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HOW I CONVINCED THE FRENCH SUPREME COURT TO CANCEL THE FIRST FRENCH LEGISLATIVE ELECTIONS IN THE UNITED STATES

*Pierre Ciric**

INTRODUCTION

On February 15, 2013, French media widely reported that the French Supreme Court voided the election results for two, new legislative seats in the French Parliament created to represent French nationals living in the United States and in Israel. The French Supreme Court, called the *Conseil Constitutionnel* (High Court), is the court that, two months before, invalidated a 75% income tax rate recently elected French President, Francois Hollande, had introduced in Parliament. Later, and out of political rivalry, front-page news showed Parliament leaders calling this decision a “Terrible blow,” or a “Decision without legal basis!”¹

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¹ Pierre Ciric, *How the French Supreme Court Annulled the First French Legislative Elections in the United States* 3 (Bocconi Legal Papers, Working Paper No. 2013-02/IT), available at <http://bocconilegalpapers.org/wp-content/uploads/file/2013-Working-Papers/BLP-2013-02-IT.pdf> (citing Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4551AN, Feb. 15, 2013, J.O. 2837 (Fr.); Liza Fabbian, *PS Screams Injustice After the Annulment of the Election of Two Socialist MPs*, LE LAB POLITIQUE (Feb. 16, 2013), <http://lelab.europol.fr/t/le-ps-crue-a-l-injustice-apres-l->

How did we get there?

I. THE FRENCH POLITICAL SYSTEM

A. THE FIFTH REPUBLIC

The current governmental system in France, the “Fifth Republic,” was born out of a new constitution ordered by General Charles de Gaulle and drafted by Michel Debré, who then became de Gaulle’s Prime Minister.² Although this French Constitution creates a parliamentary system, it also provides the Executive Branch with stronger powers as compared to both prior French constitutional schemes, as well as other presidential regimes.³ Under the Fifth Republic’s constitution, the French President is elected by universal direct voting, for a maximum of two, consecutive five-year terms.⁴ The President also appoints a Prime Minister, who is then entrusted to form a government of Ministers, whose appointment must be approved by the President.⁵ Like the U.S. Congress, the French Legislative Branch includes two chambers, a lower house of Parliament, the *Assemblée Nationale* (National Assembly), and the *Sénat* (Senate).⁶ National Assembly members, called *Députés*, are elected by universal, direct voting within each geographic district every five years, while an electoral college, formed by local elected

invalidation-des-comptes-de-campagne-de-deux-deputees-socialistes-par-le-conseil-constitutionnel-7534; *Cancellation of Election and Disqualification*, French National Assembly (Feb. 17, 2013) (statement of Jean-Jacques Urvoas), available at http://www.youtube.com/watch?v=Ou2nbza9xq0&feature=player_embedded.

² See Jennifer Wnuk, *Gaullist Modernization France Had Some Seminal Roots in Much-Reviled Third Republic and Vichy – A Revisionist View*, EUR. INST. (2010), <http://www.europeaninstitute.org/August-September-2010/qfrances-new-deal-from-the-thirties-to-the-postwar-era-q-by-philip-nord.html> (reviewing PHILLIP NORD, *FRANCE’S NEW DEAL: FROM THE THIRTIES TO THE POSTWAR ERA* (2010)).

³ See Håkon Tranvåg, *The French Fifth Republic: Against All Odds*, POPULAR SOC. SCI. (Oct. 8, 2013), <http://www.popularsocialscience.com/2013/10/08/the-french-fifth-republic-against-all-odds/>.

⁴ 1958 CONST. Art. 6 (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constiution_anglais_juillet2008.pdf.

⁵ *Id.* at art. 8.

⁶ *Id.* at art. 24.

officials, elects senators.⁷ The electoral procedure for *Députés* is based on a two-round majority vote system, whereby the winning candidate may be elected after the first round if he wins an absolute majority of votes actually cast.⁸ Otherwise, a runoff between two candidates is needed to determine the winner.⁹ The National Assembly is comprised of 577 seats, and the *Députés* are elected for five-year terms.¹⁰ The entire National Assembly is renewed at the end of the five-year term.¹¹ On the other hand, the Senate is comprised of 348 seats,¹² and senators are elected for six years on a three-year cycle.¹³ Although the President cannot dissolve the Senate, the President can dissolve the National Assembly and call for new elections for all 577 of its seats.¹⁴

In France's multi-party system, it is often necessary for parties to form parliamentary coalitions to pass laws.¹⁵ The two, broad political coalitions include a set of right-wing parties, most importantly the *Union Pour un Mouvement Populaire* (UMP), or Union for a Popular Movement,¹⁶ which supported former President

⁷ See *id.*

⁸ *Questions About the Electoral System*, LÉGISLATIVES ASSEMBLÉE NATIONALE, <http://www.elections-legislatives.fr/en/system.asp> (last visited June 19, 2014).

⁹ See *id.*

¹⁰ 1958 CONST. Art. 24 (Fr.); see also *Role and Powers of the National Assembly*, ASSEMBLÉE NATIONALE, <http://www.assemblee-nationale.fr/english/index.asp#work> (last visited June 19, 2014).

¹¹ *Id.*

¹² 1958 CONST. Art. 24 (Fr.); see also *France Sénat (Senate)*, INTER-PARLIAMENTARY UNION, http://www.ipu.org/parline-e/reports/2114_A.htm (last updated June 19, 2014); *The National Assembly and the Senate – General Characteristics of the Parliament*, ASSEMBLÉE NATIONALE (Feb. 2011), http://www.assemblee-nationale.fr/english/synthetic_files/file-04.asp.

¹³ See *The Senatorial Elections*, SÉNAT, http://www.senat.fr/lng/en/senators/the_senatorial_elections.html (last visited June 20, 2014).

¹⁴ 1958 CONST. Art. 12 (Fr.).

¹⁵ See generally Lawrence C. Dodd, *Party Coalitions in Multiparty Parliaments: A Game-Theoretic Analysis*, 68 AM. POL. SCI. REV. 1093, 1102 (1974) (explaining that “the greater the fractionalization of the parliamentary party system, the greater the uncertainty of bargaining within parliament”).

¹⁶ See *France – Political Parties*, NORWEGIAN SOC. SCI. DATA SERVICES, http://www.nsd.uib.no/european_election_database/country/france/parties.html (last visited June 20, 2014).

Nicolas Sarkozy,¹⁷ and a set of left-wing parties dominated by the *Parti Socialiste* (PS), or Socialist Party,¹⁸ which supports current President François Hollande.¹⁹

B. THE HIGH COURT OF FRANCE

France's High Court is a twelve-justice court of original jurisdiction that has the power to hear constitutional challenges to bills by senators or assembly members and constitutional challenges to laws by private plaintiffs.²⁰ The High Court is also the court of original jurisdiction for all legal challenges to the French presidential and legislative elections.²¹ In addition to the High Court, the judicial system includes not one, but four courts at its highest level. The *Cour de Cassation*, or Court of Cassation, is the court of last resort for both civil and criminal matters.²² The *Conseil d'État*, or Council of State, is the court of final appeal for administrative decisions, the legal adviser to the Executive Branch, the court for all elections other than the presidential and legislative elections, and it issues advisory opinions that are mandatory authority.²³ The *Cour des Comptes*, or National Court of Audits, conducts financial and legislative audits of

¹⁷ See, e.g., Jacey Fortin, *As France's UMP Party Crumbles, Sarkozy Saves the Day*, INT'L BUS. TIMES (Nov. 28, 2012, 7:55 AM), <http://www.ibtimes.com/frances-ump-party-crumbles-sarkozy-saves-day-904330>.

