

US ELECTION ADMINISTRATION – AN OUTLIER AMONG DEMOCRACIES

Edward R. McMahon¹

I. Introduction

A wide variety of election management models, all of which are supposed to ensure legitimate elections, exist throughout the democratic world. It is normal that countries will choose different ways of conducting elections, as countries are in a sense, like snowflakes – no two ones are identical. History, demography, culture, geography and a range of other factors clearly contribute to variations in how elections are administered. This is true more broadly regarding differences in how countries' democratic institutions are structured; for example, some countries have presidential systems while others have chosen parliamentary forms of government.

In many respects, however, the way in which elections are administered in the United States represents an outlier compared to other leading democratic nations. The United States differs in several important ways from almost all of its democratic peers. These variations carry with them serious implications, which can be identified through comparative analysis presented here.

We have chosen several of the most salient features of election administration for six other countries, all of which are ranked as “Free” or its equivalent by most current existing models assessing global levels of democracy: Canada, UK, France, Australia, India, and Germany. Apart from all being democracies, these countries were selected because: the US draws much of its political culture and tradition from the UK; Canada, Australia, Germany and India all have federal systems somewhat similar to that of the US; India is the largest democracy in the world; and France has its own long democratic tradition.

There are, of course, some significant differences between many of these countries in what elections are administered and for which offices. For example, Canada, Australia and India are parliamentary democracies, while the U.S., France and Germany to varying extents all center more power in the executive branch. In addition, the national election authorities are responsible for a range of elections, depending upon the country.

We have, however, identified for comparison three common issues which are central to question of how Electoral Management Bodies (EMBs) are constituted and managed. These include the following:

- The nature of the EMB oversight;
- the relationship between EMBs and the government, especially the method of appointment of EMB leadership; and
- EMB levels of centralization/decentralization.

These issues are important especially as a growing and evolving body of public international law related to elections and electoral and participatory rights underpins the concept that there are commonly accepted international norms and standards for genuine elections. For example,

¹ Adjunct Associate Professor of Political Science, University of Vermont and Vice Chair, Board of Directors, Election Reformers Network.

Article 21 of the 1948 Universal Declaration of Human Rights (UDHR), the bedrock of international human rights jurisprudence, highlights the role of elections in ensuring citizens' ability to participate in the public affairs of their country. This is further stated in the International Covenant on Civil and Political Rights and other international and regional treaties and instruments.

The evolving set of norms and standards are increasingly seen as prerequisites for membership in the global community of democracies. Governments and other actors, including civil society, have, over time, sought to flesh out how to make this happen, and to identify and define operational standards. The global process of establishing and promoting common legitimate electoral practices, however, has not been simple, quick or unambiguous. Instead, it has been uneven and evolving, as a growing number of governments and other actors struggle to identify and define operational standards. While there may be general consensus on overall standards, such as reflected in the 1990 Organization for Security and Cooperation in Europe Copenhagen Document, ambiguity remains over how they relate to actual contexts and country-specific situations.

Regarding election management, there are several commonly accepted international norms. Two of the most important are:

- Is there an independent and impartial electoral management body?
- Does the recruitment and appointment of electoral management body staff instill public confidence in the body?

In addition, in some countries, including the U.S., the following types of norm-related questions may also have particular relevance:

- Are the laws regulating elections equally enforced and not arbitrarily applied?
- How transparent is the electoral management body in its decision making?
- Are the principles of rule of law as regarding voter registration promoted?
- Is the voter list accurate and up to date?
- Is the right to vote guaranteed by law and subject only to reasonable and objective restrictions?

II. Comparative EMB Attributes

A. Methods of selecting EMB leadership. Who chooses the senior EMB management? Through which procedure(s)? Are there any requirements or criteria to be eligible for selection?

