Coleman Goes to Court Over Senate Recount*, STARTRIBUNE (Jan. 9, 2009, 8:26 PM), <https://www.startribune.com/coleman-goes-to-court-over-senate-recount/37148069/> (outlining the events of the months between the day of the election and the end of the controversy).

<sup>214</sup> See Nathaniel Persily & Charles Stewart III, *The 2020 Election Meltdown That Didn't Happen, Even Amid the Covid Pandemic*, WALL ST. J. (Nov. 6, 2020, 8:06 AM), <https://www.wsj.com/articles/the-2020-election-meltdown-that-didnt-happen-even-amid-the-covid-pandemic-11604667974> (explaining election officials' fears leading up to election day).

<sup>215</sup> See *id.* (comparing the issues on election day to the “meltdown” during the primaries).

OSCE reported that the election was “competitive and well managed” despite the difficulties from COVID-19.<sup>216</sup> In fact, despite the fears and uncertainty associated with the pandemic, the “number of people who voted—as a percentage of eligible voters—was greater than it has been since 1900.”<sup>217</sup> Although President Trump took an election night lead in several states, the country watched over the next few days as Vice President Biden gradually pulled ahead of Trump in key states and the Electoral College.<sup>218</sup>

Trump’s early lead, as well as Biden’s slow but seemingly inexorable increase in votes over the days following the election, stemmed in large part from Trump’s repeated attacks on mail-in voting.<sup>219</sup> A Pew Research poll found that Trump supporters were “more than twice as likely than Biden supporters to say they plan to cast their ballots in the presidential election in person on Election Day.”<sup>220</sup> As a result, Trump held the initial lead on Election Day in several states that counted their in-person Election Day votes before the early mail-in votes.<sup>221</sup> Over 100 million early votes were cast in the election,<sup>222</sup> however, and because the majority of them were cast for Biden instead of Trump,<sup>223</sup> Biden was able to surmount Trump’s lead in several key states. Most media outlets declared Biden the winner on Saturday, November 7.<sup>224</sup>

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<sup>216</sup> Org. for Sec. & Co-operation in Eur. Parliamentary Assembly [OSCEPA], *International Election Observation Mission, United States of America – General Elections, 3 November 2020* 1 (Nov. 4, 2020).

<sup>217</sup> Nathaniel Persily & Charles Stewart III, *supra* note 214.

<sup>218</sup> See Sabrina Siddiqui & Michael C. Bender, *Joe Biden Vows to Unite America as President*, WALL ST. J., [https://www.wsj.com/articles/joe-biden-wins-2020-presidential-election-ap-says-11604766914?mod=article\\_inline](https://www.wsj.com/articles/joe-biden-wins-2020-presidential-election-ap-says-11604766914?mod=article_inline) (last updated Nov. 7, 2020, 11:51 PM) (discussing how Biden gradually overcame Trump in key swing states such as Pennsylvania, Wisconsin, Michigan, and Georgia).

<sup>219</sup> See Miles Parks, *Ignoring FBI And Fellow Republicans, Trump Continues Assault On Mail-In Voting*, NPR (Aug. 28, 2020, 12:46 PM), <https://www.npr.org/2020/08/28/906676695/ignoring-fbi-and-fellow-republicans-trump-continues-assault-on-mail-in-voting> (outlining months of attacks Trump made on absentee and mail-in voting leading up to the 2020 election).

<sup>220</sup> *Deep Divisions in Views of the Election Process – and Whether It Will Be Clear Who Won*, PEW RES. CTR. (Oct. 14, 2020), <https://www.pewresearch.org/politics/2020/10/14/deep-divisions-in-views-of-the-election-process-and-whether-it-will-be-clear-who-won/>.

<sup>221</sup> See Aamer Madhani & Julie Watson, *Trump’s Attacks on Mail-In Ballots Rankle Some Military Vets*, AP (Nov. 7, 2020), <https://apnews.com/article/joe-biden-donald-trump-politics-virus-outbreak-elections-981baacc2b977f156a73d036e19e2d43> (Trump “held the advantage in many states among those who cast their ballots in person on Election Day.”).