¹⁸ See *France – Political Parties*, *supra* note 16.

¹⁹ Corinne Deloy, *Outgoing President Nicolas Sarkozy and Socialist François Hollande are Running Neck and Neck for Victory in the First Round of the French Presidential Election*, ROBERT SCHUMAN FOUND. (Mar. 26, 2012), <http://www.robert-schuman.eu/en/eem/1295-outgoing-president-nicolas-sarkozy-and-socialist-francois-hollande-are-running-neck-and-neck-f-or-victory-in-the-first-round-of-the-french-presidential-election>.

²⁰ See 1958 CONST. Art. 56 (Fr.); see also *The Members*, CONSEIL CONSTITUTIONNEL, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/the-members/the-members.25737.html> (last visited May 29, 2014).

²¹ See 1958 CONST. Art. 58–60 (Fr.).

²² See E. AGUILERA THE FRENCH LEGAL SYSTEM 5 (Ministry of Justice ed., 2012), available at http://www.justice.gouv.fr/art_pix/french_legal_system.pdf.

²³ See *The Conseil d'État*, ASSEMBLÉE NATIONALE (Feb. 2011), http://www.assemblee-nationale.fr/english/synthetic_files/file-07.asp.

national-level public institutions and tries cases involving the misuse of public funds.²⁴

In 2008,²⁵ the French Parliament, “with only one vote over the 3/5 majority requirement for constitutional amendments, adopted sweeping constitutional changes, including mandatory representation in Parliament of French nationals living abroad.”²⁶ When the former President, Nicolas Sarkozy became President in 2007, he immediately implemented one of his campaign promises: a sweeping set of constitutional amendments geared towards increasing the role of parliament and strengthening individual rights vis-à-vis judicial and administrative institutions.²⁷ In July 2008, a constitutional bill²⁸ was introduced that modified more than half of the constitutional articles following the issuance of a parliamentary report on October 27, 2007.²⁹ These sweeping changes included modifications to the

²⁴ See AGUILERA, *supra* note 22, at 6–7 (noting that “the administrative courts of appeal rule over appeals against decisions delivered by the administrative courts . . . except for specific cases over which the Council of State has jurisdiction”).

²⁵ See generally *Changes to the Constitution in 2008*, ABOUT-FRANCE.COM, <http://about-france.com/constitutional-changes-2008.htm> (last visited June 20, 2014) (noting the significant changes made to the French Constitution in 2008).

²⁶ Ciric, *supra* note 1, at 3 (citing 1958 CONST. Art. 24 (Fr.)).

²⁷ See Peter Allen, *Nicolas Sarkozy Plans Constitutional Reforms*, TELEGRAPH (Oct. 30, 2007, 12:01 AM), <http://www.telegraph.co.uk/news/worldnews/1567848/Nicolas-Sarkozy-plans-constitutional-reforms.html>.

²⁸ Loi 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République [Law 2008-724 of July 23, 2008 on the Modernization of the Institutions of the Fifth Republic], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 25, 2008, p. 11890.

²⁹ Senate Report, *La Révision Constitutionnelle du 23 Juillet 2008*, available at <http://www.senat.fr/dossier-legislatif/pj107-365.html>; *Pouvoirs Publics: Modernisation des Institutions de la Ve République*, ASSEMBLÉE NATIONALE, http://www.assemblee-nationale.fr/13/dossiers/reforme_5eme.as.p#PDT (last visited June 20, 2014) (providing a summary of the main provisions of the Senate Report); see also *France Backs Constitution Reform*, BBC, <http://news.bbc.co.uk/2/hi/europe/7517505.stm> (last updated July 21, 2008). See generally Martin A. Rogoff, *Fifty Years of Constitutional Evolution in France: The 2008 Amendments and Beyond*, 6 JUS POLITICUM (2011) (discussing the effects of the 2008 constitutional changes), available at <http://www.juspoliticum.com/Fifty-years-of-constitutional.391.html>; reprinted in *THE FINANCIAL CRISIS OF 2008: FRENCH AND AMERICAN RESPONSES I* (Martin Rogoff, ed. 2011).

following: the parliamentary procedure, the control function of the legislative branch over the executive branch, the responsibilities of representatives, and rights of minority parties.³⁰ The bill passed³¹ the French Congress—which aggregated all the votes from all 577 members of the National Assembly and the 348 votes of the Senate—by a single-vote majority over the three-fifths requirement needed for constitutional amendments.³² The more spectacular constitutional changes included the ability for the President to speak before Parliament (similar to the U.S. State of the Union address requirement) and the limitation for the President to two five-year terms.³³ A much less spectacular change was the mandatory parliamentary representation of French nationals living abroad.³⁴ Parliament introduced this change specifically to take into account a significant growth in the population of French citizens living abroad, which exceeded 2.2 million in 2013.³⁵ “This amendment led to the creation of eleven legislative districts, with the first district including Canada and the United States.”³⁶

The new representation through National Assembly members represented an additional voice to the French diaspora, which the French political system represented through other channels. Prior to 2008, French nationals living overseas were represented by two bodies. First, French nationals registered in French consulates around the world could elect representatives in a special assembly

³⁰ Senate Report, *supra* note 29. See generally Rugoff, *supra* note 29, at 30–60 (providing a detailed explanation of the effects to the four main focus points of the 2008 amendments).

³¹ The vote was 539 Yea and 357 Nay, and 538 votes (the necessary three-fifths majority) were needed for the bill to pass. See 1958 CONST. Art. 89 (Fr.); *France Backs Constitution Reform*, *supra* note 29.

³² *France Backs Constitution Reform*, *supra* note 29.

³³ 1958 CONST. Art. 6, 18.

³⁴ *Id.* at art. 24.

³⁵ See JEAN-LUC WARSMANN, RAPPORT FAIT AU NOM DE LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LEGISLATION ET DE L'ADMINISTRATION GENERALE DE LA REPUBLIQUE SUR LE PROJET DE LOI CONSTITUTIONNELLE (No. 820) DE MODERNISATION DES INSTITUTIONS DE LA VI^È REPUBLIQUE N° 892, 198–206 (2008), available at <http://www.assemblee-nationale.fr/13/rapports/r0892.asp>; Jean-Christophe Dumont & Georges Lemaître, *Counting Immigrants and Expatriates in OECD Countries: A New Perspective* (Org. for Econ. Cooperation & Dev., Working Paper), available at <http://www.oecd.org/migration/mig/33868740.pdf>.

³⁶ Ciric, *supra* note 1, at 3.

initially called the *Conseil Supérieur des Français de l'Étranger* (CSFE), or High Council of French Nationals Living Abroad.³⁷ This special assembly was created under the Fourth Republic in 1948³⁸ to “provide advice on the issues and plans impacting French nationals living abroad or the expansion of France overseas” to be submitted to the Minister of Foreign Affairs.³⁹ A number of subsequent statutes expanded the CSFE’s role to include: the election of its delegates by direct, universal voting;⁴⁰ a change of its name to the Assembly of French Citizens Abroad (AFE);⁴¹ and requiring that bills impacting French nationals living abroad be introduced in the Senate first.⁴²

Second, the 1958 Fifth Republic Constitution provided that French nationals living abroad would be represented at the Senate for the first time.⁴³ This representation went from three to six,⁴⁴ then to

³⁷ See *As Many as 10 Million Ballots Could be Cast from Abroad*, CTR. FOR VOTING & DEMOCRACY, <http://archive.fairvote.org/righttovote/prnewswei.htm> (last updated Dec. 10, 2009).