Election	Appointment – Government	Appointment – Legislature
United States	India, Australia, France	Canada, UK (de facto)

This fundamentally important theme focuses on how the leadership of the EMB is selected. In the United States 33 of the 50 state election heads are elected by voters in each state, with nine states having election boards nominated by the governor and confirmed by the state senates.

Five states have a chief election commissioner named by the governor. In three states the chief electoral officer (CEO) is named by the legislature.² In U.S. states in which CEOs are elected, anyone meeting general candidate eligibility requirements can run. In those states where CEOs are appointed, any qualifications are at the discretion of the governor or legislature, depending upon the method of appointment.

In Canada, the lead role of the national legislature is emphasized. Following consultation with the opposition parties in Parliament, the government forwards to Parliament the name of a nominee for the position of Chief Electoral Officer. Appointment takes place after a resolution of the House of Commons is passed. The CEO can only be removed via a joint resolution of both houses of parliament. The position of Chief Electoral Officer is a parliamentary -mandated position.

The Australian Governor General, on the recommendation of the government, appoints three commissioners who constitute the leadership of the Australian Election Commission (AEC), to seven-year terms. The chairperson of the AEC must be an active or retired judge of the Federal Court of Australia and is selected from a list of three names put forward by the Chief Justice of the Federal Court. A second position is the Electoral Commissioner, who is responsible for the day-to-day direction and management of the agency. This appointee must be the head of a public service agency or hold an equivalent position. Since 1984, the Australian Statistician has occupied this position, which is considered an advantage given the AEC's responsibility for boundary redistribution.³

The president of India appoints a Chief Election Commissioner and may also determine the number of, and appoint additional, commissioners with relevant expert knowledge. There is no legal requirement to consult with other parties on presidential selections. The prime minister and the government's Council of Ministers provide input into the selection process. Commissioners are typically selected from senior-ranking public servants with good reputations for neutrality and fairness. Since 1990 the Electoral Commission of India (ECI) has consisted of three commissioners.

The United Kingdom Electoral Commission members are appointed by the Queen, based on the recommendations of the parliamentary Speaker's Committee on the Electoral Commission. Commissioners cannot be elected members of any parliamentary body in the UK, or of any elected local government body. The PPERA originally set out strict limits on eligibility to serve on the EC in order to avoid even the appearance of partisanship. Commissioners could not serve on the EC if they were members of a political party. This principle was altered in the 2009 amendment, which enlarged the EC from 6 to 10 members, with the four new members representing the largest political parties (Conservative, Labor and Liberal Democrats) and one a nominee of the minor parties represented in the House of Commons. Members of parliament approved this change "on the grounds that the EC had not demonstrated sufficient knowledge of or attentiveness to the practicalities of the political process."⁴

² <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx>

³ Paul G. Thomas, Lorne R. Gibson; "A Comparative Assessment of Central Electoral Agencies", Elections Canada, Manitoba, 2014, 34.

⁴ *ibid*, 10.

In Germany the chief electoral officer (the Federal Returning Officer) and his deputy are appointed for an indefinite period by the Federal Minister of the Interior. The Federal Returning Officer is also president of the Federal Statistical Office. The Returning Office then appoints 8 other members of the Federal Election Commission, in addition to two judges from the Federal Administrative Court. Election commissions at the state (*Lande*) level are chosen by the *Lande* governments.

The French Ministry of the Interior has authority for administration of elections. The Minister of the Interior has ultimate responsibility for naming election personnel. The Constitutional Court, which oversees the electoral process, hears election complaints, and certifies the process, is composed of nine judges serving nine-year terms. Three are named by the President of the Republic, three by the Senate president and three by the National Assembly head.

B. EMB Oversight. To whom does the EMB leadership report?

Responsible to Legislature	Responsible to Executive Branch	Other
United Kingdom, Canada	Germany (Federal Ministry of the Interior), France (Ministry of the Interior and the Constitutional Council), India (with legislative input from ruling party or coalition), Australia (de facto)	United States

Closely linked but separate to the first theme is that of what entity, if any, is the EMB answerable? In the U.S there is no national level body which administers elections. Each state, usually through the office of the Secretary of State (SoS) or a board of elections/CEO, has responsibility for administering elections, usually with significant authority and responsibility existing at the county and/or local levels. A separate question is what ways does this oversight provide a check on potential partisan actions by the EMB?

