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CATCHING THE STATE OFF GUARD

Electoral Courts, Campaign Finance, and Mexico’s Separation of State and Ruling Party

Todd A. Eisenstadt

ABSTRACT

This article seeks to understand which model of electoral management body (EMB) best regulates campaign finance excesses in a hard case for EMB independence, Mexico’s one-party state during democratization (1977–2003). One would expect that the ombudsman model, where the electoral court is more autonomous from the party-state than EMB models in which the executive supervises elections directly or indirectly, would be the strongest regulatory body. However, I report that, contrarily, the indirect executive supervision EMB has rendered much more autonomous, anti-government decisions. The conclusion I draw is that the contexts in which formal institutions operate may be as important as the institutions themselves. Depoliticized electoral justice, even in the hard case of electoral courts in a fraud-marred one-party system, was largely attained, but under the ‘ombudsman’ institutional model which preceded the electoral courts’ formal incorporation into the judicial branch in the mid-1990s. It took informal political conditions – alternation in power and acceptance of this 2000 electoral watershed by the former ruling party – and a related change in the relationship with their nominators, to resume and accelerate the insulation of electoral case law from the magistrates’ nominator, the president. The achievement of true electoral court autonomy in Mexico is best evidenced through its monitoring of party finance.

KEY WORDS ■ electoral institutions ■ Mexico ■ party finance

Ideal types of judicial branch design such as Shapiro’s triadic relationship between autonomous judiciaries, other government branches, and complaint parties are useful only as contrasts in analyzing one-party states where, however independent the judiciary may be on paper, the courts are dominated by the executive branch and the ruling party controls nominations and nominations and
promotions. The fusing of the judiciary to the party-state contradicts Shapiro’s triadic model of judicial autonomy (Shapiro, 1981: 1–20). In one-party authoritarian states, the most important trait of strong judicial institutions in democratic polities, the ability of the judiciary to check ‘tyranny by the majority’ in the executive branch, is conspicuously absent.

This article focuses on the role of judicial institutions in just such ‘hard cases’ for judicial autonomy. Drawing on evidence from a decade of Mexico’s political development, I demonstrate that liberalizing but authoritarian rulers may seek to construct ‘independent’ judicial institutions to bolster their credibility, disarm complaints by softliners in the ruling coalition and more overt domestic opponents, and placate international critics. While presenting the Mexican case, I draw parallels to other liberalizing one-party systems, like Indonesia, Kenya, South Korea, Taiwan in the late 1990s, and perhaps Iran and the People’s Republic of China early in the 21st century, where authoritarians seek to bind their own hands and construct ‘independent’ autonomous institutions to placate critics. However, authorities usually seek not to jeopardize authoritarian control. To demonstrate the increasing importance of political party compliance with formal institutions, and to show how electoral commissioners and electoral court judges wrestled autonomous institutions away from the authoritarian one-party state which tolerated their creation, part of this article tells a story. I aspire to situate the forging of electoral institutions autonomous of executive branch control within its political context, arguing that, during periods of great flux and unstable institutions, such context is critical to explaining the rise of the powerful institutions which were capable of defying Mexico’s political elites to expose widespread party finance scandals in 2002 and 2003.

In other democratic transitions, authoritarians allowed plebiscites on their continuance, which they mistakenly anticipated would be a small price to pay for restoring credibility by ‘winning’ elections (such as in the Chile of Augusto Pinochet, the Poland of Wojciech Jaruzelski, or the Philippines of Ferdinand Marcos), and transition-era reformers sought to crack down on wholesale human rights violators (the Argentine and Chilean truth commissions), only to substantially soften their prosecutions under threats of military coups by the pre-transition hardliners. Similarly, the Mexican party-state established independent electoral commissions and courts to give credibility to Mexico’s historically fraudulent elections, de-legitimize opposition party complaints about Mexico’s tilted electoral playing field, and to placate international critics. However, while the electoral commission has grown progressively more autonomous, the post-1994 electoral court has actually been made less autonomous – on paper – but rendered bolder verdicts. This article explains how the court improved its credibility by handing down powerful, anti-regime verdicts, even as its formal institutional autonomy from the executive branch was diminished. The answer I propose is threefold: that increased party competition (and well-argued post-electoral challenges) forced the electoral court to ‘grow into’ its role as
election arbiter; that after 2000, the president who nominated them was replaced by one from another party, setting the judges free; and that no one believed the more formally autonomous ombudsmen could ever actually defy the government anyway, whereas the later magistrates, despite incorporation into Mexico’s weak judicial branch, have defied the government on several prominent occasions since 2000.

Borrowing a phrase from Gilman’s (1997: 11) broadside against ‘strategic behavior’ arguments, the imperative for electoral court magistrates in fraud-riddled systems needing institutional credibility is to ‘appear principled rather than strategic’. That is, whatever their ultimate possible political or personal motivations, they had to render decisions conforming to legal norms. But I demonstrate through consideration both of judicial branch career incentives and magistrates’ own reasoning of their verdicts, that upholding legal norms was only part of the story. The politicization of justice is no surprise to scholars of underdeveloped judicial systems (such as Holston, 1992; Toharia, 1975), and to those who study campaign finance in democracies new and old (such as Pinto-Duschinsky, 2001; van Biezen, 2002). The conclusion I draw is that depoliticized justice, even in the hard case of electoral courts in a fraud-marred one-party system, was largely attained, but under the ‘ombudsman’ institutional model which preceded formal incorporation of the electoral courts into the judicial branch. It took alternation in power and acceptance of this electoral watershed by the former ruling party for the electoral magistrates to resume compiling powerful electoral case law, which by 2002 challenged even the Supreme Court for judicial primacy in Mexico’s democratic consolidation.

The article is organized as follows. First, I discuss Mexico’s extensive electoral reforms since the late 1980s, focusing particularly on why the authoritarian Mexican state, governed since 1929 by the ruling Party of the Institutional Revolution (PRI), bound itself to autonomous electoral courts after decades of electoral fraud to ensure their perpetuation in power, and how the courts became ‘unbound’ from their creators after 2000. Second, I argue that magistrate incentives ‘built in’ to institutional design may have reached their maximum institutional expression in 1994, but that post-2000 political contingencies gave them the de jure independence needed for their most important ruling to date, the granting of Mexico’s first-ever subpoena powers to a federal electoral institute investigation of massive campaign finance irregularities by Vicente Fox, sitting President of the National Action Party (PAN). Finally, I expound on the significant finding of this study, that at moments of great institutional flux such as democratization, exogenous factors can play a greater role in constructing credible institutions for dispensing justice than those endogenous to Shapiro’s ‘purely’ independent triadic relationship between the judge, the executive, and the aggrieved party.