<sup>222</sup> See Nathaniel Persily & Charles Stewart III, *supra* note 214 (discussing the vast number of people who voted by mail).

<sup>223</sup> See Madhani & Watson, *supra* note 221 (noting the disparity between Trump’s and Biden’s respective shares of early votes).

<sup>224</sup> See David Bauder, *After Waiting Game, Media Moves Swiftly to Call Biden Winner*, AP (Nov. 7, 2020), <https://apnews.com/article/media-calls-joe-biden-winner->

The Trump campaign, however, was determined to fight the results of the election. As his lead began to tighten in several states, Trump made his displeasure known by saying states should “STOP THE COUNT!,”<sup>225</sup> declaring that “[w]e have claimed, for Electoral Vote purposes, the Commonwealth of Pennsylvania (which won’t allow legal observers) the State of Georgia, and the State of North Carolina, each one of which has a BIG Trump lead,”<sup>226</sup> and signaled his intent to challenge the election’s results by explaining that “THE OBSERVERS WERE NOT ALLOWED INTO THE COUNTING ROOMS. I WON THE ELECTION, GOT 71,000,000 LEGAL VOTES. BAD THINGS HAPPENED WHICH OUR OBSERVERS WERE NOT ALLOWED TO SEE. NEVER HAPPENED BEFORE. MILLIONS OF MAIL-IN BALLOTS WERE SENT TO PEOPLE WHO NEVER ASKED FOR THEM!”<sup>227</sup> and that he had “WON THIS ELECTION, BY A LOT!”<sup>228</sup>

Trump’s legal challenges focused on three key factors: “alleged barriers to observing the counting of mail-in ballots, alleged votes cast by the deceased and alleged backdated ballots.”<sup>229</sup> His campaign’s early lawsuits in Georgia, Michigan, and Nevada were thrown out by judges in those states, but a suit to ensure poll watchers could “closely observe the vote-counting process” in Pennsylvania was successful at the intermediate appellate court level—though the Pennsylvania Supreme Court ruled against the Trump campaign.<sup>230</sup> Several of the suits have alleged mistakes in ballot counting and complained of a lack of transparency in the vote collection and tabulation process.<sup>231</sup>

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bee69f9d1d32e84d68e6164ea956e67a (discussing the decision by media outlets to call the race for Biden).

<sup>225</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 5, 2020, 9:12 AM), <https://twitter.com/realDonaldTrump/status/1324353932022480896>. President Trump’s tweets are no longer accessible on Twitter since his account was suspended, but websites such as <https://www.thetrumparchive.com/> have archived all of his tweets. For simplicity’s sake, I will cite his tweets as if they were still on Twitter.

<sup>226</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 4, 2020, 4:56 PM), <https://twitter.com/realDonaldTrump/status/1324108200141082624>.

<sup>227</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Nov 7, 2020, 4:53 PM), <https://twitter.com/realDonaldTrump/status/1325194709443080192>.

<sup>228</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 7, 2020, 10:36 AM), <https://twitter.com/realDonaldTrump/status/1325099845045071873>.

<sup>229</sup> Deanna Paul, Brent Kendall, & Corinne Ramey, *Election 2020: What Are the Trump Legal Claims?*, WALL ST. J., [https://www.wsj.com/articles/election-2020-what-are-the-trump-legal-claims-11604876612?st=40juyyj02158498&reflink=share\\_mobilewebshare](https://www.wsj.com/articles/election-2020-what-are-the-trump-legal-claims-11604876612?st=40juyyj02158498&reflink=share_mobilewebshare) (last updated Nov. 8, 2020, 10:32 PM).

<sup>230</sup> *See id.* (discussing the various suits filed by or on behalf of the Trump campaign); Kelly v. Commonwealth, 240 A.3d 1255 (Pa. 2020); *In re Canvassing Observation* 241 A.3d 339 (Pa. 2020).