At the national level, the Federal Election Commission (FEC) is designed to regulate election practices and ensure compliance with existing laws, rules and regulations. Its power is, however, extremely circumscribed. Its authority is limited to elections for federal positions, covers only certain aspects of the election process such as campaign financing, and even within this area has been negatively affected by constitutional proscriptions on its authority and political deadlocks.

The FEC is also currently hampered by limited funding and vacancies on the Commission. In 2002, Congress established the Elections Assistance Commission (EAC) to administer funds and assist state and local governments to improve voter participation and the quality of elections, but it too has been the subject of substantive criticisms.⁵

By contrast, Elections Canada is a body affiliated with the parliament and is thus answerable to Parliament rather than a government ministry. The Election Commissioner is, in fact, officially

⁵ See, for example, <https://www.politico.com/story/2019/06/15/federal-election-brian-newby-2020-1365841>.

an “Officer of the Parliament”. Elections Canada both administers federal elections and regulates compliance with various election-related laws. Its budget must be approved by the government but in practice and tradition the government does not substantively alter the budget request.

The Australian Election Commission (AEC) reports to Parliament through the Joint Standing Committee on Electoral Matters. It also reports to the government through the Special Minister of State, although the government has traditionally avoided intervening on how the AEC undertakes its work.

The Election Commission of India (ECI) is an autonomous constitutional authority. It was established under India’s Constitution in 1950. The ECI’s mandate includes preparing electoral rolls and exercising control over elections to the national Parliament, to the offices of the president and vice-president and to state legislatures.

The structure of elections management in the UK is governed by the Political Parties, Elections and Referendums Act of 2000 (PPERA), as amended in 2009. It provides for an autonomous election commission which is responsible to the parliament.

The German electoral process is supervised and managed by electoral bodies provided for by the Federal Elections Act. The electoral process is overseen by the Federal Returning Officer, who is appointed by the Federal Ministry of the Interior.⁶ The actual conduct of elections, however, is undertaken by groups appointed at the sub-national level. The principle is that the electoral committees and electoral boards formed from members of the electorate are to manage and control the election. According to the Federal Returning Officer website, these are “‘self-governing bodies’ of the electorate and may therefore be subject only to an electoral scrutiny procedure.”⁷

In France the Ministry of the Interior is responsible for the administration of elections, and is in turn responsible to the Prime Minister and President. The autonomous Constitutional Council oversees the process and adjudicates election-related complaints.

C. EMB levels of centralization/decentralization.

Highly decentralized/weak central authority	Significant sharing of power between central and sub-national authorities	Highly centralized
United States	Canada, Australia, Germany	France, UK

Federal electoral authorities have limited power and authority over electoral management. Article Four of the Constitution, for example, explicitly provides that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State.” The decentralized nature of the U.S. system is thus emphasized.

⁶ Electoral Management Design Revised Edition, International IDEA Stockholm, 2014, 380.

⁷ <https://www.bundeswahlleiter.de/en/ueber-uns/aufgaben.html>

Canada is a federal state. Elections Canada is an “independent nonpartisan agency of parliament” responsible for conducting elections at the federal level.⁸ This body is replicated at the provincial level, with each province having an EMB that is to be a nonpartisan agency of the provincial parliaments.

Australia is a federal state. In addition to the national Election Commission, the electoral officers for each of the six states and the Northern Territory are appointed by the Governor General. The AEC has a three-tier structure; a national office in Canberra, state and territory offices, and divisional office for each of the parliamentary constituencies. Federal parliamentary elections are conducted under the Commonwealth Electoral Act, first enacted in 1918 and subsequently amended. The Act codifies the main characteristic of the statute, namely its uniform and unitary nature: it applies to every federal election and implements identical procedures in each legislative district.