This article addresses the demands placed on electoral management bodies (EMBs) by political parties, but also emphasizes the ‘supply side’; that is, the incentives of the electoral court magistrates themselves, and how
they extricated the authority to render anti-PRI decisions, despite operating in the least autonomous of López-Pintor’s three main models of EMB design (López-Pintor, 2000: 21–37). These three models, each of which has been tested in Mexico over the last two decades, are as follows: the ombudsman model (prevalent in Latin America where it is known as the ‘Costa Rica model’) under which independent electoral courts and/or commissions entirely conduct elections; indirect government management (the ‘French model’ but also applied in much of Europe and Francophone Africa) in which judges and legal professionals, sometimes with a mix of party representatives regulate, manage, and judge elections; and direct government management (such as in Belguim, Finland, and Indonesia). López-Pintor’s scheme classifies Mexico within the first group, the independent ‘ombudsman’ commissions, probably because the electoral commission, which manages elections except for legal disputes, was institutionally separated from the PRI-state in the mid-1990s.2

While López-Pintor described but did not rank levels of independence for each model, I extrapolate from Shapiro, arguing that the ombudsman model, offering the most autonomy from the PRI-state, would be the strongest regulatory body. In the next section, I elaborate magistrate incentives under the different systems, and then consider how the contrarian electoral court, in its most recent, indirect government management incarnation, has rendered more powerful verdicts than when it was an ombudsman court. The answer resides not in the formal constitution of the electoral courts, but in the context of the political debate, and the pressures by the political parties and the activist electoral commission, which channeled important cases to the electoral court and demanded that the court hand down relevant verdicts.

Authoritarian Incentives for Building EMBs: An Anti-leftist Coalition for Economic Reform

Strategic ‘office-seeking’ theories in which politicians maximize chances for re-election do not apply in Mexico, where re-election has not existed for any office since 1917. However, since office-holders are beholden to their party for their next candidacy in the closed list proportional representation portion of Mexico’s congressional seats, their loyalty is always to the party rather than to any other constituency, such as the electorate. While this explains PRI behavior well, opposition parties were excluded from all but the most symbolic public offices during most of Mexico’s democratic transition, and hence had few incentives to offer candidate recruits. What would explain their continued stake in democratization? Having little to lose, the pragmatic PAN deferred its democratic ideals for immediate patronage from the PRI-state, which traded undeserved congressional seats to PAN in 1988, offered interim PAN governorships where PRI candidates had been declared
victorious, and ‘threw’ mayoral elections to PAN in post-electoral arbitration (Eisenstadt, 2004: 162–198). The PRI-state, especially under President Carlos Salinas (1988–94), traded patronage for favorable PAN support of PRI legislative initiatives, as he took the PRI electoral machine for granted and focused on economic reform.

Local PRI machines, bearing the brunt of their national directorate’s concessions to PAN (known in Spanish as concertaciones, combining ‘concertation’ and ‘concession’), had little choice but to capitulate to the PRI-state (Eisenstadt, 2004: 242–250). The national PRI had built its dynasty on loyalty and discipline. While early legitimacy resulted from its initial ideological mission of institutionalizing the Mexican Revolution’s objectives of land reform, labor rights, and political enfranchisement, that platform was diluted by the 1960s and 1970s into mere pageantry. The co-optation of clever opponents, and punishment of those who refused, propelled the PRI-state’s inclusionary corporatist system. As long as the party-state could offer constituent services – albeit discretionary and conditional – citizens would actively support PRI or at least acquiesce quietly. As in other protracted transitions, such as in Brazil, Taiwan, and South Korea, voters in Mexico routinely traded votes for patronage, including bicycles, roof laminate, non-perishables, and sewing machines.

In accepting the creation of proportional representation seats for the opposition parties – starting in 1964 in Congress – PRI acceded to electoral reforms proposed by PAN since its first legislator took the podium in the late 1940s. These seats assured continuing opposition party interest in elections they never won, and Mexico’s federal municipal reform of 1983, seeking to placate leftist opposition by granting ‘opposition party’ town council seats, similarly raised the stakes of local elections by increasing the flow of federal resources into municipal coffers.

Recruitment of local PRI machine bosses faltered in the late 1980s as patronage diminished and the government’s ascendant technocrats concerned themselves more with economic policy than with clientelism, and as other options for professional political careers grew viable as PRI defectors formed other parties, such as the PRD in the late 1980s. And in 1987, PAN started accepting public funds and professional staff to help arm their charge to the political center. As the state was forced to cut spending, balance budgets, and comply with international lenders after the 1982 debt crisis, draconian cuts were made in Mexico’s social programs, long the leading source of political patronage. President Miguel de la Madrid, facing increasing electoral challenges, capital shortages, and triple-digit inflation, felt that business confidence had to be restored, as northern Mexico’s professional classes were defecting to PAN (see, for example, Loaeza, 1999: 362–399; Mizrahi, 2003: 67–89).

The PRI-state also sought to rein in challenges on the left, like the small but troublesome bands of guerrillas denied political expression since the outlawing of communist parties in the 1930s. The 1977 legalization of
leftist parties and the 1983 constitutional reform mandating proportional representation for city council seats provoked an increase in electoral and post-electoral conflicts between the left and the authoritarians in Mexico’s impoverished southern states, complemented by PAN’s persistent local electoral inroads in Mexico’s northern states. The 1980s brought a handful of recognized electoral victories by newly re-legalized communist and socialist parties in a scattering of little towns. Mostly, recognition of local party competition forced the regime to conceive of new ‘legal’ forms of repression or just give up on appearances. Anecdotes abound of extralegal persecution of opposition leaders, and while systematic violence against these fledgling leftist parties was possible, no reliable records of such abuses even exist until the late 1980s, when the National Human Rights Commission and non-governmental organizations began cataloguing abuses against the ‘old left’s’ more moderate successor, the PRD.