<sup>231</sup> *See* Miles Parks, *Trump Election Lawsuits Have Mostly Failed. Here’s What They Tried*, NPR (Nov. 10, 2020, 8:00 AM), <https://www.npr.org/2020/11/10/933112418/the-trump->

Several individuals went further than merely filing court cases; President Trump, his legal team, and many of his supporters maintained bellicose rhetoric—based primarily on conjecture and poor evidence—asserting that the election was stolen.<sup>232</sup> These conspiracy theories fueled feelings of betrayal and anger among Trump’s supporters, culminating in a pro-Trump mob storming the Capitol on January 6, 2020.<sup>233</sup> It is likely that some of the claims of election fraud which fueled this attack could have been mitigated—or prevented—if international election observation standards had been implemented for the election. International IDEA’s standards make clear that election observers should have access to “observe election activities at all levels and at all times, including counting and tabulation[.]”<sup>234</sup> The Trump campaign’s lawsuits, and many popular conspiracy theories, address the *exact* issues that International IDEA’s standards seek to clarify.<sup>235</sup> If every state had the election observation rights that International IDEA’s standards prescribe, disputes about observer rights would have been simple: either observers were given the access required by federal law, or they were not. As it is, the status of observer rights is uncertain because every state (and in some cases individual counties or cities) have their own rules for observer rights, and that uncertainty is fertile ground for prolonged litigation and conspiracy theories.

Nationally standardized observational rights would simplify litigation and discourage conspiracy theories by reducing uncertainty surrounding the law, as well as by facilitating independent vote tabulation. PVTs, as discussed in Part I, are important tools that observers can use to independently verify the results of elections. If observers were granted robust access to elections, they could independently count votes and report results without waiting for official reports. This would provide more evidence of who had won the election, which would further reduce uncertainty and aid in preventing prolonged litigation. This reduction in uncertainty would also encourage confidence in the election outcome, which would decrease public support for prolonged litigation and increase pressure on the losing candidate to accept the results.

It is worth noting that the presence of international OSCE observers did not counteract the spread of disinformation and conspiracies surrounding

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campaign-has-had-almost-no-legal-success-this-month-heres-what-they-ve (discussing various lawsuits brought in Pennsylvania, Nevada, Michigan, and Georgia).

<sup>232</sup> See, e.g., *The Kraken: What is It and Why Has Trump's Ex-Lawyer Released It?*, BBC NEWS (Nov. 28, 2020), <https://www.bbc.com/news/election-us-2020-55090145> (discussing various conspiracy theories about the election, including one of the most prominent (and inventive) of them; a series of lawsuits dubbed “Releasing the Kraken”).

<sup>233</sup> See Mann & Restuccia, *At the U.S. Capitol*, *supra* note 15 (explaining the events leading up to the riot at the Capitol, how the rhetoric of President Trump and other Republicans led to the riot, and the damage the riot caused).

<sup>234</sup> INTERNATIONAL ELECTORAL STANDARDS, *supra* note 14, at 90.

<sup>235</sup> See Parks, *supra* note 219 (discussing how observer rights were the basis of suits in Michigan and Pennsylvania).

the election. It should also be noted, however, that there were fewer international observers in the country for this election than previous ones.<sup>236</sup> Furthermore, while international election observation is certainly useful, it is most useful when paired with robust, effective domestic election observation<sup>237</sup>—which does not exist in the United States. A large, standardized domestic observation system would have increased the efficacy of foreign international observers, which in turn would have increased the efficacy of the domestic observers.<sup>238</sup> The inability of the OSCE observer team to combat widespread disinformation shows that the United States needs a strong system of domestic election observation, not that election observation is ineffective.

#### IV. IMPLEMENTING INTERNATIONAL ELECTION MONITORING STANDARDS IN THE UNITED STATES

The United States' election monitoring system does not meet international standards because it does not have one system—it has numerous systems spanning over 10,000 separate jurisdictions.<sup>239</sup> The United States' heavily decentralized election system is a direct result of its federalist system of government which gives states the ability to set the “Times, Places, and Manner of holding Elections . . . .”<sup>240</sup> The Constitution does, however, grant Congress the ability to “at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.”<sup>241</sup> This Part argues that Congress should pass legislation codifying elements of international electoral standards for federal elections. This legislation should specifically create a national accreditation process for any citizen to become a nonpartisan observer for federal elections and should mandate certain observational rights that all states must grant to federal election observers. Various objections are then addressed and countered.