Germany is a federal state. The constitutions of the individual *Länder* provide the framework for shaping electoral legislation at Land level. Given that core electoral principles are observed (elections must be general, direct, free, equal and secret), each *Länder* has the power to determine its own election procedures and electoral systems.

India is a federal state. The ECI has a national secretariat with overall responsibility for conducting elections. Each state has its own electoral commission which reports to the national election commission. Each state commission is headed by a Chief Electoral Officer who is appointed by the ECI from a list of senior civil servants proposed by the concerned state government.

France has a highly centralized administrative tradition; this is reflected in the election administration structure which is an integral part of the Ministry of the Interior.

The UK is a traditionally centralized state. In recent years significant powers have devolved to constituent regions. The election commission maintains a centralized structure although three of the ten commissioners each have particular responsibility for Scotland, Wales and Northern Ireland, respectively. The commission also maintains offices in these regions.

III. Discussion

As previously noted, no two EMBs consist of identical attributes. The foreign models referred to here, however, tend to have more similarities amongst themselves than with the US structure of election administration – and this is true more broadly in terms of other leading democratic nations’ models not included here. The U.S. system is fundamentally different from its peers in two key ways. Even though the U.S. system can be considered government-administered (a general characteristic in common with several of the countries), it is unique in that it is characterized by extreme decentralization – meaning both that there is no real centralized authority and that there exist different systems and procedures amongst the 54 states and territories. Furthermore, additional differentiation can exist at the sub-state level, between

⁸ <https://www.elections.ca/content.aspx?section=abo&dir=role&document=index&lang=e>.

counties within states. The second key differentiating theme is the use of partisan elections to appoint CEOs/SOSs at the state level (and in many states for local level elections officials).

The reasons for these variations can largely be attributed to country-specific factors. Thus, there can be some understandable reasons why the US system does not exactly mirror that of any other country. The “frontier spirit” which is a key component of the United States political tradition favors individualism, local authority, and popular will over centralized and top-down governance processes. This is translated, for example, into the tradition of electing local judges, a practice which has few if any counterparts in other democratic systems. This tradition is key to understanding why the U.S. method of administering elections is so at variance with the other countries referenced here.

The fact that this tradition exists in the U.S., however, does not *ipso facto* mean that it achieves the best results, or is immutable. For much of the life of the country, whatever flaws may exist in this system were not perceived as being sufficient to challenge the legitimacy of the outcome at the time.⁹ In recent years, however, significant cracks have appeared in this bedrock. The reasons for this are complex, but likely include increasing income disparity; the negative aspects of the explosion of the technological revolution including social media; and a fraying of the community fabric as articulated in works such as Robert Putnam’s seminal book “Bowling Alone”. This has resulted in a coarsening of the political culture and decrease in political comity over the past half-century, and is reflected in the growth of hyper-partisanship now prevalent in the U.S. Thus, changes limiting or eliminating the partisan nature of election administration could be extremely important in heightening confidence and the legitimacy of elections.

A. Method of Selecting EMBs. Perhaps the most fundamental difference with other countries’ EMBs is that in the U.S., partisanship has been integrated into the system, rather than being held at arms’ length. As noted in a comparative elections study sponsored by Elections Canada, “put simply, the US has built partisanship into the governance arrangements, whereas the other countries have sought to distance electoral management from partisanship.”¹⁰