Looking at the formal institutions, electoral reform commenced in 1977 in placating PAN after that party refused to run a presidential candidate in 1976, stripping the PRI-state’s customary guise of electoral democracy. The PAN and PRI shared economic and social policies by the early 1990s, as well as open disdain for PRD and its social movement roots. The PRI’s ideological positioning between the rightist PAN and the leftist PRD ensured that the opposition did not unite into a grand coalition, which might have endangered the interests of PRI and PAN elites. After Salinas’s uncommonly fraudulent presidential election in 1988, PAN’s moderate candidate considered joining forces with PRD – at least temporarily – but PAN conservatives pre-empted the possibility. Electoral reforms in the 1990s mandated greater proportional representation for opposition parties, increased transparency of electoral lists and balloting stations, created a more plural and autonomous national electoral commission (and subsequent reforms in the states), and limited campaign contributions and media exposure. The fight for more autonomous electoral institutions was PAN’s most important platform during that party’s first decades, and the creation of autonomous electoral courts were its centerpiece.\(^5\)

The 1988 federal race was fraught with so much controversy, that even as victorious PRI candidate Carlos Salinas de Gortari assumed office, doubts persisted about whether he had defeated Cuauhtémoc Cárdenas Solorzano, the left’s popular 1988 and 1994 presidential candidate, and later, Mexico City’s first elected mayor. Election oversight that year was conducted under the direct executive supervision EMB model, by a pro-PRI federal electoral commission headed by the Interior Secretary (the president’s most important cabinet secretary, charged with keeping internal order); burned ballots floated in rivers, vote-tallying computers mysteriously crashed, and logroll ‘victories’ were granted to congressional candidates who were not the highest vote-getters in their districts.

The PRI-state trod cautiously after the destabilizing events of early 1994, which included the Zapatista guerrilla insurgency in Chiapas, and the
slaying of PRI’s original 1994 presidential candidate, Luis Donaldo Colosio. The Salinas administration feared an alliance between PRD and the rebels which would de-legitimize the government, though this worry was unfounded. The 1994 implementation of the North American Free Trade Agreement and the country’s reliance on a US economic bailout in 1995 forced Mexican elites to accept international norms of democracy.

The choice was clear to the authoritarian incumbents: either take their chances on further reforming the electoral institution ‘monster’ they had created, and at least gain a partner with whom to finalize Mexico’s neoliberal economic reforms, or rely on the regional PRI machines to defeat the anti-regime PRD. The PRI-state consciously chose the former in 1989, siding with PAN’s rational, conservative economic policy advocates over the populist machine bosses in their own party, and did not backtrack until two years before the 2000 electoral watershed, when some activists realized the party’s electoral firewall had been dismantled.

Mexico’s Illustration of Institutional Constraints Posed by Different EMB Models

Over the last two decades, the principal EMBs – the electoral commission and court – have been removed from the executive’s direct control and given over to a council of non-partisan ‘citizen counselors’ and magistrates, electoral lists have been redrawn with opposition party monitoring and independent audits, electoral ID cards and transparent ballot boxes have been added, the selection of election-day poll workers has been depoliticized, and a tight regime of campaign spending regulation has been implemented.

The constitutional reform of 1986 created the first electoral court, dubbed the ‘Tricoel’, which – as per López-Pintor’s direct executive supervision EMB model – had only administrative powers, ‘recommending’ resolutions to the Electoral College. The judicature, consisting of seven magistrates and two alternates, was nominated by political parties and approved by the Chamber of Deputies to serve four-year terms. Magistrates had to be at least 30 years old, hold a legal degree, and they could never have been clergy members, office-holders, or political party leaders (Código Federal Electoral, 1988: 146–9). Detractors of the institution, including distinguished scholars Ignacio Burgoa and Emilio Krieger, praised the judicial wisdom and sound ethics of the individuals who served on the Tricoel (Burgoa, 1988: 41–43; Krieger, 1994: 129), but harshly criticized a perceived bias in magistrate selection and an excessive dependence on the Electoral College. The parties did propose magistrates, but only to the president of the Chamber of Deputies where, Burgoa reasoned, ‘the individuals charged with making decisions were largely PRI affiliates, and thus the designations of magistrates in their majority also pertained to this political institution and not to the opposition’ (Burgoa, 1988: 34).
As evidenced in Table 1, the powerless 1988 Tricoel subpoenaed authorities for evidence, but received cooperative responses to fewer than 30 percent of their requests.

As explained by the current electoral court president, Fernando Ojesto Martínez Porcayo,6 ‘In many cases the law was ambiguous, the electoral authorities sent no documentation, and we would subpoena evidence but then realize that the local electoral institution had ceased to exist, that its officials had gone home, sending the final results and ballots to the Electoral College, as specified in the law, but leaving us no way to obtain any documents’ (1995 interview).

Federal electoral authorities in the states and municipalities lacked incentives to comply with these summons, as there was no penalty for non-compliance. In fact, by failing to comply, authorities could sabotage complainants’ cases against the PRI-state. And if electoral authorities had no incentive to comply, the Electoral College had a disincentive. The Tricoel cited lack of access to voting papers and results – held by the Electoral College of legislators-elect who certified their own elections – as determinant in their inability to reach final verdicts in 52 percent (28 out of 54) of the 1988 ‘founded’ cases. The Electoral College members, seeking to preserve their own electoral victories, did not once respond to pleas by the magistrates to allow the electoral court to inspect ballot tallies and verify allegations. Not only did the Electoral College ignore the electoral court’s legal reasoning; they imposed flagrantly political resolutions in 13 cases by postponing election certification to make room for post-electoral ‘horse-trading’, resulting in the granting of Electoral College ‘victories’ to five second-place finishers (Gómez Tagle, 1994: 93).

