A recent ruling from the U.S. Court of Appeals for the 11th Circuit reminds us of a problem the nation has known about vividly since at least Bush v. Gore (2000) but has yet to remedy. The problem is the appearance that judges let partisanship influence their rulings in election cases.

The 11th Circuit’s April 3 decision, Florida NAACP v. Browning, involved a challenge to Florida’s rules for processing new voter registration forms. The panel upheld them, 2-1, with Republican appointees in the majority and the dissenter a Democrat. The result would be equally troubling were it 2-1 in reverse.

The concern is not limited to federal courts. Indeed, most election disputes are resolved by state judges, who can be elected themselves. When these judges split along party lines in an election case—as historically they have, especially when the stakes are high, such as with a governor’s race—suspicions inevitably arise about their motives.

But because federal courts are increasingly adjudicating election cases and because these cases are increasingly polarized, the appearance of judicial partisanship now afflicts both court systems. And since the new 11th Circuit decision is only one of many likely to affect the elections this fall (some coming before ballots are cast, others afterward), the problem should not be ignored.

**EQUAL BALANCE**

The solution is ultimately structural. If election rulings are at risk of partisan splits, then they require courts equally balanced between Democrats and Republicans, with some form of independent tiebreaker.

Drafting election statutes more precisely, which would reduce the need for judicial interpretation (and thus the potential for variance among judges), though beneficial, would not prevent judges from relying on diffuse constitutional principles to reach apparently partisan results (as happened with “equal protection” in Bush v. Gore).

Indeed, membership on the court must be fair to both sides, and for that it is necessary to create a special court to hear election cases.

There are different ways to design an election-specific tribunal, all with the essential feature of equal balance between Democrats and Republicans. For a nine-member version, replicating the size of the Supreme Court, it would be best to have three Democrats, three Republicans, and three Independents, who would be chosen by the bipartisan consensus of the first six.

In our typically two-party political system, giving one-third of the seats on an election-specific tribunal to Independents might seem disproportional. Yet this kind of 3-3-3 membership is preferable to four Democrats, four Republicans, and one Independent. First, in a 4-4-1 arrangement, both blocs can exert overwhelming pressure on the lone neutral. With an equal group of three, neutrals can better resist such efforts. Second, although Americans may not divide precisely by thirds into Democrats, Republicans, and Independents, the percentage of citizens who view themselves as untied to either of the two major parties has been large enough in recent decades that this tripartite equality is more appropriate than allocating Independents only one seat.

But this detail should not be a dealbreaker. If the six Democrats and Republicans simply choose individuals (even with well-known party affiliations) whom they all trust to be fair, that outcome should be acceptable. Any 5-4 ruling from this body most likely would come from a tie-breaking member selected by mutual consent of both sides. In this crucial respect, the ruling would be impartial.

**AN AMICUS COURT**

Creating a special-duty court for election cases, with a distinctively impartial structure tailored to these disputes, is hardly far-fetched. Our nation has specialized courts for
many matters, including designating regular judges to special part-time duty for Foreign Intelligence Surveillance Act cases. Other nations, including our neighbor Mexico, have had success with a specialized election court.

This reform, however, cannot be adopted before November. But there remains time for the private sector to adopt a surrogate institution that can accomplish much the same benefit. I call this surrogate an “Amicus Court” because it could submit its impartial judgment in an amicus brief to whatever actual court has an election case.

Let’s imagine a lawsuit this November over the counting of provisional ballots in a key state like Florida or Ohio. The Amicus Court would read the documents filed in the case and render its judgment with accompanying opinions, including any dissents, just like a real court.

Unanimity among the amicus judges would show how to resolve the case without partisanship. But even a divided ruling from the Amicus Court, given its independent tie-breaker, would cast a salutary shadow over the actual court’s deliberations. If the actual result differed from the Amicus Court’s, the divergence would be questioned. To avoid such scrutiny, the actual judges might follow the Amicus Court’s outcome and reasoning. In this way, without government power, the Amicus Court could promote fairness—and the perception of fairness—in resolving election disputes.

Over time, if the Amicus Court develops a strong reputation for nonpartisan fairness, candidates might feel compelled to accept its judgment, pledging not to seek a contrary ruling from an actual court. The Amicus Court then would become a kind of alternative arbitration panel for election litigation, much like labor arbitration developed to settle union-management disputes. This scenario is most likely to occur if the Amicus Court’s members, in addition to having blue-ribbon resumés, display judicious temperament in striving for consensus rulings grounded in the objective requirements of law.

THE FIRST STEP

In any event, let’s take the first step this year by creating a three-judge prototype of the Amicus Court to “hear” cases critical to the presidential election. In future years, it could expand to nine members and its “docket” could encompass cases on gubernatorial and other races. But because the clock is ticking, it makes sense to start with a logistically easy form and focus on the election whose outcome most requires a public perception of fairness.

Thus, we need two exemplary attorneys, one Republican and one Democrat, who would then choose the third. They could be former judges, solicitors general, or law school deans.

The key attribute, in addition to high public stature (so that their opinions would carry as much clout as possible with actual courts), would be a virtuous judicial demeanor. Were they still alive, Lloyd Cutler and Erwin Griswold would be names to consider. Surely, there is no shortage of legal luminaries to serve the nation in this way.

The amicus judges should not expect compensation for this short-term pro bono service, and leading law firms could donate junior attorneys to serve as law clerks for this brief endeavor. Because election litigation inevitably operates at an accelerated pace—indeed, presidential elections must be resolved before the Electoral College convenes in December, as Bush v. Gore decreed—the expense of operating the Amicus Court would not be great. Those private-sector institutions willing to defray the relatively small costs would earn gratitude for promoting fair elections.

PERCEIVED AS FAIR

There is precedent for this idea. In 1962, Minnesota’s gubernatorial election had initial returns showing only a 58-vote victory in favor of the incumbent. The competing candidates immediately went to court over the canvassing of official returns. The Minnesota Supreme Court decided this preliminary issue by a 3-2 party line vote.

That ugly outcome caused the two candidates to set up a special three-judge panel, whose third member was accepted as neutral, to conduct a recount. The panel’s decision, which resulted in the incumbent’s ouster, was perceived to be fair—precisely because of its impartial composition.

If a major election controversy occurs this fall, an Amicus Court established in advance would encourage the candidates, and our existing judiciary, to resolve the dispute in a way that the public would accept as nonpartisan.

Let’s hope we don’t have another debacle like the one in 2000. But let’s also do what’s still feasible to facilitate a fair outcome if a serious problem does arise. We can avoid the mistrust of another Bush v. Gore—but chances are we only will if we create an Amicus Court to point the way.

Edward B. Foley directs Election Law @ Moritz, a nonpartisan program of Ohio State University’s Moritz College of Law, where he is also a professor.