The US system is the only one in which chief election officers are not only elected, but on a partisan basis. In addition, there is no blanket rule prohibiting SoS’ from running for higher office while serving as SoS. It results in, at a minimum, the appearance if not the reality of a clear conflict of interest resulting from a candidate who is at the same time the electoral contest referee. This would thus appear to be a contrary to at least the spirit of core international election standard norms and practices. This is buttressed by research at the international level. One study of EMBs in over 70 countries determined that “political party involvement in EMB oversight, appointment of EMB chairs by partisan actors, less secure terms and rules allowing for party membership of EMB chairs, significantly undermine de facto EMB independence.”¹¹ In addition, one report concludes that concerning the weakness in terms of functionality and competencies of both FEC and the EAC in the U.S., “the dysfunctional status of the two

⁹ Notwithstanding events such as the 1876 and 1960 presidential elections in which credible arguments can be made that the will of the people was thwarted. In addition, in a broader sense, rules limiting participation by minorities and women did of course impact the legitimacy of the elections.

¹⁰ Thomas and Gibson, *op cit*, 10.

¹¹ Carolien van Ham and Holly Ann Garnett, “Building Impartial Electoral Management? Institutional Design, Independence and Electoral Integrity”, International Political Science Review, 2019, vol. 40(3) 329.

bipartisan commissions in the US provides a warning against allowing partisan political considerations to become central to the structure and procedure of an electoral commission.”¹²

An argument exists that in the U.S. system a check on partisan election administration exists in that elected CEOs must face the will of the voter and lose office. In reality, however, this mechanism is by no means foolproof, given the powers of incumbency and the to date relatively low profile and public understanding of the responsibilities of the SoS office. Thus, given the serious crisis of confidence that currently exists regarding the credibility of electoral processes in the US, the information provided here suggests that it would be useful to take a fresh look at how elections are administered in the U.S. The bottom line should be the existence of election management bodies and processes which enjoy the fullest confidence of the electorate as possible. The way that elections are administered in the US at this point leaves much to be desired.

A challenge is that an alternative to partisan election administration is having it run by the central government, as is the case in France. That can be problematic if sufficient safeguards are not in place to ensure that this method is not itself partisan. Most countries appear to address this issue by providing a major role for the judiciary in providing or selecting EMB leadership. Another method can be ensuring that collectively EMB leadership, even if not from the judiciary, is either partly or fully non-partisan, or sufficiently multi-partisan to provide an internal check.

We thus do not suggest that the answer needs to be found in a purely technical, nonpartisan EMB structure. One leading elections administration scholar in fact concludes that “formal independence of election management bodies is less important than their functional impartiality. Interactions between election institutions and political parties often promote evenhanded administration better than complete insulation from politics. Thus, formal independence may ultimately detract from functional impartiality.”¹³ The Elections Canada report suggests that “As the UK example indicates, a hybrid model can be created with a mixed membership of independent and politically aligned individuals and still be effectively insulated from political pressures, especially from the governing party.” More fundamentally, the report states that “As the examples of the other four countries with commissions reveal, with appropriate membership composition and procedures for balancing independence and professionalism with accountability and responsiveness, these EMBs can achieve a strong performance and inspire public confidence. The important consideration is to ensure that a commission is not open to undue political pressure.”¹⁴

Thus, what is critical is the context and political culture in which these institutions are functioning. To what extent does political “pressure” exist, whether external to the EMB or from within, and pervert the election administration process? We argue that in the U.S. the context has sufficiently shifted towards a more polarized and zero-sum approach that reforms in election administration management are sorely needed.

¹² *ibid*, 9

¹³ Daniel Tokaji, “Comparative Election Administration: A Legal Perspective on Electoral Institutions”, forthcoming in Comparative Election Law, Edward Elgar Publishing, 2020. Paper is currently available as Ohio State Public Law Working Paper No. 520, December 2019.

¹⁴ *ibid*, 66.

B. *EMB Oversight*. In the US system any oversight authority is found within the judicial system and the electorate in the sense that election authorities may be subject to legal complaints and rectificatory action may thus be determined by the courts. And, of course, the electorate may decide to replace an SoS through the ballot box. Other systems assign this role, to varying extents, to the legislature and, in some cases, the judiciary, including constitutional courts i.e., the equivalent of the U.S. Supreme Court.