Under the 1989–90 reform, the Federal Electoral Tribunal (TFE) retained its direct executive supervision EMB model status, but it was granted genuine judicial authority, distancing it at least nominally from the Electoral College, although the Electoral College could still override the TFE with a

<table>
<thead>
<tr>
<th>Year</th>
<th>Authority compliance (PCT)</th>
<th>N</th>
<th>Complainant compliance (PCT)</th>
<th>N</th>
<th>Compliance by third parties (PCT)</th>
<th>N</th>
</tr>
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<tbody>
<tr>
<td>1988</td>
<td>34</td>
<td>8/24</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
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<tr>
<td>1991</td>
<td>82</td>
<td>31/38</td>
<td>13</td>
<td>3/24</td>
<td>100</td>
<td>1/1</td>
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<tr>
<td>1994</td>
<td>94</td>
<td>61/65</td>
<td>54</td>
<td>81/150</td>
<td>100</td>
<td>2/2</td>
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<tr>
<td>1997</td>
<td>100</td>
<td>23/23</td>
<td>30</td>
<td>3/15</td>
<td>100</td>
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<tr>
<td>2000</td>
<td>94</td>
<td>32/34</td>
<td>50</td>
<td>1/2</td>
<td>100</td>
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Note: N = sample of 25 percent of all election-day complaints filed.
Source: Author-directed review of case files with law student research assistants. The total number of cases considered was 143 in 1988, 305 in 1994, and 26 in 2000. The sample consisted of every fourth complaint of election-day inconformity, selected by docket number.
two-thirds vote. However, the Electoral College did retain exclusive access to electoral evidence, but the Electoral College did respect TFE rulings in all cases in 1991. The court was split into five regional chambers, with the four decentralized electoral courts each composed of three magistrates, while five magistrates sat at the Mexico City electoral court bench. The regional chambers heard cases only during and immediately after elections, while the central chamber adjudicated disputes related to the preparation of elections (such as conflicts over party registrations, the voter list, campaign spending limits, etc.) as well as election-day complaints.

While the overall autonomy of the electoral court from the legislative and executive branches was higher in 1991, the selection of individual judges was more compromised. Instead of party nomination, the magistrates as of 1991 were nominated by the president directly, subject to congressional approval. The eligibility criteria for magistrates was tightened, however, with candidates required to meet Supreme Court judge standards of legal training and non-partisanship. This new constraint on nomination procedures was crucial, as it bound the magistrates – at least on paper – as the president’s agents.

The 1993–94 reforms reinforced this tendency toward magistrate accountability to the president rather than to the parties, but also made the electoral courts more powerful overall, eliminating the Electoral College altogether. Appeals from the TFE were allowed, for the first time, and heard by a congressionally-appointed appeals court, with judges named from a list submitted by the Supreme Court president (widely believed to possess strong ties to the president). Congressional appointments to the five lower court circuits were still ratified from presidential nominations, but now nominations could also come from the Supreme Court (subject to presidential vetting). Conflicts of interest by magistrates were regulated for the first time, as was the dismissal of judges. TFE authority was extended at the micro-level in several areas, including: case preparation, acceptable evidence, and magistrate discretion (Federal Electoral Institute, 1993: 211–220). Critical discovery ‘subpoena’ powers were formalized and augmented, allowing magistrates to open electoral packets for the first time (under special circumstances only). The range of acceptable evidence was broadened to include technical documents such as video and audio cassettes, and limited but real discretion was granted judges in supplementing case complaints. These powers gave magistrates unprecedented authority, although they were still subject to presidential selection.

While the 1994 appeals chamber was mostly independent of the government, the contemporary, post-1997 electoral court, the Electoral Tribunal of the Judicial Power of the Federation (TEPJF), was merged with the judicial branch, removing it further from the ombudsman EMB model and placing it – due to the perceived weakness of the judicial branch (see assessments by Cossío Díaz [1996] and Domingo [1997]) – under more proximate control of the executive. Magistrates were nominated by the Supreme
Court and ratified by the PRI-dominated Senate rather than the more plural Chamber of Deputies. However, as in 1994, the reduction in autonomy from the executive branch was accompanied by greater magistrate discretion over the management of cases and the rendering of verdicts. Most importantly, the court’s jurisdiction was extended in 1997 to state and local races, with the appeals chamber granted the authority to decide sub-national post-electoral disputes, by far the most intractable, on appeal after state-level legal institutions had been exhausted. Personnel changes were made in 1997 which confirmed the electoral court’s institutional proximity to the executive branch (even though in practice the court continued to build on an improving reputation for impartiality). The magistrate presiding over the Federal Electoral Tribunal in 1991 and 1994 received a political appointment in one of the PRI-state’s core agencies, as Sub-Secretary of the Interior. His successor was one of the original generation of electoral law experts, originally nominated by PAN before 1988. But while the five lower circuits continued their decade-long progress toward autonomy through the development of impartial powers to investigate party claims and its increasingly non-partisan record of verdicts and growing corpus of case law, the appeals chamber of the TEPJF grew more conservative, modifying original decisions in 38 out of 94 cases (40 percent), as opposed to the appeals chamber’s more passive position in 1994 and then again in 2000, when it modified votes in only a handful of lower court verdicts.

Many PRI leaders, steeped as they were in cutting deals via hugs and handshakes rather than through applications of electoral law, were shocked by President Vicente Fox’s (2000–06) switch from simultaneous recurrence to both concertación extralegal strategies, and the filing of electoral cases? to strict adherence to the electoral court only. National PRI Party President Dulce Mar’a Sauri, who resigned as Yucatán’s governor in 1990 rather than ‘throwing’ the PRI-won Mérida mayor’s race to the PAN in a concertación, appeared surprised when PAN rebuffed her party’s efforts in the fall of 2000 to cash in political capital they felt had been accrued for complacently certifying PAN’s July presidential victory and for a decade of concertación. Taking a cue from her old adversaries, Sauri’s party threatened to boycott Fox’s inaugural if the president-elect did not recognize PRI’s alleged gubernatorial victory in populous Jalisco state, which the federal electoral court had recertified to PAN by several thousand votes (Eisenstadt, 2004: 252–4).

If inklings of PRI division were evident as early as 1989 when the first concertaciones were granted to PAN, open defiance by national leaders with the decreasingly partisan PRI-state was evident by 1998, when the party abandoned its seat on the General Council of the electoral commission (known as IFE). The walkout was ostensibly to protest PRI discontent over IFE officials’ investigation of alleged 1994 federal campaign spending violations, which PRI argued were outside the jurisdiction of IFE inquiries. By prompting the walkout, a strategy more suggestive of the opposition than of the dominant party presiding over IFE’s creation, PRI lost credibility.