³⁸ Décret 48-1090 du 7 juillet 1948 instituant un conseil supérieur des Français de l'étranger auprès du ministère des affaires étrangères [Decree 48-1090 of July 7, 1948 establishing a High Council of French Nationals Living Abroad with the Minister of Foreign Affairs], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 9, 1948, p. 6645.

³⁹ *Id.*

⁴⁰ Loi 82-471 du 7 juin 1982 relative au Conseil Supérieur des Français de l'étranger [Law 82-471 of June 7, 1982 on the High Council of French Nationals Living Abroad], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 8, 1982, p. 1810.

⁴¹ Loi 90-384 du 10 mai 1990 modifiant la loi 82-471 due 7 juin 1982 relative au Conseil supérieur des Français de l'étranger [Law of May 10, 1990 amending law no. 82-471 of June 7, 1982 on the High Council of French Nationals Living Abroad], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 11, 1990, p. 5616.

⁴² Loi constitutionnelle 2003-276 due 28 mars 2003 relative à l'organisation décentralisée de la République [Constitutional Law 2003-276 of Mar. 28, 2003 on the Decentralized Organization of the Republic], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 29, 2003, p. 5568; see Maurice Braud, *New Phase of Administrative Decentralisation Launched*, EIRONLINE, <http://www.eurofou.nd.europa.eu/eiro/2003/04/feature/fr0304107f.htm> (last updated June 22, 2003).

⁴³ 1958 CONST. Art. 24 (Fr.).

⁴⁴ *La Représentation des Français Etablis Hors de France*, ESPACE EXPATRIÉS: LE SENAT AU SERVICE DES FRANÇAIS DE L'ÉTRANGER,

twelve, senators⁴⁵ to represent the significant increase of French nationals expatriated throughout Europe. Historically, their role was not only representing the various French communities living overseas, but also promoting both the economic and cultural French presence in the world in addition to the French language.⁴⁶

II. THE LEGAL CHALLENGE TO THE ELECTION RESULTS

A. DEVELOPMENTS OF THE VOTING PROCEDURES

The eleven legislative districts created by the 2008 constitutional amendments attempt to assemble the various French communities living overseas into predetermined geographic zones with equal numbers of potential voters.⁴⁷ This worldwide electoral map led to the creation of very heterogeneous geographic areas. For example, the First District includes both the United States and Canada; the Fourth District only covers Belgium and Holland; and the Eleventh District includes all Asian countries along with Russia.⁴⁸

http://www.senat.fr/expatries/documentation/representation_des_francais_eta_blis_hors_de_france.html#c579759 (last visited June 21, 2014).

⁴⁵ Loi organique 83-499 du 17 juin 1983 de relative à la représentation au Sénat des Français établis hors de France [Organic Law 83-499 of June 17, 1983 on Senate Representation of French Citizens Outside France], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 18, 1983, p. 1842.

⁴⁶ *Rôle des Membres de L'Assemblée des Français de L'étranger*, ASSEMBLEE DES FRANÇAIS DE L'ETRANGER (2010), <http://www.assemblee-afe.fr/-role-.html>.

⁴⁷ Ordonnance 2009-935 du 29 juillet 2009 de portant répartition des sièges et délimitation des circonscriptions pour l'élection des députés [Ordinance 2009-935 of July 29, 2009 on the Allocation of Seats and Delimitation of Constituencies for the Election of Deputies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 31, 2009, p. 12752.

⁴⁸ *Les 11 Circonscriptions Électorales Pour L'Élection des Députés Représentant Les Français Établis Hors de France*, FRANCE-DIPLOMATIE (Nov. 10, 2009), http://www.diplomatie.gouv.fr/fr/IMG/pdf/Les_11_circonscriptions_electorales_pour_l_election_des_deputes_representant_les_Francais_etablis_hors_de_France.pdf.

Traditionally, the French election system only provides for in-person or proxy voting election procedures.⁴⁹ However, the legislation provided special voting procedures, including internet-based voting and mail-in voting for the overseas legislative districts, “due to potential, poor turnout and the geographic dispersion of French nationals.”⁵⁰ These special procedures were implemented in response to a historically low turnout for AFE-related elections driven by large distances between French nationals’ residences and their consulates, as well as general interest with homeland political issues.⁵¹ In fact, when the legislature banned the mail-in voting procedure in 1973 due to voter fraud concerns, it still allowed for overseas voting because of its popularity.⁵² This particular procedure garnered up to 30% of the casted ballots in prior AFE-elections.⁵³ However, the legal standard of an acceptable mail-in vote was significantly uncertain since the High Court issued its last jurisprudence defining this standard in 1968.⁵⁴

The addition of these new procedures led to a complex voting calendar based on a two-round voting process allowing internet,

⁴⁹ See *Questions About Voting*, LEGISLATIVES ASSEMBLEE NATIONALE, <http://www.elections-legislatives.fr/en/voting.asp> (last visited June 21, 2014).

⁵⁰ Ciric, *supra* note 1.

⁵¹ See Joëlle Garriaud-Maylam, *L'apparente désaffection des Français établis hors de France pour le processus démocratique*, LA REVUE POLITIQUE ET PARLEMENTAIRE 196, 201, http://www.joellegarriaud.com/wp-content/uploads/2011/08/RevuePolitiqueParlementaire2002_VoteFE.pdf (last visited June 20, 2014).

⁵² *Proposition de Loi Organique tendant à rétablir le vote par correspondance pour l'élection du Président de la République et les référendums pour les Français exerçant leur droit de vote à l'étranger* [Proposed Organic Law Tending to Restore the Vote by Correspondance for the Election of the President of the Republic and Referendums for Their Right to Vote Overseas], Sénat Session Ordinaire de 2006 – 2007 [Senate Regular Session of 2006–2007] (2007) (présentée par [presented by] Mmes Joëlle Garriaud-Maylam, Paulette Brisepierre, MM. Jean-Pierre Cantegrit, Christian Cointat, Louis Duvernois, André Ferrand et Michel Guerry), available at <http://www.senat.fr/leg/pp106-335.html>.

⁵³ CE, June 16, 2010, Rec. Lebon 329196; Pleadings [hereinafter Pleadings] (on file with author).

⁵⁴ Conseil constitutionnel [CC] [Constitutional Court] decision No. 68–559AN, Dec. 19, 1968, J.O. 12191 (Fr.).

mail-in, proxy, and in-person voting procedures.⁵⁵ For instance, these procedures relied on an unreliable voter registration roster, which was extracted from the consular registry of French nationals.⁵⁶ Upon arriving at their destination, expatriates were advised to immediately register with the French Consulate. However, many expatriates do not complete this step, either because of personal oversight or more often because of privacy concerns. The Consular Roster is then frozen as of December 31 before the election year.⁵⁷ Election laws authorize the Roster to be made available electronically either to the candidates who are actually running or to the French political parties.⁵⁸ These complex procedures, along with the calendar, led to numerous issues. For instance, most voters did not receive mail-in voting materials in time, and internet access issues prevented many voters from accessing the internet ballot box.⁵⁹ These issues probably prevented a significant number of individuals among the 156,000 qualifying voters in the district from casting ballots.⁶⁰

⁵⁵ See generally André Blais & Peter John Loewen, *The French Electoral System and its Effects*, 32 W. EUR. POL. 345 (2009) (providing a detailed analysis of the two-round voting system). In fact, these procedures had already co-existed since 2003 during AFE-elections and were substantially similar to those used during the 2012 legislative elections.