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<sup>236</sup> See Julian Borger, *US Election to Have Far Fewer International Observers Than Planned*, THE GUARDIAN (Sept. 29, 2020), <https://www.theguardian.com/us-news/2020/sep/28/us-election-observers-europe-latin-america> (explaining that the lesser number of observers stemmed from COVID-19 concerns and the lack of an invitation to Latin American observers).

<sup>237</sup> See BJORN LUND, *supra* note 13, at 234 (noting that international and domestic election observation are “mutually reinforcing”).

<sup>238</sup> See BJORN LUND, *supra* note 13, at 242-45 (outlining various ways in which domestic and international election observers benefit from coordination).

<sup>239</sup> See *Election Administration at State and Local Levels*, *supra* note 165 (discussing the United States' election administration apparatus); INTERNATIONAL ELECTORAL STANDARDS, *supra* note 14, at 90 (“The law should provide clear and precise provisions establishing the rights of observers[,]” which it does not do.).

<sup>240</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>241</sup> *Id.*

A. *Outline of Proposed Federal Legislation Implementing International Election Standards*

Congress has passed several important pieces of legislation affecting states' election systems, from the VRA to HAVA. Passing the legislation is not the issue (assuming, of course, that the political will to pass the legislation is present); the issue is determining what the bill should include. Since Congress would be merely implementing international election standards that have been in place since 2002 (and developed since the 1940's),<sup>242</sup> it would not have to come up with standards on its own; it can rely on proven standards that have worked in countries for decades.

International IDEA sets out exactly what laws governing election observers should include:

The law should provide clear and precise provisions establishing the rights of observers to inspect documents, attend meetings, observe election activities at all levels and at all times, including counting and tabulation, and to obtain relevant certified copies of documents at all levels. The law should also establish an expedited process for observers to obtain corrective relief when an election management body refuses to accredit an observer or observer group.

The legal framework must also be clear and precise concerning what a domestic observer may not do, for instance, interfere with voting, take a direct part in the voting or counting processes, or attempt to determine how a voter will vote or has voted. It should strike a balance between the rights of observers and the orderly administration of the election processes. But in no case should it hinder legitimate observation, "muzzle" observers, or prevent them from reporting or releasing information that has been obtained through their observations.<sup>243</sup>

It also has a checklist to evaluate countries' election observation legislation:

Does the legal framework allow accredited election observers to observe all election processes? Does the legal framework provide clear and objective criteria for the accreditation requirements for election observers as well as providing a well-defined role? Does the legal framework

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<sup>242</sup> See *infra* Part I for discussion of the creation of the international election observation scheme.

<sup>243</sup> INTERNATIONAL ELECTORAL STANDARDS, *supra* note 14, at 90.

provide clear criteria as to which governmental authority accredits election observers? Does the legal framework provide clear criteria and time-frames for applying for election accreditation? Does the legal framework provide clear criteria for the activities of election observers and as to when and under what circumstances election observer status can be revoked? Does the legal framework strike a balance between the activities of election observers and the orderly administration of elections? Are there any legal requirements that could be too onerous for election observers and serve to hinder legitimate observation?<sup>244</sup>

These questions outline exactly what legislation in the United States should include to implement international election observation standards for domestic observers. Implementing these robust standards would enable United States citizens to engage in the domestic observation practices—such as PVTs, election day checklists, and civic education drives—that have proven so effective worldwide.<sup>245</sup> As Part I discussed, nonpartisan domestic election observers have benefits over international observers and domestic partisan observers. However, since “virtually every [election monitoring organization] has faced . . . charges of partisanship from parties, governments, election officials, and even the international community,”<sup>246</sup> Congress could easily implement a national accreditation process for partisan observers if it feels that polarization is so strong that nonpartisan observers would not be trusted to truly be “nonpartisan.” Partisan observers from both parties would be able to co-observe polling locations to “balance out” any perceived bias of individual parties’ observers. Regardless of whether the observers are nonpartisan or partisan, Part I has shown that domestic observers would foster civic engagement with the political process, encourage public confidence in elections, and deter fraud.