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How could an electoral institute established to mediate party interests function without the largest party? The PRI's boycott ended by early 2000, however, when party moderates realized that the party’s 2000 electoral fortunes required IFE’s authority to be reinforced. As summarized by one PRI campaign advisor in a near-admission of the self-serving nature of PRI-state complicity in establishing an independent, ombudsman-model EMB: ‘We don’t want to shoot our own foot by discrediting IFE’.8

Magistrate Behavior Leading Up to 2002
Party Finance Scandals

As we have seen, procedures for magistrate nomination were most autonomous from the executive branch in the 1988 version of the electoral court, which was largely irrelevant overall, because its verdict ‘recommendations’ were freely ignored by the Electoral College. With the 1990 electoral reform’s transfer of nominations from the parties to the president (subject to lower house approval), the autonomy of the electoral courts was formally clipped. However, several of the veterans of 1988 were retained, as the reduced but still plural composition of the Chamber of Deputies (64 percent PRI, 18 percent PAN, 4 percent PRD)9 was conducive to bargaining over magistrate ratification, and seemed to favor previous electoral court experience over nominees’ partisan loyalties. This logic also applied in 1994. While opposition representation in the 1994 Chamber of Deputies was greatly reduced from 1988 levels (60 percent PRI, 24 percent PAN, 14 percent PRD), the lower chamber was still far more plural than the Senate (74 percent PRI, 20 percent PAN, 6 percent PRD), charged with magistrate ratification in 1996. As political competition increased, demands for credible electoral courts to resolve post-electoral conflicts also increased.

The 1996 reforms largely reversed 123 years of judicial non-intervention in elections. But despite intentions to fortify the judicial branch by extending Supreme Court judicial review and creating the Federal Judicial Council in 1994 to administer budgets and hiring, President Zedillo stacked the court with 10 of 11 new appointees in 1995 (including two of the federal judiciary’s 1994 electoral court appellate magistrates). The Supreme Court had traditionally been servile to the executive, refusing to intervene in overtly political decisions, and, rather, preferring to champion property rights and individual protection in low-profile cases (Domingo, 1997: 12–13). As in Toharia’s depiction of Francoist Spain, ‘judges are independent because they are powerless’ (1975: 486, author’s italics). Zedillo promised that the 1994 reforms would change all that, but the federal judiciary was timid in assuming its new responsibilities. Prior to 2000, the court only meekly exercised its functions in several high-profile test cases.10 Since President Fox’s election in 2000, the Supreme Court has been more active, but not in promoting the president’s agenda.11 However, if the new federal
judiciary offered few outward signs of rising to its new role, internally it was abuzz with the construction of a new career ladder and the fortification of an autonomous identity. The passage of electoral court nomination from the executive, in consultation with the parties, to the Supreme Court, apparently without extensive party consultation, did not remove the specter of executive intervention, but merely moved this political ‘fact’ by a degree. Not only did the new constitutional solution fail to end executive intervention under Zedillo, but it added a new autonomy-mitigating force in magistrate nomination, the increasingly powerful internal incentives of federal judicial bureaucrats.

Career advancement within the judicial branch would seem, as of 1996, to motivate electoral court behavior. The judicial branch presence had dominated the appeals circuit since 1994, even before the electoral court was formally integrated into the judicial branch. However, the 1995 naming of two electoral appealsmagistrates as Supreme Court ministers in Zedillo’s ‘court packing’ reform seems to have piqued judicial careerists’ interest in the possible benefits of electoral court service. The appeals chamber, dominated by the judicial careerists over the old electoral law experts, was the focal point of this new demand to serve on the high-profile electoral court in hopes of gaining promotion up the judicial ladder. The appeals chamber was also dominated by judicial careerists in 1994 (Table 2), but the overall structure was still of an ombudsman EMB, and the electoral court’s reputation as a Supreme Court springboard had not yet been made.

These differences help explain why, in 1994, the appeals chamber overturned only one significant lower court ruling, and let stand the revocation of five PRI victories, while in 1997, the appeals chamber overturned all three lower court electoral outcome-altering verdicts adverse to PRI. All told, 1 percent of the 1994 verdicts were overturned on appeal, while in 1997 this percentage was increased 40-fold.

An impressionistic comparison of the post-electoral court careers of judicial careerists with those of the displaced non-judicial ‘original electoral law experts’ illustrates the differing incentives of each group. While there appears to be a public sector premium on the original experts’ electoral law training, some half of them fall back on academic posts rather than more lucrative public sector jobs. Contrarily, the first two departing judicial branch careerists assumed posts as Supreme Court ministers, and the three 1994 judicial careerists on the electoral appeals chamber who did not leave are widely rumored to have stayed because they did not make the Supreme Court leap. Even the best-placed of the original law experts, a PRI’sta federal congressman and a sub-secretary of the Interior Ministry, landed positions inferior to those of their Supreme Court-bound judicial careerist cohort, given the post-1994 elevation of Supreme Court ministers.

The judicial career ladder – which the electoral court joined – was created only in 1994 to insulate judges from outside pressures and retain talent. Judicial autonomy has also reinforced the selective incentives judicial
careerists face within their own increasingly powerful bureaucracy – to construct an internal labor market consisting of hundreds of posts nationwide which only one out of ten aspirants can enter, but which provides career-long advancement to those on the inside. Under the previous system, at least partially in effect from 1917 until 1994, Supreme Court ministers directly named federal judges with greater regard for personal connections and lobbying than for judicial expertise or legal acumen (Cossío Díaz, 1996: 64–5). The judicial reform sought to create a central institution, the Federal Judicial Council, to oversee recruitment and promotion based on merit rather than cronyism. Judicial purists no doubt sought to make the judicial branch a competitive career, rather than a stepping stone, which it was prior to the early 1990s, when at least 20 percent of the Supreme Court justices resigned their posts in favor of political appointments as governors, secretaries of state, congressional members, senators, attorneys general, or even state-level cabinet ministers. In other words, the prestige of a Supreme Court minister, at least in a few cases, was inferior to that of a cabinet post, on a state governor’s staff (Domingo, 1997: 15–16).

Whether incorporation into the judicial branch has insulated the electoral court from outside pressures remains a question for subsequent empirical research. However, the permeability of ombudsman courts by special interests, at least at the federal level, is known to have been low. In Mexico’s states, on the other hand, development of credible electoral courts (lagging federal electoral court reforms by some three to five years) via the ombudsman model was seriously hindered by several notorious cases of federal PRI-state pressures on local verdicts. At the federal level, executive intervention has been less direct, and expressed only in Supreme Court nomination and Senate approval of magistrates promoting the status quo. For example, only one of the four magistrates of the activist Jalapa Circuit (which voided two PRI victories in favor of PRD in 1994) was renewed in 1996, when several other independent-minded magistrates were also denied renewal by the Supreme Court and the Senate, at least in part, for political reasons (García Moreno).