⁵⁶ See Written Question to the Assemblée des Français de l'Étranger from M. Jean-Yves LECONTE, elected member in the Vienne électoral district, 2012 Elections and Electoral List, Assemblée des Français de l'Étranger, available at <http://www.assemblee-afe.fr/elections-2012-et-liste-electorale.html> (noting “an increasing number of discrepancies between the electoral list and the individuals registered on the consular registry”); see also CE, May 29, 2009, Rec. Lebon 321867 (holding the elections should be cancelled because of “intentional manipulations [involving the electoral registry] which impacted the sincerity in the election results, given the very small gap between the two leading lists”).

⁵⁷ Ray Clancy, *Expats Must Register to Vote in French 2014 Elections Before Deadline*, EXPATFORUM.COM (Dec. 24, 2013), <http://www.expatform.com/france/expats-must-register-to-vote-in-french-2014-elections-before-deadline.html>.

⁵⁸ CODE ELECTORAL [C. ELECTORAL] art. R16 (Fr.).

⁵⁹ CE, June 16, 2010, Rec. Lebon 329196.

⁶⁰ See *ELECTIONS—Qui est responsable de ce fiasco général?*, LE PETIT J., (June 4, 2012), <http://www.lepetitjournal.com/expat-politique/2013-01-14-14-01-21/francais-de-l-etranger/110005-elections-qui-est-responsable-de-ce-fiasco-general>; Alexis Buisson, *Vote par Internet: y'a comme un bug*,

B. DIFFICULTIES IN FILING A CHALLENGE

French litigators filing a legislative election challenge before the High Court face numerous legal issues. First, there is the issue of whether they have standing to sue, but it is easy to overcome that issue since both “voters or candidates have statutory standing to sue either the winning candidate or the government, which organized the elections.”⁶¹ Therefore, in an overseas election, any of the candidates or anyone present in the Consular Roster as of December 31 would have standing to file an election challenge.

Second, the statute of limitations on filing legislative election challenges “runs very quickly, since such an action must be filed within ten days of the results’ publication.”⁶² This simple rule raises significant challenges, such as what constitutes a relevant publication of election results. Unlike the American system, the statutory framework does not clarify whether only final round results are involved, or whether first round and second round results may be subject to a challenge. Moreover, the publication rules for the first and second round of voting are quite different. First round results are usually published via the *Journal Officiel de la République Française* (JO), the official Gazette of France, and that publication date is what triggers the ten-day deadline.⁶³ However, the JO typically does not publish the second round results since it is the institutional body subject to the elections, which publishes its own results.⁶⁴ Third, no clear legal rule exists as to whether the publication of new National Assembly members on the *Assemblée Nationale* internet site constitutes a publication. In fact, many election challenges are dismissed for failure to involve the proper election result, which

FRENCH MORNING (May 26, 2012), <http://frenchmorning.com/vote-par-inter-net-ya-comme-un-bug/>.

⁶¹ Ciric, *supra* note 1.

⁶² *Id.*; see also ELECTORAL COMM’N, CHALLENGING ELECTIONS IN THE UK ¶ 72, at 21 (Sept. 2012), available at http://www.electoralcommission.org.uk/_data/assets/pdf_file/0010/150499/Challenging-elections-in-the-UK.pdf.

⁶³ Ordonnance 58-1067 du 9 novembre 1958 constituant un institutionnel loi sur la constitution conseil [Ordinance 58-1067 of Nov. 9, 1958 Constituting an Institutional Act on the Constitutional Council], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 9, 1958, p. 10129.

⁶⁴ Pleadings, *supra* note 53.

usually questions whether the complaint includes first round results, but not second round results.⁶⁵

“Third, the pleadings must raise all relevant causes of action, but no rule exists as to the particularity of those claims.”⁶⁶ While the U.S. Federal court system specifies the level of specificity allegations must set forth,⁶⁷ the High Court jurisprudence is silent as to how specific these allegations need to be in order to satisfy its pleading standard.⁶⁸

“Fourth, the challenger must bring to the court enough evidence to substantiate his claims,”⁶⁹ but the level of acceptable evidence relating to the quantity of votes is quite unclear. For instance, should a plaintiff be expected to submit an affidavit from each voter who has had an issue with mail-in or internet procedures? Thankfully, evidence burden-shifting rules exist where: (1) the government is the only party with access to all the evidence; (2) a material mistake was made by the government; (3) the injury suffered by the voter was certain and real; (4) the government’s breach impacts a fundamentally protected interest (here the right to vote); and (5) causation between the government’s faulty actions and the prejudice suffered by the voter has been established.⁷⁰ Litigants’ challenges in the elections often use the burden-shifting rules since many causes of action easily fit in this standard as long as the procedural rules implemented by the government contribute to the voting issues.

⁶⁵ See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4544AN, July 13, 2012, J.O. 11734 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4546AN, July 13, 2012, J.O. 11735 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4547AN, July 13, 2012, J.O. 11735 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4548AN, July 13, 2012, J.O. 11735 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4607AN, July 13, 2012, J.O. 11735 (Fr.).

⁶⁶ Ciric, *supra* note 1.

⁶⁷ See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

⁶⁸ Ciric, *supra* note 1.

⁶⁹ *Id.*

⁷⁰ Establishing that evidence controlled by the “deficient functioning of the public service may engage the liability of the Government.” CE, Mar. 7, 1980, p. 507; see also CE, Jan. 9, 1980, Rec. Lebon 06403; CE, Dec. 9, 1988, Rec. Lebon 65087; CE, Mar. 1, 1989, Rec. Lebon 61406; CE, June 14, 1991, Rec. Lebon 65459; CE, Feb. 19, 1992, Rec. Lebon 73403.

“Fifth, the standard for voiding an election in the French system is quite clear since a judge will void election results ‘only if the difference between the last selected candidate and the first unselected candidate is such that proven irregularities are likely to have affected the ‘sincerity’ [validity] of the vote.’”⁷¹ Therefore, if a procedural rule in the voting operations affects an excessive number of votes between a selected candidate and an unselected candidate, the High Court will usually void the election and order a new election to take place.

C. CHALLENGING THE 2012 ELECTION

In a two-round legislative election held in the First Legislative District⁷² in May and June 2012, Frederic Lefebvre, the conservative candidate and ally of Nicolas Sarkozy, lost to the socialist candidate, Corinne Narassiguin, with a margin of 2,341 votes.⁷³ To cancel this result, the High Court would have to accept that the faulty government procedures would have affected more than 2,341 votes. In the case at hand, given the significant voting operation issues, I filed a multi-claim lawsuit challenging the 2012 election for the First Legislative District.

There were several procedural hurdles that I needed to overcome. First, there was the issue of standing, which was resolved since I was a registered voter on the December 2011 Consular Roster. Next, I had to address the ten-day statute of limitations rule by filing two challenges: I filed the first challenge within ten days of the JO publication of the first-round results, and I filed the second challenge at a local electoral commission meeting⁷⁴ within ten days of the proclamation results. Since the first round JO publication took place on June 15, the statute of limitations ran out on June 16.

⁷¹ Ciric, *supra* note 1, at 4 (quoting CE, Aug. 10, 2007, Rec. Lebon 294889).

⁷² The first district is comprised of the United States and Canada. Ciric, *supra* note 1.

⁷³ See Shira Schoenberg, *French Parliament Candidate Frederic Lefebvre Campaigns in Boston to Represent Overseas Citizens*, MASS LIVE (May 23, 2013, 3:35 PM), http://www.masslive.com/politics/index.ssf/2013/05/french_parliamentary_candidate.html.

⁷⁴ Closed-door meetings took place in each consulate on the Monday following the second round voting day.