Legislation that codified the International IDEA’s standards into federal law, implementing national standards for accreditation and access (that could either be administered by the states or the federal government), would be incredibly beneficial. It is worth mentioning, however, that it could also be beneficial for Congress to create a national Electoral Management Body (EMB) pursuant to International IDEA standards.<sup>247</sup> The EMB could combine the EAC and the FEC, as well as the election-related functions of the DOJ and other government agencies, into one agency. It could standardize election procedures throughout the United States, which would greatly reduce

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<sup>244</sup> INTERNATIONAL ELECTORAL STANDARDS, *supra* note 14, at 92.

<sup>245</sup> See *infra* Part I for a discussion of the efficacy of these practices.

<sup>246</sup> BJORN LUND, *supra* note 13, at 238.

<sup>247</sup> See INTERNATIONAL ELECTORAL STANDARDS, *supra* note 14, at 37-44 (outlining appropriate standards for the mission, structure, and composition of an EMB).

the issues related to the country's current hodgepodge of laws. A full argument for a national EMB, however, is outside the scope of this paper and is mentioned here only to underscore the reality that the United States can take concrete steps to strengthen its democracy—if the people have the will to do so.

Congress could easily pass robust, effective, and impactful legislation that would meaningfully improve federal elections in the United States by implementing international election standards as articulated by the International IDEA's electoral standards and guidelines. The priority should be a nationwide, standardized system of election observation accreditation and observational rights for federal elections. Accredited observers should be allowed to view all aspects of federal elections before, during, and after election day, including campaigning, voting, and vote tabulation. This would result in increased citizen engagement with democracy, increased confidence in elections, and prevention and deterrence of prevent and deter fraud.

### *B. Objections*

The effect that the proposed legislation would have on our election system would be unparalleled since at least HAVA, and potentially since the VRA. There are, of course, several arguments against Congress passing legislation this consequential. This section will address some of those arguments and demonstrate why they are unconvincing. The benefits of robust election observation far outweigh any of the costs, and potential difficulties—even those that seem insurmountable—are not so upon closer inspection.

#### *i. Election Observation is Ineffective*

One possible objection to passing legislation allowing for election observation for all federal elections is that election observation is ineffective. After all, if observers merely observe what happens, they by definition cannot intervene in the process. As Part II of this paper has shown, however, the United States has an election problem. Thankfully, Part I has given decades of evidence from numerous, diverse countries showing that election observation has effectively addressed similar election problems in the past. Domestic election observation is particularly effective because it involves citizens of the country holding the election.<sup>248</sup> “Beyond deterring fraud or helping to push out autocrats, election monitoring has empowered civic

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<sup>248</sup> See BJORN LUND, *supra* note 13, at 242 (arguing that domestic observers are more effective than international observers because they observe the election process longer, can mobilize more people, and know their society and culture better).

organizations in public affairs and transformed the way that many citizens view national politics.”<sup>249</sup>

Domestic election observation is an end unto itself; it aims to “enhance confidence of the public and contestants [which] increases the chances that all sides will accept the results of a reasonably acceptable process” by “[m]onitoring the preparation of electoral laws and regulations, voter registration, campaigning, voting, vote counting, and the resolution of election disputes.”<sup>250</sup> It also, however, is a means by which “democratic practices, values, and institutions” can be built, which in turn can “spur the development of civil society and democratization.”<sup>251</sup> History has proven, and Part I has shown, that domestic election observation is effective at accomplishing both of those purposes and improves elections in the countries where it is practiced.

ii. *Even if Election Observation is Effective, It Does Not Justify the Cost*

Another possible argument against implementing international standards of election observation is that the cost of doing so will be too high. Legislation that institutes federal standards for observer accreditation and rights will be one more thing the federal government must fund, either directly or via subsidies to the states to run the program. That cost, so the argument might go, would simply not be worth the benefit to the country.