The magistrates assess complaints through the ‘causes of annulment’ of ballot boxes. Annulment of 20 percent of the ballot boxes (considered by some to be an unreasonably high number) results in annulment of the election. Even among ‘founded’ cases, it is rare that all ballot boxes are annulled. In fact, even in 1997, when the greatest number of ballot boxes were annulled by far (11 percent of those challenged, although many were overturned on appeal), only some 37 percent of the claims in the vote-annulling cases were ‘founded’. By the mid-1990s, the blame for so many unfounded and even frivolous complaints shifted from the PRI-state authorities, who had early on sabotaged cases by refusing cooperation, to the parties, which filed cases to justify street mobilizations, even if they had little cause to complain (as acknowledged in some instances by PRD activists such as Tuñón, Romero, and Villavicencio).
By the late 1990s, compliance by electoral authorities with electoral court subpoenas of information also improved greatly (Table 1). By 1997, compliance by electoral authorities with electoral court requests was the norm, as nearly 100 percent of the electoral court subpoenas to electoral authorities were answered, up from 34 percent in 1988. However, compliance by the complainant parties remained below 50 percent in 1997 and 2000, revealing parties’ strategies of submitting complaints whenever electoral fairness was in doubt, and following up with proof later. The strategy was to justify post-electoral marches over the paper trails left by unsubstantiated (and thus unfounded) electoral court complaints. Sanctions for non-compliance with such subpoenas were legislated in 1993, but have not yet been enforced sufficiently so as to create a credible threat to ensure party compliance.

Appeals chamber activism, largely limited in 1994 to the rubber-stamping of lower court decisions, also took a radical turn in 1997. PRD representatives, who ‘lost’ one election and won another in the appeals chamber due...
to new limitations on lower court discretion, did not object to the new appeals chamber activism. Instead, they lauded the higher court’s new rigor, and argued that such inflexibility, imposed by true electoral law authorities, was the only way to establish objective norms (Villavicencio, Vargas Manriquez). In fact, the PRD’s new electoral jurists actually discredited their own past political strategies, invoked as recently as 1994, when PRD sought to sabotage the entire electoral process by ‘jamming’ the electoral court with over 1000 identical ‘knock-off’ complaints, rather than bothering to elaborate individual objections (Table 3). Only two out of 80 of the ‘list shaving’ cases in a representative sample of 25 percent of the electoral court rulings were ruled ‘founded’ for any ballot boxes, and in these instances only specific original complaints attached to the prefabricated format were validated. In addition to the list shaving ‘boiler plate’ there were at least four other PRD prefabricated stock complaints in 1994 filed at least a dozen times, bringing the percentage of PRD knock-offs presented (as a percentage of total complaints filed) to a whopping 72 percent.

Table 3 shows that PAN, which had experimented rather unsuccessfully with knock-off generic presentations in 1991, largely abandoned the practice in 1994 (a partial explanation for that party’s overall high rate of ‘founded’ cases). The PRD also presented fewer than half as many knock-offs in 1997 and 2000. The result was a great improvement in annulment rates and a decrease in filing of frivolous complaints. Overall party compliance with procedural and legal requirements both improved. The percentage of complaints lacking judicial form, filed outside the proper time frame or lacking complainant signatures, dropped considerably, and the percentage of ‘founded’ cases increased with each election during the 1990s.

Campaign Finance Reform Via an Indirect Executive Supervision EMB

Unlike the powerless direct executive supervision electoral court of 1988, the indirect executive supervision electoral court of 2000 certified President Fox’s victory – the first non-PRI victory since before World War II – without controversy, after a court-sponsored publicity campaign enhanced its credibility in the face of outside observers’ predictions of conflict and even violence. The federal electoral court’s willingness to certify the election in its chambers was a testament to the Fox administration’s disdain for concentración and to the credibility the electoral court had earned after a decade. The electoral court’s overturning of PRI gubernatorial victories in Tabasco in 2000 and of PRI attempts at election-rigging in Yucatán in 2001 confirmed the court’s independence, especially since in both cases PRI local and national bosses had perpetrated the irregularities. Electoral court president Fernando Ojesto strenuously denied that his colleagues had been liberated from their PRI nominators by Fox’s election. But the pre-2000 court
had not dared overturn previous contentious gubernatorial races – such as in Guerrero in 1998 and Tlaxcala in 2000 – without the ‘smoking gun’ evidence which was also missing in the circumstantial case in Tabasco.

The annulments of gubernatorial races in PRI strongholds Tabasco and Yucatán were a prelude to the electoral court’s most important ruling ever, in 2002. The electoral court ruled against PAN, based on complaints filed before the 2000 election by PRI and PRD, alleging that Fox’s campaign coordinator, businessman Lino Korrodi, and a network of other Fox supporters, had laundered some $9m through a Belgian technology business and other ‘parallel’ donor agencies, which sent the money back to Mexico, into ‘Friends of Fox’ campaign coffers, outside the regulatory purview of Mexico’s EMB. IFE auditors had already established their authority to follow public campaign funding trails wherever they led, legitimizing allegations against PAN and PRI over campaign spending.

The electoral court ruled that IFE could audit campaign spending in private bank accounts without recruiting auditors from the Treasury Secretariat, who handle most government audits. The ruling was historic, confirming the IFE’s authority as sole arbiter of campaign finance monitoring, and assuring its own position as referee, a role which the electoral court cautiously but unanimously accepted. The IFE spent much of the summer debating the ruling’s implications, which, according to then-IFE Council President José Woldenberg, forced the EMB to resolve contradictions between the ruling and the federal electoral law, which does not allow audits of private contributions (which may legally represent 30 percent of a party’s total financing) not dispersed by the IFE (Irízar, 2002). The limitation on the ruling was that it only applied to the ‘Amigos de Fox’ case, without carrying the future weight of jurisprudence (Peschard, 2003: 4).