Additionally, since the second round results were subject to a proclamation on June 18, the statute of limitations ran out on June 28. Next, I satisfied the minimum pleadings rule by defining the legal claims I raised with a short statement describing the legal theories upon which I relied.⁷⁵ For instance, the complaint included a claim that technical difficulties with the internet vote violated a legal principle upholding continuous and uninterrupted voting access during a specified time period. To satisfy the pleading requirements without the benefit of future discovery, the complaint included a one-sentence statement summarizing the claim and the legal principle which was violated. Then, the complaint included several factual allegations, supported by exhibits, demonstrating the technical difficulties experienced by voters. Here, the plaintiff has the burden to produce sufficient evidence to support the factual allegations. Then, the complaint included the legal principle, along with the required cited jurisprudence, establishing the legal rule which was violated. Then, the factual allegations were applied to the cited legal principle, in order to demonstrate that the violation impacted a number of votes in excess of the gap in votes between the selected candidates.

Finally, I satisfied the evidentiary burden requirement by using actual evidence gathered by a few voters on Election Day as well as deductive evidence, such as district comparisons of voting estimates from prior elections with current voting statistics. For example, since so few mail-in votes were counted in this election, the comparison of the mail-in votes in prior elections and this election supported the allegations that the mail-in procedures were not satisfied.

In the complaint filed against the first round results several claims were made regarding voting procedures. Under French law, and contrary to election rules in the United States,⁷⁶ no public poll may be published, and no political campaigning may take place less

⁷⁵ However, I did not know the level of particularity required because pleading statements are usually supported by further discovery in the U.S. while pleading statements in France are written without first going through an American-like discovery process.

⁷⁶ See *Election Law: An Overview*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/elections> (last visited June 20, 2014). See generally U.S. CONST. art. II, § 1.

than twenty-four hours before voting day.⁷⁷ Otherwise, the High Court may void an election.⁷⁸ This rule aims to prevent abuses in the marketing of political campaigns where the marketing of a candidate on the eve of an election day could illicitly influence the outcome of the election. For instance, if a candidate were to order, and publish, a poll within hours of the election, the opposing candidates would have no time to order their own poll, or respond to the publication of the other candidate's poll. Therefore, the rule created a buffer period during which attacks and counter-attacks from candidates are barred. If the High Court were to cancel an election on this basis, a judge would take into account the nature of the communication media, the opportunity for the opponent to respond, and the numerical impact on voters. In the 2012 election dispute, a French online magazine published a poll on May 22, less than twenty-four hours before the start of the internet voting on May 23, claiming that the winning candidate, Corinne Narassiguin (PS), was far ahead of the other candidates.⁷⁹ Consequently, this gave rise to the issue of what constitutes a voting day. During the internet-voting period from May 23 to May 29, a total of 20,088 electronic votes were cast, which averages out to approximately 3,115 votes per day.⁸⁰ Thus, the filed complaint alleged that this publication illicitly influenced the estimated 3,115 voters who cast their votes on May 23, 2012.⁸¹

⁷⁷ Article 11, Law # 77-808, July 19, 1977, prohibits polling publication the day before the "voting day." Loi 77-808 du 19 Juillet 1977 relative à la publication et à la diffusion de certains sondages d'opinion [Law 77-808 of July 19, 1977 relating to the publication and dissemination of some opinion polls], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 20, 1977, p. 3837. Prior jurisprudence allowed for voiding of a local election because of a poll publication. CE, Jan. 25, 1984, Elections municipales d'Étampes, Rec. Lebon 14.

⁷⁸ Loi 77-808 du 19 Juillet 1977 relative à la publication et à la diffusion de certains sondages d'opinion [Law 77-808 of July 19, 1977 relating to the publication and dissemination of some opinion polls], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 20, 1977, p. 3837.

⁷⁹ Yves Alavo, *LÉGISLATIVES: Sondage exclusive, Corinne Narassiguin (PS) en tête du premier tour* [LEGISLATIVE: Exclusive Survey, Corinne Narassiguin (PS) Won the First Round], BLEU DE LUNE ET SOLEIL D'OR (May 22, 2012), <http://yalavo.wordpress.com/2012/05/22/sondage-excl-usif-corinne-narassiguin-ps-en-tete-du-premier-tour/>.

⁸⁰ Pleadings, *supra* note 53.

⁸¹ *Id.*

French law also prevents the distribution of political advertising materials—such as pamphlets, emails, and advertisements—and campaign communications within twenty-four hours of Election Day.⁸² This rule prevents a candidate from being unable to respond to a political argument made in a campaign communication document. If someone makes a claim alleging that a late political argument has occurred, a judge must consider the impact of the violation within the general context of the political campaign in addition to the realistic opportunities for the other candidates to respond to the violating candidate's late communication. For instance, a judge will not cancel the election if: the controversy involved had already been discussed prior to the expiration of the deadline;⁸³ the political communication is a response to a prior controversy raised by another candidate;⁸⁴ the communication had too small of an impact;⁸⁵ or the communication did not have a major impact in the difference in votes between the two contestants.⁸⁶ In the case at hand, the winning candidate, Corinne Narassiguin (PS), sent email messages to voters until the night before the vote.⁸⁷ Here, the deadline for a moratorium in political campaign was to start at midnight on Friday, June 1, 2012.⁸⁸ Later that evening, the entire electoral list in the U.S. and Canada, which consisted of about 156,645 names,⁸⁹ received an email from Corinne Narassiguin raising important issues and controversies involving education and taxes, including a statement committing to the absence of new taxes.⁹⁰ The

⁸² CODE ELECTORAL [C. ELECTORAL] art. R26 (Fr.).

⁸³ Conseil constitutionnel [CC] [Constitutional Court] decision No. 97-2236DC, Nov. 18, 1997, J.O. 16885 (Fr.).

⁸⁴ Conseil constitutionnel [CC] [Constitutional Court] decision No. 97-2182DC, Oct. 14, 1997, J.O. 15112 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 97-2356DC, Jan. 23, 1997, J.O. 17232 (Fr.).

⁸⁵ Conseil constitutionnel [CC] [Constitutional Court] decision No. 97-2226DC, Jan. 29 1998, J.O. 1635 (Fr.).

⁸⁶ Conseil constitutionnel [CC] [Constitutional Court] decision No. 97-21193DC, Jan. 9, 1998, J.O. 585 (Fr.).

⁸⁷ Compl. (on file with author).

⁸⁸ *Id.*

⁸⁹ Marc Billion, *Election Results*, (June 6, 2012, 5:20AM), <http://marcbillon.com/news.php?lng=fr&pg=&id=2>.

⁹⁰ Pleadings, *supra* note 53.

complaint argued that the other candidates did not have an opportunity to respond to the tax issue.⁹¹

Another allegation in the complaint focused on delays in distributing a legal notice presenting the program of each candidate. In the French election system, if candidates choose to do so, they may communicate to their political program via a type of legal notice called a *circulaire*.⁹² If the candidate decides to issue a *circulaire*, he or she must comply with a number of legal rules of which failure to do so may trigger a cancellation of the election. Although the candidate is responsible for producing the *circulaire*, the government is responsible for distributing the notice in a timely fashion.⁹³ Most specifically, any delays in distribution of the notice that would create significant information inequality are grounds for the cancellation of election results.⁹⁴ Here, the voting calendar made it impossible for voters in most zones outside of Europe to receive mail before internet voting had already begun. The complaint alleged that, for the United States, the notice was not received until after May 26, 2012, by which time more than 9,000 voters had already filed electronic ballots.⁹⁵ The remaining voters, whether voting via the Internet or in person, were assumed to have based their decision on the notice, creating an information inequality amongst voters that created a basis for an election cancellation.⁹⁶

Next, the government rejected a high number of mail-in votes as a result of a signature verification procedure that voters who had pre-registered to submit mail-in votes had already held to be too demanding.⁹⁷ When the mail-in voting procedure was in place prior to 1973, the High Court had already held that a mail-in vote was presumed to be valid unless express evidence of fraud was found.⁹⁸ In the 2012 election dispute, various consulates in the U.S. and

⁹¹ *Id.*

⁹² Mandatory distribution of candidate program description. CODE ELECTORAL [C. ELECTORAL] art. R29 (Fr.).