In contrast to the U.S., most election administration systems rely, to greater or lesser extents, on government entities for personnel and logistical support. This may include staff from the Ministry of Interior or other line ministries. By contrast, the U.S. electoral administration system with its locus at the state level, avoids reliance on central authorities. In addition, the greater emphasis in the U.S. political culture on volunteerism and independence from government functions is a positive contributing factor.

Certainly, contexts in which greater reliance is placed on government support could adversely impact public perceptions of electoral legitimacy. This is where history, traditions of impartial civil service, existing institutional checks and balances, relatively low levels of political partisanship and even social and cultural characteristics can come into play and provide an “enabling environment” in which legitimate election administration can occur even if government-run. We note, for example, that the long-time democracy most closely affiliated with a highly centralized and significant role for the government authorities, France, has not been subject to substantive critiques regarding the legitimacy of its elections. In addition, there can be benefits in terms of efficiency and function accruing from greater levels of government support for election administration.

C. *Level of (De)Centralization*. The U.S. stands alone in the basic extent of decentralization of the election administration system. All other countries with federal systems examined here attach significantly greater powers to the central election authority. This U.S. approach most likely evolved out of the tug-of-war engaged in by the Constitution’s framers in terms of allocating powers between states and the new federal government, and a basic suspicion by many of the concerns about the dangers of centralized power, including that to administer elections. To this may be added current day concerns about the potential for bias being instituted into the system at a national level. We note again, however, that there are economies of scale and quality control that can be achieved by assigned more responsibility to elections administration at the national level, even if it is to only be to strengthen the FEC’s supervisory powers. These could have important positive effects in terms of increasing perceptions of the legitimacy of the process.

In conclusion, we do not suggest that the U.S. should adopt whole cloth one or another of the various models of elections administration adopted by other countries. Choices about how to increase confidence in the U.S. electoral process can and should be, however, informed by experiences elsewhere in countries with significant and successful experience in administering elections. A strong argument can be made that given the nature of the information revolution and rapidly evolving technology, in addition to heightened polarization and diminished confidence in U.S. elections, that the devolved system of elections being organized by 50 different states is antiquated, inefficient, and counterproductive. At a minimum much greater

emphasis needs to be placed on improving coordination, information-sharing and collective action capabilities of the various state election authorities.¹⁵

¹⁵ The Elections Assistance Commission was an attempt to move in this direction but, as with the FEC, it was not imbued with sufficient authority or funding to be effective.

Bibliography

Elections Canada.

<https://www.elections.ca/content.aspx?section=abo&dir=role&document=index&lang=e>.

Accessed March 2, 2020.

Federal Republic of Germany Federal Returning Officer website.

<https://www.bundeswahlleiter.de/e/ueber-uns/aufgaben>. Accessed February 27, 2020.

Geller, Eric. “Federal election official accused of undermining his own agency”

<https://www.politico.com/story/2019/06/15/federal-election-brian-newby-2020-1365841>.

Accessed February 27, 2020.

International IDEA. Electoral Management Design Revised Edition, Stockholm, 2014, 380.

National Conference of State and Local Levels. Election Administration at State and Local

Levels. <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx>. Accessed February 28, 2020.

Thomas, Paul G. and Gibson, Lorne R. “A Comparative Assessment of Central Electoral Agencies”, Elections Canada, Manitoba, 2014, 34.

Tokaji, Daniel. “Comparative Election Administration: A Legal Perspective on Electoral Institutions”, forthcoming in [Comparative Election Law](#), Edward Elgar Publishing, 2020. Paper is currently available as [Ohio State Public Law Working Paper No. 520, December 2019](#).

van Ham, Carolien and Garnett, Holly Ann. “Building Impartial Electoral Management? Institutional Design, Independence and Electoral Integrity”, [International Political Science Review](#), 2019, vol. 40(3) 329.