The increasingly vitriolic polarization in the country, violent effects of conspiracy theories such as QAnon,<sup>252</sup> the international and national increase in dissatisfaction with democracy, and the court battles and general cloud of distrust and suspicion that hung over this past presidential election—much of which was caused by anger resulting from disputes over election observers’ access to vote tabulation—argues that we cannot afford *not* to implement some sort of national election observation scheme. Also, with a national budget of \$4.79 trillion in fiscal year 2020,<sup>253</sup> financing the accreditation process (and any elements of the observation process that required funding) would not be prohibitively expensive, especially given the benefits.

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<sup>249</sup> BJORN LUND, *supra* note 13, at 251.

<sup>250</sup> BJORN LUND, *supra* note 13, at 251.

<sup>251</sup> BJORN LUND, *supra* note 13, at 251.

<sup>252</sup> See Brett Forrest, *What Is QAnon? What We Know About the Conspiracy-Theory Group*, WALL ST. J., <https://www.wsj.com/articles/what-is-qanon-what-we-know-about-the-conspiracy-theory-11597694801> (last updated Feb. 4, 2021, 8:28 PM) (explaining the genesis of the popular conspiracy theory).

<sup>253</sup> See OFFICE OF MANAGEMENT AND BUDGET (OMB), A BUDGET FOR AMERICA’S FUTURE: BUDGET OF THE U.S. GOVERNMENT 1, 109 (2020) (outlining the United States’ budget).

Congress would not have to hold long legislative hearings, nor undertake costly legislative investigations into the efficacy of election observation, because election observation has proven its effectiveness over the decades of the 20th and 21st centuries. Congress would also not have to go far for expertise on election observation; the Carter Center and the National Democracy Institute, two global leaders in election observation, are based in the United States. These groups, in addition to International IDEA, the OSCE, and others, have already worked to create best practices for election observation; Congress would only need to put them into appropriate legislation. While that will undoubtedly be more difficult to do than to say, Congress is supposed to do difficult things, and they have passed much more complicated legislation in the past. Congress could also delegate much of the implementation of the scheme to the states by offering them money contingent upon their implementation of the new federal standards. This would save time and energy, and likely money as well, by incentivizing the states to do the harder work of implementing the new law.

*iii. Election Observation Violates Principles of Federalism*

Another argument that could be raised against the creation of a nationwide system of election observation for federal elections is that it goes against our nation's federalist system of government. The Constitution, after all, gives states the authority to regulate elections,<sup>254</sup> and (so the argument might go) it is good to protect the states from federal infringement into a traditionally state area of control. Furthermore, even though the Constitution gives Congress the ability to alter state election laws, maybe Congress should refrain from doing so.

The most obvious problem with that argument is that it is difficult to say that the federal government is improperly taking away the states' authority over elections if the Constitution explicitly gave the federal government the power to supersede the states' authority over elections.<sup>255</sup> The Elections Clause is not like the Commerce Clause, where the vague language has caused the Supreme Court to guard "traditional areas of state concern" from federal encroachment.<sup>256</sup> The language of Article I, section 4 is clear: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the

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<sup>254</sup> See U.S. CONST. art. I, § 4, cl. 1 (The Elections Clause).

<sup>255</sup> See *id.* (giving the federal government the ability to contravene states' laws concerning federal elections).

<sup>256</sup> See *United States v. Lopez*, 514 U.S. 549, 577, 580 (1995); *United States v. Morrison*, 529 U.S. 598, 608, 615 (2000) (explaining that allowing the federal government to extend authority to anything conceivably related to commerce would destroy the distinction between federal and state governments).

Places of chusing [sic] Senators.”<sup>257</sup> There is, therefore, no fear that Congress would be using a constitutional provision to expand its authority past the point that the Framers intended, because the Framers explicitly gave it this authority.