⁹³ *Id.*, at art. R34–39.

⁹⁴ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4597/4626AN, Feb. 15, 2013, J.O. 2840 (Fr.).

⁹⁵ Pleadings, *supra* note 53.

⁹⁶ See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4597/4626AN, Feb. 15, 2013, J.O. 2840 (Fr.).

⁹⁷ CE, Jan. 16, 2010, Rec. Lebon 329196.

⁹⁸ Conseil constitutionnel [CC] [Constitutional Court] decision No. 68–559AN, Dec. 19, 1968, J.O. 12191 (Fr.).

Canada cancelled more than 900 votes because voters had not included a sample of their signature in the voting envelope for the government agents to verify.⁹⁹ Such procedures have previously provided grounds for election cancellation in similar situations.¹⁰⁰

Next, because a significant number of voters who requested the mail-in vote never received the material before the deadline, the lawsuit claimed this was similar to an “early closing of voting station” claim in which a material violation of voting hours could justify the cancellation of an election because a voting station must be held *continuously* open until the last published time.¹⁰¹ Premature closing of voting booths renders an election void if the number of rejected voters is unevenly spread between the winning and losing candidates.¹⁰²

Additionally, a significant number of voters, estimated to exceed 60%, could not access the internet ballot box during the internet-voting period.¹⁰³ Similar to the reasoning behind the “early closing of voting station” rule, inaccessibility of the internet ballot box further supports cancellation of the election because the government knew that certain Java-dependent configurations had failed during prior tests.¹⁰⁴ In February 2012, the French government published the results of a test showing that only 30% of users were able to access the internet ballot box.¹⁰⁵ It was later confirmed that this issue resulted primarily from a Java version that blocked Mac users because it was incompatible with the internet ballot box software.¹⁰⁶ The legal issue then became whether the French government had an obligation to warn voters who had selected the internet voting option about the proper configuration to use.

After the June 29 deadline to file challenges had passed, a total of 109 lawsuits were submitted regarding 577 seats, which is a

⁹⁹ Pleadings, *supra* note 53.

¹⁰⁰ CE, June 16, 2010, Rec. Lebon 329196.

¹⁰¹ Pleadings, *supra* note 53.

¹⁰² CE, Mar. 17, 1972, Rec. Lebon 81948 (Fr.).

¹⁰³ Pleadings, *supra* note 53.

¹⁰⁴ *Id.*

¹⁰⁵ Luc Allain, *VOTE PAR INTERNET – Edouard Courtial présente les résultats du test*, LE PETIT J. (Feb. 13, 2012), <http://www.lepetitjournal.com/expat-politique/2013-01-14-14-01-21/francais-de-l-etranger/95446-vote-pari-nternet-e-courtial-presente-les-resultats-des-tests>.

¹⁰⁶ *ELECTIONS*, *supra* note 60; Buisson, *supra* note 60.

significantly higher rate than in U.S. elections.¹⁰⁷ Immediately following the 2012 U.S. federal elections, no case was filed to directly challenge the U.S. House of Representatives election results.¹⁰⁸ Most grounds for legal challenges filed in the U.S. system after a candidate is elected must rise to such a systemic level of violations of voters' rights that all such challenges were dismissed.¹⁰⁹ However, recounts or modifications of result tabulations are the usual remedy. In European systems, if the challenger is able to prove essentially that the effect of certain irregularities or illicit acts influenced the outcome of the election, ultimately vitiating the overall elective process, there must be another election.¹¹⁰ Therefore, a recount in such a context is never a proper remedy.¹¹¹

¹⁰⁷ See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-26 ELEC, July 11, 2013.

¹⁰⁸ Although no challenge was filed directly after the 2012 elections to the U.S. House of Representatives, election-related litigation generated a record-breaking 298 cases throughout 2012, including federal, state and local election cases. However, these lawsuits typically involved voting procedures prior to voting day and none of them involved a specific elected representative. Such lawsuits involved challenges against section 5 of the Voting Rights Act, state registration procedures, such as so-called Voter ID statutes, state registration and computerization efforts, including registration purging procedures, state redistricting efforts, ballot nomination procedures, the setting of election dates, absentee and early voting procedures, poll hours and places procedures, and provisional ballot procedures,. See Rick Hasen, Election Litigation Rates Remain High, More than Double the Period Before Bush v. Gore ELECTION L. BLOG (Jan. 7, 2013, 7:55 AM), <http://electionlawblog.org/?p=45951>; see also Federal Judicial Center, Case Studies in Emergency Election Litigation, available at [http://www.fjc.gov/public/pdf.nsf/lookup/EE-Abstracts.pdf/\\$file/EEAbstracts.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/EE-Abstracts.pdf/$file/EEAbstracts.pdf).

¹⁰⁹ See, e.g., Texas Democratic Party v. Dallas County (Jorge A. Solis, N.D. Tex. 3:08-cv-2117) Rios v. Blackwell (James G. Carr, N.D. Ohio 3:04-cv-7724), Ohio ex rel. Yost v. National Voting Rights Inst. (Edmund A. Sargus, S.D. Ohio 2:04-cv-1139), and Delaware County Prosecuting Attorney v. National Voting Rights Inst. (James G. Carr, N.D. Ohio 3:05-cv-7286) Rosselló v. Calderón (3:04-cv-2251) and Suárez Jimenez v. Comisión Estatal de Elecciones (3:04-cv-2288) (Daniel R. Domínguez, D.P.R.)

¹¹⁰ COUNCIL OF EUROPE, SCI. & TECH. OF DEM. NO. 46, THE CANCELLATION OF ELECTION RESULTS 14, 18 (2010).

¹¹¹ *Id.* at 19.

III. THE ACTUAL TRIAL

As a default rule, the High Court assumes that the trial is a bench trial on briefs only, not involving hearings, witnesses, or juries; and it is entitled to unilaterally dismiss actions prior to any discovery, without the parties having any opportunity to be heard.¹¹² The usual grounds for such dismissals are late filings, the absence of any legal claim or sustainable legal theory, the lack of evidence, or the challenge of the first round without challenging the second round.¹¹³ By July 13, the High Court had dismissed fifty-three of the 109 actions, or almost half of the actions filed.

Then, on November 28, 2012, I, the plaintiff in the action, received a notice from the High Court announcing that the government had rejected Narassiguin's campaign finance account submissions.¹¹⁴ The High Court also asked me to prosecute the case on campaign finance grounds on behalf of the High Court.¹¹⁵ What was all of this about? This development shifted the litigation to campaign finance rules. In the U.S., state-campaign finance regulation schemes are based on different methods, such as disclosure-based rules, contribution limit-based rules, and public financing rules.¹¹⁶ The public financing rules can rely on a matching fund system in which the candidate raises private money, which is then matched by taxpayer dollars up to a maximum dollar amount.¹¹⁷

¹¹² Ordonnance 58-1067 du 9 novembre 1958 constituant un institutionnel loi sur la constitution conseil [Ordonance 58-1067 of Nov. 9, 1958 Constituting an Institutional Act on the Constitutional Council], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], p. 10129.