Table 3. Photocopy ‘knock-off’ complaints by party and year

<table>
<thead>
<tr>
<th>Complainant</th>
<th>1988 Copy cases/ party total</th>
<th>1988 Percentage of party cases</th>
<th>1994 Copy cases/ party total</th>
<th>1994 Percentage of party cases</th>
<th>2000 Copy cases/ party total</th>
<th>2000 Percentage of party cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>PAN</td>
<td>2/46</td>
<td>4</td>
<td>6/35</td>
<td>17</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>PRD (FDN coalition)</td>
<td>15/68</td>
<td>22</td>
<td>163/225</td>
<td>72</td>
<td>1/12</td>
<td>8</td>
</tr>
<tr>
<td>PRI</td>
<td>2/21</td>
<td>10</td>
<td>2/4</td>
<td>50</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Other</td>
<td>1/8</td>
<td>13</td>
<td>25/41</td>
<td>61</td>
<td>4/5</td>
<td>80</td>
</tr>
</tbody>
</table>

*Source:* Author-directed review of case files with law student research assistants. The total number of cases considered was 143 in 1988, 305 in 1994, and 26 in 2000.

*Notes:* N = Sample of 25 percent of all election-day complaints filed.

While it was obviously impossible to recognize a particular knock-off complaint format the first time it was encountered, upon coming across the second example of a new format, the researcher notified the rest of the group about the characteristics of the format so that the rest could identify it. In 1994, a half-dozen frequent knock-off formats were identified, while in the other processes, only two or three common formats were identified. Once two identical complaints occurred in the sample, all occurrences of that format were classified as knock-offs.
several years investigating hundreds of individuals and over 50 companies, PAN was fined $36m, its 2000 coalition partner the Partido Verde Ecologista de México (PVEM – which in 2003 formed another electoral and legislative coalition, but with PRI) was required to pay $18m.

Investigation of PRI irregularities was more straightforward, even though the magnitude of improprieties alleged against PRI dwarfed those against PAN. Since the allegations of money laundering were through a public union of the state-owned oil company, inspection of financial records required no subpoenas to access private individuals’ accounts. Allegations against PRI were that, in 2000, the party laundered close to $110m through Mexico’s parastatal oil company, Petróleos Mexicanos (PEMEX). The scheme was said to have involved routing money from PEMEX (the government’s largest revenue generator) to the oil workers’ union, sending it to Texas banks, and then back to Mexico – but to PRI accounts. According to allegations (Barajas, 2002), PRI ‘raffled’ the money to PRI leaders’ families, who gave it back to the national party’s finance committee, which disseminated funds to district committees nationwide. PRI was fined $100m, discounted from the party’s public funds during 2003 and 2004. And while critics charge that the fine and the lukewarm criminal investigations were insufficient, the scandal was handled more sternly than observers imagined possible, and Mexico’s fortified EMBs emerged as true legal guardians, willing to pursue legitimate entry points into complex investigations, regardless of which party or parties stand to gain.

Conclusions: Formal Versus Informal Constraints on Electoral Magistrate Behavior

The federal electoral court, which in the ominous summer of 2000 resorted to stuffing phone bills with glossy ads attesting to the institution’s independence and professionalism, by 2003 had emerged as one of Mexico’s premier legal watchdogs, especially after its verdict allowing the IFE to follow the money trails of the 2000 Fox campaign into previously ‘off-limits’ private domains. The construction of strong, autonomous EMBs – despite an actual decrease in independence of electoral court nomination procedures in the early 1990s – was forged by the confluence of informal political circumstances, rather than the body’s formal constitution. The continuance of a politically plural judicature named by Zedillo and ratified by the PRI-majority Senate, but under the ‘hands-off’ Fox administration, allowed that body – including the newly incorporated electoral court – to emerge from PRI’s shadow. This institutional fortification was also facilitated by independent leadership of the IFE ombudsman and electoral court president Ojesto Martínez Porcayo, one of the first magistrates to annul PRI congressional victories in the early 1990s. The rapid evolution of electoral dispute case law also facilitated the court’s self-sufficiency after 2000, as did
the apparent consistency of interpretation with those of the Supreme Court, which at least tentatively upheld electoral court verdicts with constitutional implications, such as the one affirming IFE access to the alleged ‘Friends of Fox’ campaign spending violators.

This article has argued that the greatest inducement of all to the fortification of the rule of law in the electoral realm was the persistence of the opposition. The PAN continued winning elections and filing complaints throughout the period under study, while PRD was perhaps even more decisive in that it went from undermining electoral court credibility by ’sabotaging’ the 1994 election by submitting hundreds of knock-off complaints, to bolstering electoral court credibility by assuming important protagonistic roles in preparing strong cases against PRI in the Tabasco and Yucatán gubernatorial races and also taking the lead in the ‘Pemexgate’ prosecution of PRI. The PAN’s vision of a legalistic and plural electoral system, combined with the declining PRI’s need for a legislative ally starting in 1989, forced PRI to construct autonomous EMBs, even before Mexican democracy was ready for them. But the leftist PRD – and PRI’s own moderates – were more important in winning acceptance of these institutions, which seized upon the paper autonomy which the hardliners within the PRI-state never planned to formally implement, as evidenced by their ‘walkout’ rejection of IFE when that body sought to turn its independent powers against its creators prior to 2000. The decade-long realignment of post-electoral expectations around these new institutions allowed for a smooth conclusion to Mexico’s democratic transition.

Shapiro’s friction, the courts’ mandates to mediate between private interests and those of the government while also imposing their own interests, only becomes more difficult to reconcile as court bureaucracies grow and their own prerogatives weigh more heavily on decisions. In democratization, judicial reformers must continuously extend prerogatives of courts to countermand corruption and insulate judges so that they may arrive at purely judicially based verdicts. However, the more prerogatives judges are granted, the more vested their interest in preserving the status quo, and the less impartial they become in dealing with adversaries. The Mexican reformers’ initial answer, parceling the areas of greatest authoritarian abuse among autonomous ombudsman institutions, such as the National Human Rights Commission and the EMBs, seems to have been only partially successful. As evidenced by Mexico’s electoral courts, such measures can effectively establish safeguards within their limited jurisdictions, but they cannot force actor compliance. Furthermore, such institutions come at a high cost; expending the credibility of individuals whose endorsements are needed elsewhere, as well as valuable resources.21 The creation of the ombudsman EMBs – the IFE and the electoral court – were drastic measures taken at critical moments but for the wrong reasons. They were given formal autonomy in 1990 by a cynical PRI-state which never expected these bodies to use it. This autonomy was partially retracted in the 1996 counter-reform
tying the electoral court to the judicial branch, but only as all major parties were growing accustomed to it, and discovering the court’s utility as a means of diminishing their previously inevitable dramatic waste of energies and resources in contesting electoral outcomes. When the electoral court’s judges were ‘freed’ from their PRI nominators by the 2000 PAN victory, they created opportunities to further extend their discretion through decisions such as the one increasing the authority of IFE auditors to investigate PAN supporters’ bank accounts.