Since the Constitution so clearly gives Congress the ability to pass legislation that affects federal elections, the only argument against doing so is a normative one: Congress *may* do so, but it nonetheless *should not* do so, because it would be better for states to retain control over observers’ rights. The evidence and arguments in this paper serve as a response to that argument. It is true that this legislation would take power from the states in some sense, but the Constitution shows that authority over federal elections is something that the states always only ever had in a conditional sense; they retained such authority only to the extent that Congress chose not to exert its own, superior authority. It might be more accurate to say that by asserting more control over federal elections, the federal government is taking back power it had given to the states. As it stands, state governments can exert control over how the federal government—a distinct government from state governments—operates its own elections. Surely the burden on federalism that would arise from allowing one governmental entity to more comprehensively control its own elections would be light, and more than justified by the benefits that would follow from doing so.

iv. *Implementing International Election Observation Standards Threatens the United States’ Independence*

Another argument that could be raised against implementing international election observation standards is that the United States should not take legislative cues from the international community. The United States is perfectly capable of governing itself—according to this argument—and should not abdicate its governing authority by adopting international standards wholesale. However, legislation that implemented international standards to codify election observer rights for federal elections would have to pass Congress. While this paper has discussed the benefits of election observation, and has also pointed out the ease with which Congress could apply international standards in the United States, Congress would undoubtedly have some hearings, generate some legislative findings, and hold some hours of debate on what exactly should be included in the legislation. Legislation would likely not be a wholesale codification of pre-existing standards, but instead be informed by the unique history and needs of the United States. Thus, at no time would any foreign power have authority to make laws that would be binding on United States citizens.

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<sup>257</sup> U.S. CONST. art. I, § 4, cl. 1.

The United States could hypothetically sign onto a treaty that mandated its members provide certain rights for election observers, which would have the practical effect of altering domestic law based on international law.<sup>258</sup> That approach, however, is not suggested in this paper. Implementing international election observation standards in federal elections via federal legislation would not take any authority from the United States, it would only enable it to enjoy the benefits of robust election observation that other countries already enjoy.

v. *Implementing International Election Observation Standards in the United States Will Not Solve the Problem of Global Dissatisfaction with Democracy*

The final argument that this paper will address is that implementing international standards in the United States will do nothing to solve the global democracy crisis. Even if it helps increase satisfaction with democracy within the United States, the democracy crisis is global, and this does nothing to help global democracies. The United States, however, is still a leader in the international community. In fact, the creation and expansion of election observation was facilitated in large part by groups such as NDI and the Carter Center, which are based in the United States. If the international community sees the United States using election observation to improve its democracy, other countries may be inspired to do the same. Additionally, even if other countries' rates of satisfaction with democracy do not improve, the various benefits of democracy were discussed in the Introduction. The world is better off when democracies are numerous and healthy, and it can be nothing but beneficial to the international community for the United States to deepen its commitment to democracy.

## V. CONCLUSION

Democracy is indeed facing a global crisis, and there is no one cure. There are, however, steps we can take to improve democracies and increase satisfaction with democracy worldwide. One step that has proven effective at improving democracy, both from a technical standpoint and from a public satisfaction standpoint, is election observation. Due to the federalist nature of the United States' government, its election observation laws vary from state

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<sup>258</sup> Some election observation groups point to the *International Covenant on Civil and Political Rights*, which the United States has ratified, as the legal basis "for their election assessments and observation missions." So, one could argue that some form of observer rights are already legally mandated. However, even if this were true, this would not necessarily mean that the United States has a legal obligation to standardize observer rights. AVERY DAVIS-ROBERTS & DAVID J. CARROLL, *THE CARTER CTR., USING INTERNATIONAL LAW TO ASSESS ELECTIONS* 2, 4 (2010).

to state, and sometimes from county to county. This means that, while observers are allowed in some jurisdictions, they are not allowed in all of them. The international community, on the other hand, has robust standards of election observation that have been developed over the past seventy-plus years. Election observation done pursuant to these standards has helped countries such as Nepal and Tunisia, which are transitioning from dictatorships to democracies, to improve the quality and perception (both domestically and internationally) of their democracies.

To take advantage of these benefits, the United States should implement international standards by passing federal legislation—using the International IDEA’s election standards as guidelines—outlining a standard accreditation process and set of observational rights for domestic election observers. Domestic observers should be allowed full access to observe every facet of all federal elections. While domestic election observation is not a panacea that will solve all democracy’s problems, its ability to deter and catch fraud, increase public engagement with democracy, and foster public confidence in elections would go a long way towards rejuvenating democracy—both in the United States and worldwide.