¹¹³ See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4546AN, July 17, 2012, J.O. 11735 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4544AN, July 13, 2012, J.O. 11734 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4547AN, July 13, 2012, J.O. 11735 (Fr.).

¹¹⁴ Pleadings, *supra* note 53.

¹¹⁵ *Id.*

¹¹⁶ See generally *The FEC and the Federal Campaign Finance Law*, FED. ELECTION COMM'N (Jan. 2013), <http://www.fec.gov/pages/brochures/fecfeca.shtml> (explaining the federal campaign finance laws in the U.S.).

¹¹⁷ See, e.g., Ciara Torres-Spelliscy, Counsel, Brennan Ctr. for Justice at N.Y.U. Sch. of Law, Statement at the N.Y. Senate Elections Comm. (June, 3 2009), available at <http://www.brennancenter.org/sites/default/files/legacy/>

Alternatively, the rules can rely on a fully publicly-funded system in which the candidate raises some funds and is then eligible for a public grant covering all campaign costs in exchange for strict spending limits.¹¹⁸ On the other hand, the French-campaign finance regulation scheme is essentially a hybrid system, allowing candidates to gather small donations throughout the election campaign while also providing a block grant to the candidate to cover most of the expenses through a reimbursement and audit procedure.¹¹⁹

In 1990, the French government created a special commission to ensure that political campaign spending was tightly controlled and subject to strict cap rules, under the condition that the government reimbursed such political spending.¹²⁰ The basic principle of a government-sponsored campaign finance system was that political parties and candidates were reimbursed for the spending related to political campaigning. However, candidates and parties had to subject themselves to significant controls and disclosure rules. Such rules included: the complete ban on institutional political contributions, whether they originate from public or private entities;¹²¹ restrictions on disclosures made by incumbent candidates to ensure equality of information for all candidates; the complete ban on the use of commercial media for political campaigning; and the use of a single manager for all financial management of the campaign, including the acknowledgment of the receipt of funds or the actual expenditure, which completely excludes any interaction between the campaign account and the candidate.¹²² Most

Democracy/Ciara%20Torres-Spelliscy%20Testimony%20NY%20Senate%20Elections%20June%203,%202009.pdf.

¹¹⁸ See, e.g., *id.*

¹¹⁹ See *Campaign Finance: France*, LIBRARY CONG., <http://www.loc.gov/law/help/campaign-finance/france.php> (last updated Feb. 28, 2014).

¹²⁰ Presentation, La Commission Nationale des Comptes de Campagne et des Financements Politiques [France's National Commission for Campaign Accounts and Political Financing], 1 (2010) [hereinafter CNCCFP], available at http://www.cnccfp.fr/presse/kit/cnccfp_fr.pdf (*translation available at* http://www.cnccfp.fr/presse/kit/cnccfp_en.pdf).

¹²¹ CODE ÉLECTORAL [C. ELECTORAL] art. L52-8 (Fr.).

¹²² The hiring of a campaign financial manager (*mandataire*) is a requirement for the political candidate to be properly registered on the ballot. See Article 12, Loi organique 2011-410 du 14 avril 2011 sur l'élection des députés et des sénateurs [Organic Law 2011-412 of Apr. 14, 2011 on the Election of Deputies and Senators], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 14, 2011, p. 6826.

importantly, candidates are banned from spending beyond certain expense caps defined by statute.¹²³ Beyond the strict cap rules, this system assumed that complex rules always segregated the political candidate from any contact with campaign funds. Failure to comply with these rules would trigger a number of potential severe consequences, such as criminal prosecution, ineligibility for subsequent elections, and most importantly, the refusal to reimburse campaign expenses.¹²⁴

CODE ÉLECTORAL [C. ÉLECTORAL] art. L154 (Fr.). *See also Section No. 15: the campaign financing scheme of the French political system: parties, electoral campaigns*, FRENCH NAT'L ASSEMBLY, available at http://www.assamblee-nationale.fr/connaissance/fiches_synthese/septembre2012/fiche_15.a.sp (stating that “[e]very candidate is required to appoint a campaign financial manager who may be, as appropriate, an individual – with financial power of attorney - or a not for profit entity dedicated to campaign finance incorporated under the 1901 not-for-profit law. This manager is singlehandedly empowered to collect funds to finance campaign expenses and to ensure that campaign expenses are properly paid (therefore ensuring that candidates are prohibited to handle any campaign finance fund directly”). *See also* CODE ÉLECTORAL [C. ÉLECTORAL] art. L330-7 (Fr.) (“once designated, the campaign financial manager must open a single bank account to be located in France:).

¹²³ *Id.* at art. L52-11.

¹²⁴ As a general rule regarding failures to comply with electoral campaign rules, the key article is CODE ÉLECTORAL [C. ÉLECTORAL] art. LO136-1 (Fr.), which provides for two options:

- If the candidate did not file his campaign finance accounting report according to the procedural requirements provided in CODE ÉLECTORAL [C. ÉLECTORAL] art. L52-12 (Fr.), or if the campaign finance accounting report shows that expenses exceeded a prescribed regulatory cap, the judge may rule that the candidate's election is cancelled and that the candidate is “ineligible” and may not run again for a period of at least 1 year;
- If the candidate is found to show an intent to defraud the campaign finance accounting rules, or if he fails to comply with those rules in a particular grave manner, the judge must rule that the candidate is ineligible and may not run again for a period of at least 1 year.

New elections must then be held within a three month period. CODE ÉLECTORAL [C. ÉLECTORAL] art. LO178 (Fr.). *See also* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2007-4359AN, March 27, 2008 (Fr.) (holding the candidate ineligible because expenses paid

This process is quite extensive since all candidates receiving more than 1% of the votes must file a campaign accounting submission, which the special government commission fully audits,¹²⁵ in a fashion similar to an adverse administrative proceeding. The submission must include a complete and detailed breakdown of all campaign expenses, including specific receipt forms for expenses, gifts, and financial contributions, as well as a complete reconciliation of these fund movements with corresponding bank statements. Furthermore, a CPA must both audit and certify the overall submission.¹²⁶

These proceedings have two potential outcomes: either the commission approves the reimbursement application, with or without changes, and within the guidelines of the expense cap rules; or the commission denies the reimbursement application, which could lead to civil or criminal judicial proceedings.¹²⁷ Here, the commission decided to reject the campaign finance application and initiated civil proceedings.¹²⁸ Since I had already filed a civil proceeding against that candidate, the High Court consolidated both cases, transforming

directly by the candidate took place before the campaign financial manager was designated); CE, Aug. 10, 2005, Elections cantonales de Château Renard, CE, Jul. 27, 2005, Elections cantonales de Châtenay-Malabry (holding that the candidate was declared ineligible because the campaign finance accounting report was not approved and signed by the campaign financial manager); CE, Jan. 04, 2005, élections européennes 2004, Nord Ouest.

See also CE, Oct. 2, 1996, No. 176967, Elections municipales Annemasse, CNCCFP c/Borel (holding that friends of the candidate had provided services to the political campaign without charge); CE, Jun. 17, 2005 (holding that late payments and receipts leading to a campaign finance accounting report in deficit justified that the candidate was declared ineligible); Conseil constitutionnel [CC] [Constitutional Court] decision No. 93/1632AN, Dec. 4, 1993 (Fr.) (holding that a campaign finance accounting report submitted without back receipts is declared not filed, triggering the ineligibility of the filer).

¹²⁵ CNCCFP, *supra* note 120, at 4.

¹²⁶ CODE ELECTORAL [C. ELECTORAL] art. L52-8 (Fr.); CNCCFP, *supra* note 120, at 2–4.