The post-1997 electoral court, incorporated into the weak judicial branch as a specialized federal chamber, suffered setbacks to its institutional autonomy. The federal judiciary, long criticized for its pro-PRI-state, status quo complacency, may have at least implicitly passed this norm on to the Appeals Circuit, which annulled the most significant 1997 electoral rulings by the activist lower court. Joining the judicial branch meant adhering to that body’s career ladder, which seemed to prize status quo legal formalism, at least before 2000. However, the watershed 2000 executive branch alteration from PRI to PAN changed the rules in two important ways as it freed electoral magistrates to implement case law precedents they had been developing for more than a decade, and it gave them the power to render powerful verdicts. On the ‘demand side’, the opposition parties – and especially PRD and PRI moderates – bound themselves to compliance with the newly fair-minded electoral court, and on the ‘supply side’, the magistrates were unbound from commitments to their original ratifying body, the PRI-dominated Senate.

In regard to the formal independence of Mexico’s federal electoral court since late 2000, less has been more, highlighting the tension between formal institutions and their informal contexts. A qualification may be in order to the conventional wisdom that ombudsmen are more independent than government-directed EMBs. Ombudsman agencies may be best suited to stay on task and guard independence during the early stages of constructing a democratic rule of law; but indirect executive supervision – by relatively autonomous judicial or other authorities – may be more sustainable and conducive to democratic electoral regulation over the long run.

Notes

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1 In Shapiro, it must be recognized that the pioneering author of judicial institutions was creating an ideal type (he called it a ‘prototype’) only, and that, in
practice, courts were ‘the most coercive of triadic conflict resolving institutions’ (Shapiro, 1981: 8). The author himself recognized that violations of the ‘triad’ – the two disputing parties and the court or other arbiter – were the norm (1981: 1–20, 24–32).

2 Jaime Cárdenas, one of the ombudsman ‘citizen counselors’ in the post-1996 IFE, explained that the PRI-state initially mistook the apolitical professors selected to staff the electoral institute for meek and malleable figures, never expecting that they would emerge as strong champions of a ‘level playing field’ by 2000 (interview, 19 July 2000, Mexico City).

3 Inclusionary corporatism referred to Mexico’s ‘soft’ authoritarian regime which nonetheless mobilized citizens in official labor and peasant unions and achieved a high level of popular support based on appeals to the ideals of a revolution decades hence. See Reyna and Weinert (1977: 161).

4 All of these examples are from the 2000 federal election in the state of Yucatán.

5 More than 10 percent of PAN’s 321 legislative initiatives between 1947 and 1988 were electoral reform proposals, and among these were six bills calling for the establishment of an electoral court (PAN passim).


7 Fox and his most important cabinet member, Interior Secretary Santiago Creel, both experienced concertación first-hand, and witnessed how the practice tore PRI apart. Fox lost the 1991 Guanajuato governorship, but a fellow PAN activist from that state was named interim governor anyway. As a former IFE ombudsman, Creel unsuccessfully arbitrated a post-electoral dispute in 1995 over the 1994 Tabasco governor’s race.

8 Sandra Fuentes, PRI International Coordinator, with the Carter Center’s pre-electoral mission led by Robert Pastor of Emory University (group interview, 14 June 2000, Mexico City).

9 The remainder came from the regime-supporting so-called ‘parastatal’ parties of the center-left, which in 1988 briefly abandoned pro-PRI positions to support Cárdenas, but which were back on the regime’s bandwagon by 1991.

10 The most important of these cases was the 1995 slaying of 17 peasants in the town of Aguas Blancas, Guerrero, with apparent complicity of the state government, and the controversy over Attorney General-certified evidence that the PRI’s winning gubernatorial candidate in the 1994 Tabasco governor’s race spent 50 times the legal limit. In both cases, the Supreme Court refused to carry out more than perfunctory investigations or to punish violators. See, for example, González Oropeza (1996) and Eisenstadt (1999).

11 Perhaps the Supreme Court’s most important decision to date, taken in April 2002, blocked Fox administration plans to privatize Mexico’s troubled electricity industry.

12 The foundation of the career is the federal circuit magistrates, numbering nearly 200 by 1998.


14 Even the annulment of 11 percent of the ballot boxes challenged only represented 1.2 percent of the total vote (TEPJF, 1997: 22). The 11 percent annulment rate
is more a sign of greatly improved targeting of complaints by the political parties than any ‘softening’ on the part of the electoral courts.

15 Tuñón, José Luis, assistant director, PRD Secretariat of Judicial Affairs (interview, 23 March 1996, Mexico City).

16 Romero, Juan, associate director, PRD Secretariat of Judicial Affairs (interview, 30 April 1996, Mexico City).


19 More specifically, the complaint charged the Federal Electoral Institute with ‘shaving’ the names of PRD supporters off the electoral list, and finding means to allow PRI supporters to vote multiple times (by granting them multiple voter IDs, creating several names for the same person, etc.). The complaint charged that the creation of this list was biased, and that its external audit was also compromised. TFE judges ruled the xeroxed presentations to be ‘unfounded’ in cases where they were not complemented by concrete allegations of election-day fraud. Magistrates argued in their resolutions that the PRD’s ‘list shaving’ charge had been fully considered and answered in the appropriate venue, an appeal complaint from the IFE (RA-400/94).

20 The ruling was vetted in the electoral court for six months, in order to avoid internal dissent (Lizárraga, 2002).

21 During the 1994 and 2000 federal election years, the EMBs received well over 1 percent of the federal budget, more than the legislative and judicial branches combined (Treasury Secretariat). Expenditure per eligible voter was higher in Mexico than in almost any other country in a 49-case sample (López-Pintor, 2000: 73–76) and Mexico spent up to 10 times the per capita election expenditure of democracies like the United States, Germany, and Sweden.

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