¹²⁷ CODE ELECTORAL [C. ELECTORAL] art. L52-15 (Fr.); *id.* at art. LO136-

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¹²⁸ Pleadings, *supra* note 53.

the civil plaintiff into the de facto prosecutor of the campaign finance case.¹²⁹

On November 29, 2012, the day after I received the notification from the High Court that it had consolidated the civil and campaign finance proceedings,¹³⁰ the campaign finance jurisprudence was in turmoil. Prior to April 2011, the government commission's rejection of a campaign accounting submission was sufficient to trigger the automatic ineligibility of the violator and the cancellation of the election results. However, this rule was reversed in 2011 by statute,¹³¹ and by jurisprudence,¹³² so that a rejection by the government commission would require a court to void the election only when it found an "intent to defraud or...a particularly serious breach of campaign finance rules."¹³³ The only case relying on this new standard came down on November 29, 2012: whereby the High Court excused the candidate who had violated a ban on institutional gifts.¹³⁴ Although the commission had rejected the candidate's campaign accounting, the High Court refused to cancel the election because of "the lack of influence [of the violation] on the election due to the gap in votes between the winning and losing candidate."¹³⁵ After this decision, the legal community was widely confused as to how to predict the impact of the new legal standard defined as the "intent to defraud or...a particularly serious breach of campaign finance rules"¹³⁶ on the cases before the High Court.

The plaintiff in the consolidated case discovered documents pertaining to the candidate's campaign finances, including those related to the adverse administrative proceedings with the

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Loi organique 2011-410 du 14 avril 2011 sur l'élection des députés et des sénateurs [Organic Law 2011-412 of Apr. 14, 2011 on the Election of Deputies and Senators], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 14, 2011, p. 6826.

¹³² CE Sect., Jan. 28, 2011, Rec. Lebon 338033; CE Sect., Jan. 28, 2011, Rec. Lebon 338199.

¹³³ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-667DC, May 16, 2013, J.O. 8258 (Fr.).

¹³⁴ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4603AN, Nov. 29, 2012, J.O. 18906 (Fr.).

¹³⁵ *Id.*

¹³⁶ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-667DC, May 16, 2013, J.O. 8258 (Fr.).

commission, between November 2012 and February 2013.¹³⁷ In addition to the documents regarding the administrative proceedings, the plaintiff also discovered documents pertaining to the continuous use of two bank accounts—one in France and one in the U.S.—for all activities during the campaign.¹³⁸ “One of the critical rules of campaign finance laws is the use of a single account for all campaign receipts and expenses, which must be based in France.”¹³⁹ An additional requirement is that a single person, called the Legal Representative, or *Mandataire* of the candidate, must control all account movements.¹⁴⁰

Whether the existence of multiple bank accounts in overseas districts was in contravention of the fundamental rule in French campaign finance that unique bank accounts would be evidence of the “intent to defraud or... a particularly serious breach”¹⁴¹ standard remained unclear. The plaintiff’s legal strategy was to fully brief one single issue: whether a continuous violation of the single account rule constituted evidence of “intent to defraud or...a particularly serious breach of campaign finance rules”¹⁴² after the 2011 changes.¹⁴³ During a February 7, 2013, hearing before the High Court in connection with this case, the parties only debated the issue of the campaign accounting violation and never referred to the other voting operations claims.¹⁴⁴

In the briefs exchanged the day before the hearing, two important factual points came to the Court’s attention. First, the use of the two accounts, one in France and one in the U.S., directly managed by the candidate, which directly violated the *mandataire* rule that had been ongoing for a full year prior to Election Day, indicating that the candidate did not modify her behavior throughout the campaign.¹⁴⁵ Second, the financial statements did not show any expenses related to seventeen campaign trips made across the U.S. during the campaign, but the discovery indicated that the candidate

¹³⁷ Pleadings, *supra* note 53; Ciric, *supra* note 1, at 7.

¹³⁸ Ciric, *supra* note 1, at 7.

¹³⁹ *Id.* (citing Code ÉLECTORAL [C. ÉLECTORAL] art. L52-6 (Fr.)).

¹⁴⁰ *Id.*

¹⁴¹ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-667DC, May 16, 2013, J.O. 8258 (Fr.).

¹⁴² *Id.*

¹⁴³ Ciric, *supra* note 1, at 7.

¹⁴⁴ *Id.*

¹⁴⁵ Pleadings, *supra* note 53.

had travelled with French politicians across seventeen American cities between June 1 and November 11, 2011.¹⁴⁶ In its decision on February 15, 2013, the High Court concluded that the violation of article LO136-01 of the Code Électoral was sufficient to trigger the voiding of election results.¹⁴⁷

However, the decision did not say which prong of the “intent to defraud or...breach of campaign finance rules”¹⁴⁸ test the Court relied upon.¹⁴⁹ By then, in addition to this suit, only seven out of the 577 election results were voided.¹⁵⁰

CONCLUSION

Although a high number of legal challenges, 109 in total, were filed in the 2012 legislative elections cycle, the *Ciric v. Narassiguin* case illustrates the numerous hurdles, both procedural and substantive, that a plaintiff must overcome to succeed in such a high-stake political and legal environment. In the end, the High Court

¹⁴⁶ *Id.*

¹⁴⁷ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4551AN, Feb. 15, 2013, J.O. 2837 (Fr.).

¹⁴⁸ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-667DC, May 16, 2013, J.O. 8258 (Fr.).

¹⁴⁹ [G]iven the materiality of the violation of the rules, of which Ms. Narassiguin could not ignore the extent and impact, the court must, pursuant to section LO 136-1 of the Electoral Code, rule that Ms. Narassiguin is ineligible for any mandate for a period of one year from the date of this decision, and that, without the need to review the other claims in the complaint, the elections that took place in the first district of French nationals living overseas must be voided.

Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4551AN, Feb. 15, 2013, J.O. 2837 (Fr.).

¹⁵⁰ See e.g. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4563/4600AN, Oct. 18, 2012, J.O. 16298 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4565/4567/4568/4574/4575/4576/4577AN, Oct. 18, 2012, J.O. 16299 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4590AN, Oct. 24, 2012, J.O. 16656 (Fr.).

only canceled election results in six districts, or 5% of all challenges filed.¹⁵¹

Furthermore, this case was critical in clarifying campaign finance rules as they were applied to overseas districts in the first election of legislators representing French nationals living abroad. When the French Parliament designed rules for these overseas elections, it chose simply to extend the same jurisprudence and legal restrictions, which had been in place in France since 1958, as opposed to carving out different rules for voting procedures and campaign finance requirements. Therefore, when confronted with this legal challenge, the High Court had no choice but to apply a strict interpretation of campaign finance jurisprudence, most notably in reading and applying Electoral Code Article L0136-1.¹⁵² However, in refusing to adjudicate the voting operations claims, the High Court left open major legal uncertainties over voting operations as they apply to overseas districts. This uncertainty makes it almost certain that new legal challenges will be raised in future legislative elections for overseas districts, most notably over the internet-voting process. In fact, internet voting has already raised a number of concerns with other European countries, some of which have refused to emulate France's implementation of this voting system.¹⁵³

Although this case illustrated the risks created by technology over democratic access to the ballot box and over-increased participation in the electoral process, in the end, the High Court specifically left the door open for future legal challenges regarding the internet-voting system.¹⁵⁴

¹⁵¹ See Brennan, *supra* note 117.

¹⁵² CODE ELECTORAL [C. ELECTORAL] art. L0136-1 (Fr.).

¹⁵³ See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 3, 2009, 2 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] [3/07] 2009 (Ger.).

¹⁵⁴ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-4597/462AN, Feb. 15, 2013, J.O. 2840 (Fr.).

